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ЗМІСТ

CONTENTS

СЛОВО РЕДАКЦІЙНОЇ КОЛЕГІЇ!

Вісник Національної академії правових наук України – це фаховий науково-практичний журнал, у якому понад 27 років поспіль знаходять своє відображення наукові й практичні розробки з актуальних загальнотеоретичних, галузевих правових проблем і правозастосовної практики, зокрема теорії та історії держави і права, конституційного й державного будівництва, цивільного, трудового, фінансового, господарського, адміністративного, митного, екологічного та кримінального права, кримінального та цивільного процесів, криміналістики та інших.

Конкуренція ідей, їх наукове обгрунтування слугують належним рівнем задоволення інформаційних потреб у знаннях у галузі права, розробки загальнотеоретичних проблем нормотворення та правозастосування, дослідження проблем історії національного державотворення, теорії та практики міжнародного й національного права інших країн, висвітлення теоретичних засад та прикладних аспектів діяльності органів державної влади та місцевого самоврядування.

Однак інформаційний розвиток суспільства не стоїть на місці, як і час в цілому. Правова наука і практика не можуть залишатися осторонь від сучасних глобальних та всеохоплюючих процесів, а наукові думки, ідеї мають стати підґрунтям для обґрунтованих рішень, які оновлюються, модернізуючись відповідно до сучасних інформаційних реалій, зумовлених інтеграцією ринків України та країн-членів Європейського Союзу.

Орієнтація на Європейський вектор розвитку суспільних відносин вимагає від науки формування нового мислення, сприйняття новітніх конструкцій діджиталізації, цифрової трансформації, цифрової освіти, діджитал-маркетингу тощо. У процесі входження України у правовий простір Європейського союзу загальноєвропейські правові конструкції, які до не давнього часу були маловідомими та малодослідженими в українських дослідженнях мають стати об'єктом пильної уваги українських правознавців. Можливість для активності досліджень та наукового аналізу вченим стала доступною завдяки розвитку всеохоплюючих процесів та інформаційних баз даних, зокрема й наукометричної – Scopus.

Наукометрична база Scopus – це найбільша у світі єдина наукометрична платформа, яка створена у 2004 році видавничою корпорацією Elsevir. Станом на 2020 рік база містить 24 000 проіндексованих активних назв наукових видань. За минулий рік до бази даних було додано 820 нових журналів. Наукометричний апарат бази даних забезпечує облік публікацій науковців і установ, у яких вони працюють, статистику авторського цитування та ін., що надає можливість не лише створити уявлення про діяльність вченого, а й в цілому міжнародної співпраці.

Повідомляємо Вам, що журнал «Вісник Національної академії правових наук України» у 2020 році визнано високопрофесійним науковим фаховим виданням України, яке увійшло до наукометричної бази даних Scopus.

Науковий юридичний журнал «Вісник Національної академії правових наук України» висвітлює найкращі результати наукових праць, робить вагомий внесок у розвиток інтелектуального потенціалу та забезпечує в цілому комунікацію між вченими-дослідниками.

Запрошуємо науковців до подальших наукових дискусій на сторінках журналу «Вісник Національної академії правових наук України».

Дякуємо за співпрацю засновнику «Наукового альянсу» Денису Сергійовичу Пилипенку!

A WORD FROM THE EDITORIAL BOARD!

Bulletin of the National Academy of Legal Sciences of Ukraine is a professional research-to-practice journal, which for more than 27 years in a row reflects scientific and practical developments on topical general, branch-related legal issues and law enforcement practice, including theory and history of state and law, constitutional and state building, civil, labour, financial, economic, administrative, customs, environmental and criminal law, criminal and civil proceedings, forensics, etc.

Competition of ideas and their scientific substantiation serve as an appropriate level of satisfaction of information needs in knowledge in the field of law, development of general theoretical problems of rule-making and law enforcement, research of history of national state-building, theory and practice of international and national law of other countries, coverage of theoretical principles and applied aspects of activities of state bodies and local self-government authorities.

However, the information development of society does not stand still, as does time in general. Legal science and practice cannot shy away from modern global and comprehensive processes, and scientific opinions and ideas should become the cornerstone for sound decisions, which are updated and modernised in accord with modern information realities due to the integration of markets of Ukraine and EU Member States.

Orientation towards the European vector of development of public relations requires the science to develop new thinking patterns, the perception of the latest concepts of digitalisation, digital transformation, digital education, digital marketing, etc. In the process of Ukraine's accession to the legal space of the European Union, pan-European legal concepts, which until recently were little known and understudied in Ukrainian research, should become the subject of focus of Ukrainian legal scientists. Opportunity for active research and scientific analysis has become available to scientists through the development of comprehensive processes and information databases, including the scientometric database of Scopus.

The Scopus scientometric database is the world's largest scientometric platform established in 2004 by Elsevier Publishing Corporation. As of 2020, the database contains 24,000 indexed active titles of scientific publications. Last year, 820 new journals were included in the database. The scientometric apparatus of the database provides accounting of publications of scientists and institutions in which they work, statistics of author's citations, etc., which gives an opportunity not only to create an insight into the activities of the scientist, but also into the international cooperation in general.

The inform you that in 2020, the "Bulletin of the National Academy of Legal Sciences of Ukraine" journal was recognised as a highly professional specialised scientific publication of Ukraine, which is included in the Scopus scientometric database.

Scientific Legal Journal "Bulletin of the National Academy of Legal Sciences of Ukraine" journal covers the best results of scientific studies, makes a substantial contribution to the development of intellectual potential and provides overall communication between researchers.

We invite scientists to further scientific discussions on the pages of the "Bulletin of the National Academy of Legal Sciences of Ukraine" journal.

We would like to acknowledge Denys Serhiiovych Pylypenko, the founder of Science Alliance, for cooperation!

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ПРАВА ЛЮДИНИ В ЦИФРОВУ ЕПОХУ: ВИКЛИКИ, ЗАГРОЗИ ТА ПЕРСПЕКТИВИ

Анотація. *Сучасний етап розвитку суспільних відносин характеризується стрімким збільшенням цифрових технологій. Інтенсивний розвиток науки та активний технологічний прогрес стали основними характерними ознаками сучасного суспільства. Це позначилось на особливостях життя людей в соціумі, реалізації їх прав та свобод, стало каталізатором формування нової категорії прав людини – «цифрових» прав. Метою статті є аналіз основних загроз та викликів, які постають перед правами та свободами людини в умовах цифровізації, та вироблення пропозицій щодо перспективних шляхів захисту від цих загроз. У статті проводиться теоретико-правове дослідження проблемних питань реалізації прав людини в умовах масової цифровізації суспільних відносин, вказується, що ера цифрових технологій дає абсолютно нові та якісно інші можливості для їх реалізації, але в той же час вона створює нові виклики та загрози для забезпечення цих прав і свобод. Відмічено, що класичні права та свободи людини трансформуються, наповнюються новими аспектами та змістом, розгалужуються на такі, що пов'язані саме з процесом цифровізації. Наголошується на тому, що результати цифровізації багатьох сфер життя вимагають осмислення та адекватного формулювання правового механізму регулювання, реалізації та захисту вже існуючих та тих, які тільки на початку формування, прав людини з метою сталого соціально-економічного розвитку, забезпечення реалізації та захисту конституційних прав і свобод людини і громадянина. У центрі уваги дослідження нові права, такі як право бути забутим, право на анонімність, право на захист персональних даних, право на цифрову освіту та доступ до цифрових знань; права, пов'язані із захистом генетичної інформації; права на участь в обороті майна в цифровій сфері*

Ключові слова: *цифровізація права, цифрова революція, права людини, свободи людини, цифрові права, захист прав та свобод*

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HUMAN RIGHTS IN THE DIGITAL AGE: CHALLENGES, THREATS AND PROSPECTS

Abstract. *The current stage of development of public relations is described by a rapid increase in digital technologies. Intensive development of science and active technological progress have become the main characteristic features of modern society. This has affected the specific features of people's lives in society, the exercise of their rights and freedoms, and has become a catalyst for the development of a new category of human rights – "digital" rights. The purpose of the study is to analyse the main threats and challenges facing human rights and freedoms in the context of digitalisation, and to develop proposals on promising ways to protect against these threats. The study conducts a theoretical and legal research of problematic issues of the implementation of human rights in the context of mass digitalisation of public relations, indicates that the era of digital technologies provides completely new and qualitatively different opportunities for their implementation, but at the same time it creates new challenges and threats to ensure these rights and freedoms. It is noted that classical human rights and freedoms are being transformed, filled with new aspects and content, and branched out into those that are related to the digitalisation process. The results of digitalisation of many spheres of life require comprehension and adequate formulation of the legal mechanism for regulating, implementing, protecting the already existing and emerging human rights for the purpose of sustainable socio-economic development, ensuring the implementation and protection of constitutional human and civil rights and freedoms. The study focuses on new rights such as the right to be forgotten, the right to anonymity, the right to protect personal data, the right to digital education and access to digital knowledge; rights related to the protection of genetic information; rights to take part in property turnover in the digital sphere*

Keywords: *digitalisation of law, digital revolution, human rights, human freedoms, digital rights, protection of rights and freedoms*

INTRODUCTION

The use of modern digital technologies has given rise to the processes of transformation in modern society – the digital transformation of social relations, which is expressed in the use of modern digital technologies in various areas of human activity. The digital revolution as a factor of dynamic development has led to the creation of a digital economy, the development of the foundations of digital law, a new configuration of social relations based on the use of the Internet, social networks, and other information and communication technologies. Modern digital technologies form a new way of production, create prerequisites for the transition to a new formation, to the digitalisation of public relations and the law itself regulating these relations. Digital transformation has a direct impact on the implementation of fundamental human rights, contributes to the emergence of new human and civil rights as a participant in the global information and digital space. The results of digitalisation require comprehension and adequate formulation of the legal mechanism for regulating, implementing, protecting the already existing and emerging human rights for the purpose of sustainable socio-economic development, ensuring the implementation of constitutional human and civil rights and freedoms.

The sphere of digital relations is described by signs of virtuality and cross-border nature, requires special attention to the sphere of fundamental human rights from the standpoint of their provision, taking into account the special properties of this environment, where subjects and objects very often act as a kind of "simulation", and the limits of the exercise of individual rights and interference in them are not always unambiguously identified. If modern practice of the development of law is any guide, the category "digital rights" (also referred to as Internet rights, network rights) is gradually being introduced into conceptual and legal circulation, which has become widespread as a substantial element for describing the legal status of a person on the Internet. At the same time, such a category of rights as "digital rights" has not yet received universal recognition either in law or in doctrine, including in view of Ukrainian legal and law enforcement experience. Evidently, this is conditioned by the fact that the problem of finding and determining the specific features of fundamental human rights (their content and implementation) in the digital environment has arisen relatively recently and, perhaps, solving this issue is a matter of the near future.

At present, when new technologies are rapidly emerging and developing, threats to privacy are also rapidly increasing. The right to privacy is one of the fundamental rights stipulated in international law. With the increasing digitalisation of modern life, protecting privacy has become more difficult. Both state and non-state organisations often interfere in the privacy of citizens. Even those legislative acts that regulate the possibility of such interference and determine cases of granting permission to the relevant authorities to do so do not keep up with the rapid development of technology. The methods of protection offered by the current legislation do not keep up with the requirements of the modern world, and there is a need to review the mechanisms of legal regulation and professional legal awareness in general. V. Hartzog and N. Richards, analysing the existing norms and methods of regulating privacy relations, fairly note that a minimised set of legal provisions frees the hands of companies that make a profit by extracting as much value as possible from users' personal data, the principle of "informing and choosing" translates the most important conditions for rendering information services into the plane of points written in small print at the end of contracts [1, p. 1193].

Other researchers note that surveillance technologies in many situations create opportunities for serious violations of privacy by governments, individuals, and the private sector [2]. In those cases when they are used in accordance with international human rights standards, surveillance technologies can often be an effective tool for law enforcement. Therewith, it is not uncommon to use software for targeted listening of communication channels and facial recognition, the use of which can lead to human rights violations (for example, the right to peaceful protest), arbitrary arrests and detentions [3, p. 235]. These technologies can also incorrectly identify certain minority groups, consolidating existing stereotypes in society [4, p. 10], and increase the probability that representatives of marginalised groups and minority communities will face discrimination more often, for example, when issuing a loan [5, p. 1268].

The study of human rights in the context of digitalisation, and digital rights in particular, is covered in the studies of such foreign scientists as N. Borisov [2], J. Coccoli [6], F. Galindo [7], J. Garcia-Marco [7], K. Hamman [4], W. Hartzog [1], S. Jahid [2], A. Kapadia [2], P. Mittal [2], Sh. Nilizadeh [2], N. Richards [1], J. Riordan [8], R. Smith [4], J. Tomalty [9] and others. The views and considerations expressed in their studies on human rights in the age of digitalisation will be considered in this study.

At the same time, a holistic theoretical legal study on the impact of digitalisation on fundamental human rights and freedoms, understanding and adequate formulation of the legal mechanism for regulating, implementing, and protecting these rights in the context of digital transformation in the legal doctrine has not been carried out, the system of Ukrainian regulations in this area is only at the initial stage of its development. Thus, the main purpose of the study is to describe human rights in the era of digitalisation, identify the challenges and threats that it can create for such rights, as well as study the prospects for their development in the future.

1. MATERIALS AND METHODS

To carry out the study, a system of methods of scientific cognition was applied, in particular general philosophical, general scientific (dialectical, analysis, synthesis, abstraction, analogies), particular methods of scientific cognition used in the branches of many sciences (comparative analysis, quantitative and qualitative analysis), as well as special legal methods (formal legal, comparative legal, system-structural).

The the general philosophical (universal) method of cognition was applied at all stages of the cognitive process. The dialectical method was used to analyse doctrinal approaches to the definition of the term "digital rights", which to date has not received universal recognition either in law or in doctrine, including in view of Ukrainian legal and law enforcement experience. Using the method of analysis, the study covered the inherent features and identified the individual features of human rights in the era of digitalisation, analytical interpretation made it possible to engage in reverse engineering of the concept, in particular, to distinguish a stage of development of such rights and investigate it as a separate part of the whole. The method of analysis also contributed to the identification of the inherent features and features of digital rights, made it possible to identify similarities and distinguish them with classical human rights, correlate the universal catalogue of human rights with the rights that started developing under digitalisation processes, and identify their place in it.

Using the synthesis method, the authors of the study have come to the conclusion that digital rights should be interpreted as an extension of universal human rights to the needs of an information-based society. The hermeneutical method was used in the interpretation of scientific concepts of the theory of law and the provisions of current legislation. The method of deduction made it possible, based on the doctrinal opinions of scientists, to draw a general conclusion regarding the inherent features of human rights, the grounds for their classification. The inductive method of cognition made it possible to obtain a general conclusion that mass control and analysis of publicly available information have far-reaching consequences for society, and they are particularly dangerous for various minorities and people with oppositional views. There is a need to develop a set of basic rules at both the state and local levels, which would allow monitoring the advanced technologies used in state surveillance of citizens; at the national level, it is necessary to consolidate the basic protection of citizens from excessive state monitoring of social networks and other publicly available data.

The Aristotelian method was useful in analysing the content of the current legislation of Ukraine on digitalisation of spheres of public life, clarifying the problems of its legislative technique in the relevant regulations. The comparative legal method facilitated a comparative analysis and made it possible to investigated the features of legislative regulation and protection of human rights in the context of digitalisation in order to identify the

most advanced legal means that can be incorporated into national legislation in the relevant area.

Special legal methods have also been used, in particular, formal legal and system-structural methods used in the development and research of the terminology of this paper, namely, in clarifying the content of the categories "human rights", "digitalisation", "digital rights", as well as upon formulating the definition of the specified legal categories.

The theoretical framework of the study comprises scientific articles and opinions of leading foreign experts covering the study of issues of ensuring the protection of human rights in the context of mass digitalisation of public relations. The regulatory framework for this study includes current laws and other regulations of Ukraine governing social and legal relations arising in connection with digital transformation, regulations of European and international organisations. The empirical basis for the study comprises the judicial decisions of the European Court of Human Rights, which actively takes into account current challenges to human rights upon interpreting the provisions of the articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, the study uses doctrinal sources that cover the content and characteristics of the implementation of human rights and freedoms in the context of digitalisation, and offer promising ways to protect them from possible threats.

2. RESULTS AND DISCUSSION

Today, everyone is aware that access to the global network can cause problems related to the violation of human rights in the process of using web technologies, including due to inappropriate behaviour of people operating within different jurisdictions, legal, political, and information cultures. As the researchers note, the advent of the Internet has not created a set of "new behaviours" – for the most part, it largely reproduces previous models. Only the consequences of such behaviour and the problems associated with its legal regulation have changed [7, p. 2]. The state and society face important tasks: to identify new rights and prospects for the development of conventional rights. Legislators, scientists, and specialists in the field of information and communication technologies are called upon to offer conceptual and acceptable solutions to these tasks and issues.

Any analysis of the impact of new technologies on human rights, as Jacopo Coccoli points out, is extremely complex and requires prior consideration of two aspects. The first is conditioned by the evolutionary period of time that separates the achievements of technological progress and their legal registration. Adaptation of both national and international legal provisions to innovations in science and technology, in particular to digital technologies, is too slow and ineffective. The second aspect reflects the trend of their development at the international level. Taking these aspects into account should determine the goals in the field of human rights protection: firstly, there is a need to reinterpret conventional human rights in the light of scientific and technological development; secondly, new human rights appear, which can be defined as "sui generis" – a generation of digital rights [6, p. 224-225].

Digitalisation catalyses the blurring of boundaries between conventional branches of law. Information and technologies are already present in every industry, they become a common denominator and are capable of determining a unified logic of law. The value of the boundaries of branches of law decreases in legal practice, which inevitably affects the theory of law. The category of digital rights is gradually being recognised in global, regional, and national contexts. Sometimes this happens in the procedure of regulating specific human rights, which are usually referred to as digital or communication rights, but sometimes on a more comprehensive basis – when determining a detailed list of such rights. At the same time, such a category of rights as "digital rights" has not yet received universal recognition either in law or in doctrine, including in view of Ukrainian legal and law enforcement experience. Evidently, this is conditioned by the fact that the problem of finding and determining the specific features of fundamental human rights (their content and implementation) in the digital environment has arisen relatively recently and, perhaps, solving this issue is a matter of the near future. Be that as it may, the task of today should be to understand the existing ideas about digital rights and who they belong to and what they represent, what benefits they are intended to protect, how they correlate with fundamental rights and freedoms (how independent they are). In a general understanding, digital rights should be interpreted as an extension of universal human rights to the needs of an information-based society. The authors of this study believe that digital rights can include a wide scope of fundamental rights that are implemented in a digital environment and require research in terms of the properties of this environment. Therewith, fundamental digital rights are primarily derived from information rights, but they are not reduced to them.

At present, such digital rights are already actively distinguished as follows: the right to access information; the right to access information platforms and technologies; the right to protect personal data (individual and biometric); the right to freedom of assembly and association online; the right to digital education and access to digital knowledge; rights related to the protection of genetic information; the right to take part in property turnover in the digital sphere; the right to be forgotten; the ability to exercise personal, social, economic, political and cultural rights based on new technological platforms. That is, conventional and worldwide human rights and freedoms are being transformed, filled with new aspects and content, and branched out into those that are related to the digitalisation process. Discussions regarding the right to access the Internet are currently ongoing. Some scientists insist that the right to access the internet should be singled out as a separate category, referring it to the group of digital rights. Others believe that the existence of the right to access the Internet remains a controversial issue at the doctrinal level. The researchers note that access to the Internet cannot be considered as a universal natural right that belongs to all

people by virtue of their nature. Human nature does not make provision for access to the Internet, people have lived without it for centuries without harm to their nature and, perhaps, will do without it in the future, if the Internet is replaced by new, more efficient technologies [9, p. 6].

Access to the internet itself has no legal value, it is important as a means of realising other human rights and freedoms in general – the basis of all the human's natural rights. The social forms and ways of human freedom are diverse and historically variable. At present, they are becoming more technologically equipped and technologically dependent. The internet (and the need for access to it) is one of the manifestations of this trend. Specific socially, historically and culturally determined (including technologically) ways of exercising personal freedom may well qualify as human rights. Admittedly, the exercise of almost all human rights remains possible without the access to the Internet, but is certainly less effective.

The issue of human rights security upon using the Internet remains extremely relevant from the standpoint of protecting human rights. Thus, representatives of one of the oldest educational and research centres in Spain at the University of Zaragoza, Professor F. Galindo and Professor J.G. Marco, question whether the Internet can help strengthen freedom of expression and information without restricting the freedom of its users. Scientists reasonably note that the widespread use of information and search engines and their automatism, on the one hand, facilitate access to various information stored on the Internet, and thus contribute to strengthening freedom. On the other hand, it creates problems related to privacy, lack of transparency in the use of information and control by users. F. Galindo and J.G. Marco fairly point out that query keywords in conjunction with related metadata can enable almost anyone to obtain information about the user, including his or her interests, habits, and preferences. Moreover, some queries may contain identifiers and quasi-identifiers that allow them to be linked to a particular person [7, p. 8].

Another important issue arises both from the standpoint of theory and practice of legal regulation – this refers to the responsibility of Internet intermediaries. This problem is not new, it is the subject of many studies, the most interesting of which is the monograph of the University of Liverpool J. Riordan "The Liability of Internet Intermediaries" [8]. The author attempts to define the limits of liability and consider them from the standpoint of various branches of law. This study aims to help judges, practitioners, and academics propose clearer and more consistent rules governing the activities of the next generation of internet intermediaries, as well as disputes related to their services.

The responsibility of internet intermediaries covers a wide scope of issues, thereby arousing the interest of the scientific community in solving them. Therewith, the results of the study demonstrate that increasing the responsibility of internet intermediaries and pressure on them can negatively affect the activities of the business sphere related to data. As noted, when establishing such responsibility, it is always necessary to remember that when making appropriate decisions, care must also be taken to ensure that working business models are not destroyed. J. Riordan fairly believes that intellectual property, data protection, net neutrality, service infrastructure, and competition law are areas where policymakers and legislators should take a balanced, proportionate approach in determining accountability. The committee of Ministers of the Council of Europe has issued a recommendation[1] on the role and responsibilities of internet intermediaries. The document summarises international human rights standards in situations where states restrict the work of internet intermediaries (including by blocking and deleting content or any other measures that may lead to restrictions on the right of access to information and freedom of speech). In accordance with this recommendation, states should:

– evaluate the potential impact of planned measures on human rights and take only those measures that achieve the necessary goal with minimal restriction of rights;

– ensure the existence of procedural guarantees: a judicial procedure for making a decision on restricting access to content, legal remedies, etc.;

– refrain from imposing a general obligation on internet intermediaries to monitor the content of third parties that such platforms host, transmit, or store;

– ensure that the liability measures that apply to internet intermediaries are proportionate, since excessively strict liability measures lead to the fact that internet intermediaries begin to independently restrict acceptable content;

– refrain from imposing liability on internet intermediaries for the content of third parties that they post. Internet intermediaries can be held accountable if they do not restrict the distribution of content as soon as they become aware of its illegal nature;

– encourage the development of self-regulation or joint regulation of internet platforms.

Digital technologies can help overcome discrimination (for example, by expanding access to financial services through the development of mobile money) or strengthen it. The latter is often associated with the potential ability of algorithms to reproduce discriminatory practices. Thus, in the Declaration on the manipulative capabilities of algorithmic processes, the Committee of Ministers of the Council of Europe notes that technological progress makes it possible to draw fairly detailed conclusions regarding people based on available data, referring them to certain categories [10]. This practice only reinforces the currently existing forms of social, cultural, religious, legal, and economic segregation. This allows distributing people based on their digital profiles. Such actions can have a direct impact on their lives, in particular when an artificial intelligence system is used to make decisions on who should primarily be eligible for a mortgage or healthcare service. Network security expert H. Abelson also writes about privacy issues. He

1. Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries. (2018, March). Retrieved from https://rm.coe.int/1680790e14.

claims that the harm that granting the exclusive right of access to information to law enforcement agencies can cause will be very serious. Apart from the expected technical difficulties, the number of problems related to general regulation will increase. In such a situation, there are no guarantees that the principles of respect for human rights and the rule of law would remain [11, p. 72]. Thus, the risk of spreading confidential data is quite high. The issue of ensuring privacy is constantly evolving. Society is increasingly immersed in the internet space, and the authorities are attempting to control the publicly available data that is posted on social networks as much as possible. Undoubtedly, such a high level of state supervision undermines the individual's rights to freedom of speech and compromises the foundations of democracy.

Mass control and analysis of publicly available information have far-reaching consequences for society, and they are particularly dangerous for various minorities and people with oppositional views. There is a need to develop a set of basic rules at both the state and local levels that would allow monitoring the advanced technologies used in state oversight of citizens. Furthermore, it is at the national level that it is necessary to consolidate the basic protection of citizens from excessive state monitoring of social networks and other publicly available data. The impact of new technologies on human rights is also gradually gaining the attention of scientists from various branches of law. Thus, digital technologies have made obvious changes to labour law. In many areas of the economy, modern technologies allow performing a labour function outside the location of work and workplace, not only at home (home office), but also in any convenient place (mobile office).

The employer often expects an employee to be available at all times. If in developing economies this is rather a plus and is perceived positively both by the workers themselves, who want to earn more money, and by consumers who are comfortable, for example, shopping at night, then in developed countries traditional values (the right to rest and privacy) prevail. In France, in August 2016, the law on Labour, modernisation of social dialogue, and ensuring professional careers[1] was adopted, one of the sections of which is called "adaptation of labour law in the digital age". For the first time, the law established the right of an employee to turn off digital devices (in particular, telephone and e-mail) in order not to violate their recreation time, vacation, as well as to respect their private and family life. In other words, French employees have the right not to answer their employer's calls and emails during non-working hours. And indeed, on weekends and holidays, the French are practically "inaccessible". France became the first country to include this right in labour legislation.

Since employees' rest time can no longer be occupied by professional requests (such as email responses), one promising possibility is that a considerable proportion of these employees spend even more time on social networks such as Facebook, YouTube, or Twitter. Thus, paid professional time can be replaced with digital work, especially on microtechnological services such as Amazon Mechanical Turk.

Digitalisation can also modernise the field of environmental law. In particular, legal disputes regarding the state of the environment in a particular area would be resolved faster if a mechanism were provided for transmitting data on the state of pollution to the population in real time. In administrative law, there are also many new phenomena that affect the procedure for implementing public administration. Mechanisms for electronic participation of citizens in governance are being developed, and ways of informing society by state institutions are being enriched. However, not just concerns are voiced, but particular confirmations that social networks, and the Internet in general, pose a threat to both democracy and the state itself. The state conventionally supports coordination and mediation mechanisms for society, minimising direct contacts of citizens. Back in 2013, the UN warned that states risk being sidelined from citizens' communication with each other. This is what encourages states to actively "go" to the Internet themselves. Government involvement in the digital environment is becoming an important component. These processes have not passed Ukraine by. Thus, the Ukrainian authorities, while remaining in the trend of these changes, contribute in every possible way to the process of digital transformation, the current result of which is the adoption of the Decree of the Cabinet of Ministers of Ukraine No. 67 "On Approval of the Concept of Development of the Digital Economy and Society of Ukraine for 2018-2020 and Approval of the Action Plan for its Implementation" dated January 17, 2018[2]. To activate the development of digitalisation within the Cabinet of Ministers of Ukraine, a specialised ministry has also been created – the Ministry of Digital Transformation of Ukraine, which in particular is designed to ensure the development and implementation of national policy in the field of digitalisation, digital economy, digital innovations, e-governance and e-democracy, the development of the information society; the development and implementation of national policy in the field of digital skills and digital rights of citizens; the development and implementation of national policy in the field of open data, the development of national electronic information resources and interoperability, the development of infrastructure for broadband internet access and telecommunications, e-commerce and business.

The adaptation of both national and international legal provisions that are designed to regulate the sphere of science and the latest technologies is slow, and the current legislation is incapable of adequately regulating the situations generated by technological

1. Law No. 2016-1088 "Of relating to work, the modernization of social dialogue and the securing of professional careers". (2016, August). Retrieved from https://www.legifrance.gouv.fr/loda/id/JORFTEXT000032983213/.

2. Decree of the Cabinet of Ministers of Ukraine No. 67-p "On Approval of the Concept of Development of the Digital Economy and Society of Ukraine for 2018-2020 and Approval of the Action Plan for its Implementation". (2018, January). Retrieved from https://zakon.rada.gov.ua/laws/show/67-2018-%D1%80#Text.

innovations. At the global level, this problem was fixed by UN resolution 2450 (XXIII), which proposes to commence an interdisciplinary research at the national and international levels aimed at determining standards for the protection of human rights and freedoms from the potential impact of new technologies. The resolution calls for focusing efforts on establishing a balance between scientific and technological progress and the intellectual, spiritual, cultural, and moral wealth of nations [12, p. 4]. At the level of the Council of Europe, the impact of new technologies on human rights was considered by all key authorities. The committee of ministers and the Parliamentary Assembly have adopted relevant declarations and recommendations, conferences and scientific research are constantly held on the legislation and practice of various Council of Europe countries in the field of Internet freedom [13]. The European Court of Human Rights (ECtHR) also considers current challenges to human rights upon interpreting the provisions of the articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Issues related to the collection and storage of human data by public authorities usually occupy a considerable part of the total number of cases concerning the right to respect for private life (Article 8 of the ECHR). As the ECtHR has repeatedly noted in its practice, modern technologies for data collection and storage can endanger human rights [14].

Back in 2008 in the case of S. and Marper vs the United Kingdom [15], which concerned the indefinite retention of the applicants' fingerprints, cell samples and DNA profiles in the database, after the criminal prosecution had ended for one of them with an acquittal and for the other with the termination of the case, the Grand Chamber of the ECtHR pointed out that the use of modern scientific methods in the criminal justice system at all costs was unacceptable. A balance must be struck between the potential benefits of widespread use of such methods and the interests associated with the protection of privacy. Any state that applies cutting-edge technological advances has a special responsibility to "maintain a fair balance". The court found that the unquestioning and indiscriminate nature of the powers relating to the retention of fingerprints, cell samples and DNA profiles of persons suspected of crimes but not convicted of them, as was the case in the cited case, did not strike a fair balance between the competing public and private interests.

A number of cases relate to data collection through secret interception of communications and, in particular, the existence or absence of effective safeguards against abuse in this area. In Szabo and Vissy vs Hungary [16] 2016 concerning Hungarian legislation on secret anti-terrorist surveillance, the applicants complained that they could potentially become targets of such surveillance under the pretext of protecting public safety, with measures of interference with their private life unjustified and disproportionate due to the imperfection of that legislation, in particular because it did not provide for judicial control over decisions of the special services. The ECtHR noted that the consequence of the fight against manifestations of modern terrorism is the desire of states to resort to advanced technologies for collecting information, such as mass monitoring of communication lines. However, to prevent terrorist acts, the state is obliged to take measures to ensure that the legislation governing the use of such technologies does not allow for the possibility of their abuse. The court found that in this case such a condition was not met – according to the law, surveillance measures could be applied to virtually any person in Hungary, and technology made it possible to collect information en masse, including persons who were outside the scope of the operation. Moreover, the order to apply such measures was issued by the executive authorities and could not be appealed.

In May 2014, the European Court of Justice issued a decision [17] granting citizens of EU countries the right to apply to any search engines with a request to remove certain links containing private information about applicants. The court pointed out that if the request is justified and there are no obstacles to its execution, the search engine administrator shall be obliged to grant the request. The court's decision came as a surprise, as it contradicted the opinion of the Advocate General of the EU Court of Justice, who believed that the Google search engine should not be considered as an entity that controls personal data on the pages it processes. Notably, the Advocate General has the same qualifications as judges, and it is his duty to provide an independent and reasoned opinion on a particular case that has come to the European Court of Justice, before the judges themselves begin to consider the claim on its merits. The opinion of the Advocate General does not have the force of a court decision, but for the most part the court takes into account its recommendations. The trial on the "right to be forgotten" was an exception where the court did not take into account the position of the Advocate General. The decision of the European Court of Justice was positively assessed, it was a real victory in the fight for the protection of personal data of Europeans. The court's decision confirmed the need to transfer the norms of information protection from the "stone digital age" to the modern world, and provided an opportunity to strengthen and expand the right of citizens to be forgotten on the Internet.

Thus, ideas about the universality of human rights can be harmoniously linked to the neutrality and universality of digital technologies [18]. In the era of digitalisation, the essence of a person and their main needs are unlikely to change, as well as the basic values associated with them. And it is human rights that can become a unifying purposive perspective upon determining the attitude towards various technologies, which involves analysing the effect they have on the rights and freedoms, honour and dignity of people [19, p. 14]. This idea is quite promising, given the certain confusion of scientists and practitioners in the face of the challenges that the digital age brings.

CONCLUSIONS

The era of digital technologies provides new, broader opportunities for the exercise of human and civil rights and freedoms, but at the same time it creates new challenges and threats to ensuring these rights and freedoms. Digitalisation of almost all spheres of life also leads in some cases to a negative impact, primarily on ensuring

natural, inalienable human rights, especially when it comes to privacy. In most cases, users of digital technologies and the World Wide Web protect personal information individually, using a wide variety of technologies. But this is not always effective due to both objective and subjective reasons, which means that there is a direct threat to many fundamental natural human and civil rights and freedoms.

At present, there is no doubt that an effective mechanism for ensuring human and civil rights and freedoms is impossible without effective information content. But at the same time, it is clear that information technologies and their use in the implementation of human rights are not always completely positive. The widespread use of digital technologies not only ensures the exercise of human and civil rights and freedoms, but also sometimes directly affects fundamental human rights, in many cases violating them. This objectively poses difficult tasks for the states of the world and the international community to solve existing problems in this area to ensure a balance of the rights and legitimate interests of individuals, society, and the state. Digitalisation catalyses the blurring of boundaries between conventional branches of law. Information and technologies are already present in every industry, they become a common denominator and are capable of determining a unified logic of law, which inevitably affects the theory of law. The category of digital rights is gradually being recognised in global, regional, and national contexts. Sometimes this happens in the procedure of regulating specific human rights, which are usually referred to as digital or communication rights, but sometimes on a more comprehensive basis – when determining a detailed list of such rights.

The current task should be to understand the existing ideas about digital rights and who they belong to and what they represent, what benefits they are intended to protect, how they correlate with fundamental rights and freedoms (how independent they are). In a general understanding, digital rights should be interpreted as an extension of universal human rights to the needs of an information-based society. Digital rights can include a wide scope of fundamental rights that are implemented in a digital environment and require research in terms of the properties of this environment. Therewith, fundamental digital rights are primarily derived from information rights, but they are not reduced to them.

RECOMMENDATIONS

The scientific value of the study lies in the fact that it outlines the main challenges facing human rights and freedoms in the context of digitalisation based on the study of theoretical and statutory issues, and makes proposals on promising ways to protect these rights in new conditions. The study covered such a category of rights as "digital rights", which has not yet received universal recognition either in law or in doctrine, including in view of Ukrainian legal and law enforcement experience. The study provided a definition of digital rights, which should be interpreted as extending universal human rights to the needs of an information-based society. Digital rights can include a wide scope of fundamental rights that are implemented in a digital environment and require research in terms of the properties of this environment. Therewith, fundamental digital rights are primarily derived from information rights, but they are not reduced to them.

REFERENCES

[1] Richards, N., & Hartzog, W. (2017). Privacy's trust gap [Resensio]. *The Yale Law Journal*, 126, 1180-1224.

[2] Nilizadeh, Sh., Jahid, S., Mittal, P., Borisov, N., & Kapadia, A. (2012). Cachet: A decentralized architecture for privacy preserving social networking with caching. In *CoNEXT 12: Proceedings of the 8th international conference on Emerging networking experiments and technologies* (pp. 337-348). New York: Association for Computing Machinery.

[3] Wang, J. (2018). *Carceral Capitalism*. South Pasadena: Semiotext(e).

[4] Hamman, K., & Smith, R. (2019). Facial recognition technology: Where will it take us? *Criminal Justice*, 34(1), 8-17.

[5] Prince, A.E.R., & Schwarcz, D. (2020). Proxy discrimination in the age of artificial intelligence and big data. *Iowa Law Review,* 105(3), 1257-1318.

[6] Coccoli, J. (2017). The challenges of new technologies in the implementation of human rights: An analysis of some critical issues in the digital era. *Peace Human Rights Governance*, 1(2), 223-250.

[7] Galindo, F., & Garcia-Marco, J. (2017). Freedom and the Internet: Empowering citizens and addressing the transparency gap in search engines. *European Journal of Law and Technology*, 8(2), 1-18.

[8] Riordan, J. (2016). *The liability of Internet intermediaries*. Oxford: Oxford University Press.

[9] Tomalty, J. (2017). Is there a human right to Internet access? *Philosophy Now*, 118, 6-8.

[10] The age of digital interdependence: Report of the UN Secretary-General's High-level Panel on Digital Cooperation. (2019). Retrieved from https://www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf.

[11] Abelson, H. (2015). Keys under doormats: Mandating insecurity by requiring government access to all data and communications. *Journal of Cybersecurity*, 1, 69-79.

[12] Access to Internet and freedom to receive and impart information and ideas: Factsheet of the European Court of Human Rights. Strasbourg. (2018). Retrieved from http://www.echr.coe.int/Documents/FS_Access_Internet_ENG.pdf.

[13] Freedom of expression, the Internet and new technologies. Thematic factsheet. (2017, August). Retrieved from https://rm.coe.int/factsheeton-freedom-of-expression-internet-and-new-technologies-11aug/1680738366.

[14] New technologies: Factsheet of the European Court of Human Rights. Strasbourg. (2018, February). Retrieved from http://www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf.

[15] Case of S. and Marper v. The United Kingdom. Judgment. European Court of Human Rights, Application No. 30562/04 and No. 30566/04. (2008, December). Retrieved from https://rm.coe.int/168067d216.

[16] Szabo and Vissy v. Hungary, Judgment, European Court of Human Rights, Application No. 37138/14. (2016, January). Retrieved from https://www.statewatch.org/media/documents/news/2016/jan/echr-case-SZAB-%20AND-VISSY-v-%20HUNGARY.pdf.
[17] Google Spain SL Google Inc. v. Agencia Española de Protección de Datos (AEPD) Mario Costeja González, Judgment of the Court (Grand Chamber) in Case C-131/12. (2014, May). Retrieved from http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=794833.
[18] Petryshyn, O.V. (2020). *General theory of law*. Kharkiv: Pravo.
[19] Brownsword, R., Scotford, E., & Yeung, K. (2017). Law, regulation, and technology: The field, frame, and focal questions. *The Oxford Handbook of Law, Regulation and Technology*, 1, 3-40.

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РОЛЬ МІЖНАРОДНИХ ОРГАНІЗАЦІЙ ІЗ ЗАХИСТУ ПРАВ ЛЮДИНИ В УМОВАХ КОНФЛІКТУ НА СХОДІ УКРАЇНИ

Анотація. *В даному науковому дослідженні поставлено завдання вивчення ролі міжнародних організацій із захисту прав людини в умовах конфлікту, викликаного на території сходу України. Підставою для проведення наукового дослідження служать останні доповіді Управління Верховного комісара ООН з прав людини, а також ОБСЄ по Україні. Актуальність заявленої тематики дослідження обумовлюється гостротою проблеми порушення прав людини в ході збройного конфлікту на території України і значною роллю міжнародних організацій із захисту прав людини, що роблять активні зусилля щодо його вирішення. Метою даного наукового дослідження виступає визначення основних аспектів ролі, яку відіграють міжнародні організації у врегулюванні даного спектра питань, а також позначення потенційних можливостей врегулювання ситуації з порушенням прав людини на українських територіях. Провідним підходом в даній науково-дослідній роботі стало поєднання кількісного і якісного методів дослідження всього спектра питань, винесених у тематику даного наукового дослідження. Основними результатами, отриманими в ході виконання даної науково-дослідної роботи, стали: аналіз ролі і місця міжнародних організацій із захисту прав людини в оцінці ситуації щодо конфлікту на українських територіях і отримання статистичної інформації щодо реального стану справ з порушенням прав людини на даних територіях. Цінність даної наукової роботи полягає в отриманні практичних рекомендацій з пошуку шляхів мирного врегулювання конфлікту на Сході України і здійснення комплексних заходів щодо створення реальних умов для захисту прав людини в зазначеному регіоні*

Ключові слова: *конфлікт на Сході України, жертви конфлікту, бойові дії, протиборчі сторони, міжнародні правозахисні організації*

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THE ROLE OF INTERNATIONAL HUMAN RIGHTS ORGANISATIONS IN THE CONTEXT OF THE CONFLICT IN EASTERN UKRAINE

Abstract. *The task of this paper is to study the role of international human rights organizations in response to the conflict taking place in eastern Ukraine. The study is based on recent reports from the Office of the UN High Commissioner for Human Rights and the OSCE on Ukraine. The relevance of the stated topic is determined by the situation with human rights violations in the armed conflict in Ukraine and the significant role of international human rights organizations, making active efforts to resolve it. The purpose of this study is to determine the main aspects of the role that international organizations play in resolving this range of issues. This will help to identify potential opportunities to tackle the problem with human rights violations in the Ukrainian territories. The study combines quantitative and qualitative research of the entire spectrum of issues brought into the subject. The main results obtained are: analysis of the role and place of international human rights organizations in assessing the situation with the conflict in the Ukrainian territories and obtaining statistical information on the current status of human rights violations in these territories. The value of this paper lies in obtaining practical recommendations for finding ways to peacefully resolve the conflict in the East of Ukraine and implementing comprehensive measures to create conditions for the protection of human rights in this region*

Keywords: *conflict in eastern Ukraine, victims of the conflict, hostilities, warring parties, international human rights organizations*

INTRODUCTION

The armed conflict in the east of Ukraine is taking place against the background of numerous violations of human rights in the involved territories. In this context, the role of international human rights organizations plays a decisive role in the peaceful settlement of the conflict and the search for ways to normalize relations between the warring parties. The Office of the High Commissioner for Human Rights, in its report dated 16.05.-15.08.2019, states "The ongoing conflict in eastern Ukraine continued to adversely affect the lives and well-being of civilians living near the contact line, in particular, due to damage to critical civilian infrastructure and schools"[1]. This report notes that 68 civilian casualties were recorded during this period, which is 51.1% more than in the previous reporting period. At the same time, the losses incurred as a result of the conduct of military operations, account for 56 people. Such statistics testify to the escalation of tension in the conflict-ridden territories and the unwillingness of the opposing sides to seek its gradual settlement. It follows from the same report that violations of the right to liberty and security continued during the reporting period. The Office of the High Commissioner for Human Rights (OHCHR) continued to receive reports that the Security Service of Ukraine (SSU) was responsible for the arbitrary detention, torture, and intimidation of individuals who, according to the SSU, were associated with armed groups 1. The report notes that during the reporting period, the Office of the UN High Commissioner for Human Rights officially documented numerous cases of arbitrary detention of citizens for no apparent reason in cities bordering the conflict zone, in particular in Kharkiv, under the pretext of being forcibly sent for military service to the Ukrainian armed forces. OHCHR officials express deep concern about the continued practice of using "administrative arrests" and "preventive arrests" in areas under the control of the armed forces of the DPR and LPR. All such cases can legally qualify as arbitrary and incommunicado detention.

Currently, the ceasefire agreements reached between the leaderships of the opposing sides in eastern Ukraine are violated. Despite the fact that the Minsk agreements prohibited the use of weapons in the conflict zone, the conflict itself has not yet been resolved, and practically no progress has been observed on this issue. According to the UN Under-Secretary-General for Political Affairs Rosemary Dicarlo "The conflict in eastern Ukraine has been going on for the fifth year. And although it no longer appears in the headlines of major international news outlets, this conflict has not turned into "dormant" or "frozen". It is still in an active stage and requires our attention, especially when it comes to preventing loss of life" [1]. The UN spokesman emphasizes that the repeated promises of the warring parties to abide by the provisions of the ceasefire agreements are usually not kept, which does not contribute to the cessation of hostilities. Despite the fact

1. Report on the human rights situation in Ukraine 16.05.-15.08.2019, Office of the United Nations High Commissioner for Human Rights. (2019). Retrieved from https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16May-15Aug2019_RU.pdf.

that, compared with the first years of the conflict, there has been a decrease in the total number of murders and looting, the situation remains critical. According to Rosemary Dicarlo and her colleague Ursula Müller, over two and a half thousand people were killed and over nine thousand civilians were injured during several years of conflict in eastern Ukraine [1]. At the same time, representatives of OHCHR note the presence of numerous facts of violation of the rights and freedoms of citizens in the conflict zone. In the government-controlled areas, OHCHR notes cases of criminal prosecution of perpetrators of crimes related to the conflict. During the period from April 2019 to April 2020, the detention of such persons was carried out without a preliminary court decision, which is a gross violation of the current legislation. Contrary to the provisions of the international human rights law they were often subjected to a preventive measure in the form of detention[1].

Thus, today there are numerous cases of human rights violations in the area of combat operations in eastern Ukraine. The situation is practically uncontrollable due to systematic deviations from the peace agreements reached during the previous negotiations. The role of international human rights organizations, by their actions contributing to the settlement of the conflict and the creation of optimal conditions for maintaining peace and stability in the region of hostilities, is the most important prerequisite for the observance of human rights in the east of Ukraine. The author of this paper notes "The first step towards reconciliation could be the recognition of the opposite side as a subject of the negotiation process, and not as an enemy, that the basis for reconciliation and overcoming the current crisis should have been the unconditional guarantee of respect for human rights, human dignity and personal integrity to all citizens of Ukraine.

After the outbreak of the conflict in the east of Ukraine, I publicly supported the proposals of the Minister of Foreign Affairs of Germany Frank-Walter Steinmeier and called on the Ukrainian authorities to make maximum use of the Organisation for Security and Cooperation in Europe (OSCE) negotiating tools as a platform for finding a compromise and establishing a trusting dialogue between the authorities and society. Unfortunately, this correct move was taken by the authorities only after three devastating months of the ATO and the deaths of thousands of Ukrainian citizens from both sides, including children. Ultimately, after the mass death of both the civilian population of Donbas and representatives of both warring parties, tens of thousands of disabled people, millions of refugees and internally displaced persons, the President of Ukraine Petro Poroshenko was forced to negotiate and sign the Minsk agreements" [2].

2. LITERATURE REVIEW

Materials of the report of OHCHR on the human rights situation in Ukraine for the period from 16.08. to 15.11.2019, testify to the numerous difficulties experienced by representatives of the local population due to the ongoing conflict in Donbas. In the course of preparing this report, representatives of the OHCHR visited 59 settlements along the line of military clashes, as well as over 20 places of deprivation of liberty in this territory. It explicitly states that "While political efforts to end the conflict continued, civilians living near the contact line experienced daily hardships due to ongoing hostilities, which further deteriorated their socio-economic rights. People living in remote communities near the contact line that are considered "isolated" due to disruption to road infrastructure, internal checkpoints, the contact line, and insecurity continued to experience difficulties in accessing social benefits and basic public services such as health care, medicines and education" . This report provides statistical data, according to which at the time of its preparation since the beginning of the conflict, the loss of civilians in it amounted to at least 3,047 people, including "1807 men, 1,055 women, 98 boys, 49 girls and 37 adults, whose gender is unknown, and also 298 people killed on board Malaysian Airlines flight MH17"[2].

Materials of the report on the human rights situation in Ukraine for the period from 16.02.2020 to 31.07.2020, prepared by the Office of the UN High Commissioner for Human Rights, indicate: "As a result of several spikes in hostilities during the reporting period, most notably in March and May, the total civilian casualties in the first seven months of 2020 increased to 107 people (18 killed and 89 injured), which is ten percent less than in the same period in 2019"[3]. It is also noted that since the beginning of the armed conflict "There has been no tangible progress in creating a statutory remedy and redress for civilian victims of the conflict"[3]. At the same time, international organisations welcome the positive initiatives that take place in improving the current legislation of Ukraine. Thus, "OHCHR welcomes the decision of the Constitutional Court to declare unconstitutional Article 375 of the Criminal Code of Ukraine, which provides for criminal liability of judges for making "knowingly unjust" decisions in relation to persons who have committed illegal actions in the conflict zone"[4]. But, it is also noted that against the general background of the development of events in the zone of hostilities, such facts are insignificant and do not have an impact on the situation in the region. Thus, the analysis of the materials presented in the study shows the complexity of the situation related to the violation of human rights in the conflict zone in Ukraine and the need to resolve it peacefully as soon as possible.

1. Human rights in the administration of justice in criminal cases related to conflicts in Ukraine on April 2020, Office of the United Nations High Commissioner for Human Rights. (2020). Retrieved from https://www.ohchr.org/Documents/Countries/UA/Ukraine-admin-justice-conflict-related-cases-ru.pdf.

2. Report on the human rights situation in Ukraine 16.08.-15.11.2019, Office of the United Nations High Commissioner for Human Rights. (2019). Retrieved from https://www.ohchr.org/Documents/Countries/UA/28thReportUkraine_RU.pdf.

3. Report on the human rights situation in Ukraine 16.02.-31.07.2020, Office of the United Nations High Commissioner for Human Rights. (2020). Retrieved from https://www.ohchr.org/Documents/Countries/UA/30thReportUkraine_RU.pdf.

4. Report on the human rights situation in Ukraine 16.08.-15.11.2019, Office of the United Nations High Commissioner for Human Rights. (2019). Retrieved from https://www.ohchr.org/Documents/Countries/UA/28thReportUkraine_RU.pdf.

3. MATERIALS AND METHODS

The present study sets the task to investigate the role of international human rights organisations in resolving issues of human rights protection in the conflict zone in eastern Ukraine. The object of the study is the situation in the zone of military operations in the context of numerous violations of the rights and freedoms in this area through the prism of assessment of the situation by representatives of international human rights organisations. The study is based on the analysis of the latest reports from the Office of the UN High Commissioner for Human Rights, as well as OSCE reports on the situation in eastern Ukraine.

The methodology is based on a combination of quantitative and qualitative approaches to the study of the role of international organisations in the context of the conflict in the Ukraine. The chosen methodology in the context of the issues submitted for consideration seems to be optimal for conducting research in the chosen direction. A quantitative analysis of the information presented in the reports of the Office of the UN High Commissioner for Human Rights, as well as the OSCE mission in the east of Ukraine, creates the necessary basis for an in-depth study of the issues submitted for consideration and contributes to a qualitative analysis of the materials of this study with the formation of final conclusions. In the process of a qualitative analysis of the materials taken for research, the necessary structure of future conclusions is prepared and the main, necessary elements are identified on which these conclusions are subsequently based. The problem of human rights violations during the armed conflict in Ukraine and the role of international human rights organisations in its settlement requires in-depth study, which is broken down into a number of stages in order to form the necessary consistency of conclusions. The chosen methodology of research meets the assigned tasks and contributes to the creation of an optimal structure of conclusions obtained in the course of the study. The problem of assessing the role that international organisations play in response to human rights violations in the conflict in Ukraine requires a comprehensive, qualitative research covering various aspects of this issue. The study of the materials that form the basis of research with the formation of final conclusions based on its results corresponds to the nature of the task and contributes to its qualitative and objective resolution.

A review of the available literature sources covering various aspects of the role of international organisations in the settlement of an armed conflict on the territory of Ukraine, in general, and contributing to the peaceful resolution of issues of human rights observance, in particular, reveals the breadth of assessments and the variety of situations displayed. Sources covering the problem agree on one issue: a large-scale violation of human rights is taking place in the zone of hostilities due to the unwillingness of the warring parties to comply with their obligations for the peaceful settlement of conflict situations.

4. RESULTS

The assessment of the role of international human rights organisations in the context of the ongoing conflict in Ukraine gave the following results. The Office of the High Commissioner for Human Rights (OHCHR) and the Organisation for Security and Cooperation in Europe (OSCE) have repeatedly sent missions to the war zone on Ukrainian territory to assess the current situation and the possibilities for its peaceful settlement. The OHCHR reports, formed on the basis of materials received during these missions, reflect the current state of affairs in the conflict zone and contain evidences of human rights violations in this area. The diagram below shows the increase in civilian casualties over the years since the beginning of the conflict in Ukraine (Figure 1).

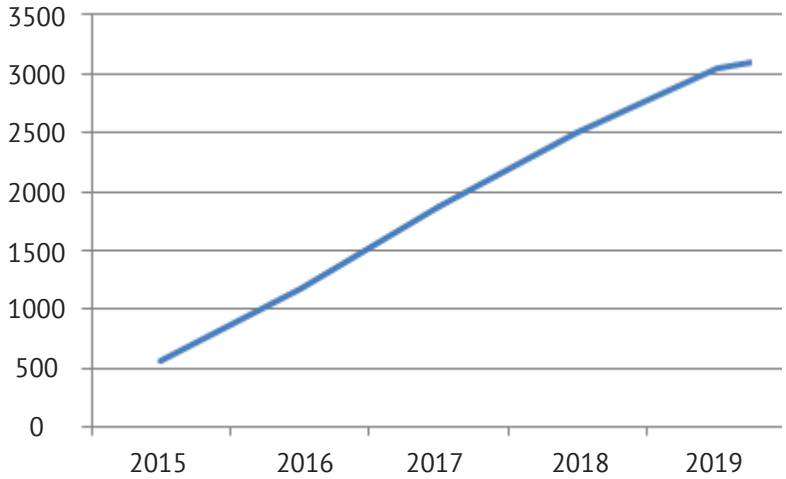

Figure 1. *Growth of civilian casualties over the years since the beginning of the conflict in Ukraine*
Source: *[3]*

The presented diagram clearly demonstrates the increase in civilian casualties on Ukrainian territory for the period from 2014 to 2019. At the moment, there are cases of violence against the local population, manifested in attacks on civilians, robberies, beatings, torture, and ill-treatment. Such facts are recorded in detail in the reports of the Office of the UN High Commissioner for Human Rights and OSCE missions in Ukraine. The role of international organisations for the protection of human rights in the context of the conflict on Ukrainian territory lies in the following aspects:

1. Monitoring function, which consists in the presence

in the conflict zone and recording all the manifestations of human rights violations.

2. Documenting cases of casualties among the local population, death of civilians for reasons related to the conduct of hostilities and the situation in the conflict zone.

3. Development of practical recommendations for resolving issues of human rights observance in the territories involved in armed confrontation.

4. Evaluation of the effectiveness of work and compliance with the rule of law by law enforcement agencies in the zone adjacent to the area of hostilities, and fixing the identified violations.

5. Development of measures to suppress various types of discrimination against citizens affected by the conflict on the territory of Ukraine.

The reports provided by the OSCE mission and the Office of the UN High Commissioner for Human Rights contain information on numerous violations of the rights of citizens to personal liberty and security. There is ample evidence of the responsibility assigned to the Security Service of Ukraine for numerous arrests and detention of persons allegedly involved in the conflict on the side of the anti-government coalition forces. In addition, representatives of the OSCE Mission to Ukraine and OHCHR identified many cases of arbitrary detention of male citizens, without sufficient grounds for sending them to the combat zone as part of the units of the Ukrainian army. Such a practice, according to the norms of current international law, can be qualified as "illegal and incommunicado detention"[1].

Representatives of international human rights organisations recorded massive cases of human rights violations in the indicated territories of Ukraine related to the need to resettle citizens from the combat zone to safe areas of the country. Representatives of international organisations kept such records often at risk to their lives, since in order to obtain objective, most reliable information, they were forced to be directly in the zone of hostilities. Also, representatives of international human rights organisations have identified cases of discrimination on ethnic grounds, expressed in the persecution of people who speak Russian. Such facts discredit the very idea of national self-determination, declared by the provisions of the current Constitution of Ukraine and the principles of equality and self-determination proclaimed by the UN Charter.

The reports of the OSCE Mission to Ukraine record cases of violation of ceasefire agreements between the warring parties, continuing at the time of preparation of this paper. The mission's unmanned aerial vehicles record multiple cases of overcoming trenches on both sides of the contact line at its various sections in the Donetsk region. Below is a summary table of violations of the ceasefire agreement, compiled on the basis of data collected by representatives of the OSCE Mission as of 20 November 2020 (Table 1).

***Table 1**. Ceasefire violations, compiled on the basis of data collected by representatives of the OSCE Mission as of 20 November 2020*[2]

Location of surveillance cameras	Event location	Means	No.	Observation	Description	Weapon	Time
Avdiivka	3 km SE	Recorded	18	Projectile	In vertical flight	N/K	5:26.
Donetsk Filtration Station	3 km SE	Recorded	10	Explosion	Undetermined	N/K	7:36.
1 km SW of Shyrokyne	3 km SSW	Recorded	8	Muzzle flash	Undetermined	N/K	14:44.
1 km NW of Yasynuvata	2 km S	Heard	6	Burst	Undetermined	N/K	17:26.
Pervomaisk 58km W of Luhansk	1 km W	Heard	5	Burst	In vertical flight	Small arms	20:56.

Thus, representatives of international human rights organisations carried out a large-scale work to collect and process information concerning the facts of human rights violations in the context of the conflict in Ukraine. All conclusions are presented in special reports containing a detailed description of the situation in eastern Ukraine and a sample of statistical data. A thorough analysis of all the data presented contributes to a detailed understanding of the role of representatives of international missions monitoring the situation in the Ukrainian territories involved in the armed conflict in general and in the context of human rights violations in them in particular.

The author of this paper believes that "The military conflict in the east of Ukraine and the blockade of Donbas led to gross, massive, and systematic violations of human rights on both sides: hostage taking, torture, rape and ill-treatment, killings and extrajudicial executions, forced labour, looting and robberies, trafficking in persons and weapons, lack of medical assistance and medicines, significant restrictions on the right to freedom of movement, economic blockade, as well as the termination of social payments for pensioners, disabled people, children, women. The listed infringements of rights have the signs of genocide" [2]. The author also notes: "According to Ukrainian sociologists, it will take at least 125 years to overcome the collective psychotrauma of Donbas residents. My personal communication with representatives of different parties to the conflict gives me the right to assert that all its participants received a deep psychological trauma, to overcome which hard work will have to be done in Ukraine for many years" [2].

1. Report on the human rights situation in Ukraine 16.05-15.08.2017, Office of the United Nations High Commissioner for Human Rights. (2020). Retrieved from https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/20170912_ukraine_-_19th_hrmmu_report_rus.pdf.

2. OSCE Daily Report No. 277/2020. (2020, November). Retrieved from https://www.osce.org/files/2020-11-20%20Daily%20Report_RUS.pdf.

5. DISCUSSION

The issues of human rights violations in the context of the conflict in the east of Ukraine are widely discussed in the press and specialised publications. The role of international human rights organisations in the settlement of this conflict and the restoration of violated law in the territories of armed confrontation is also widely discussed. Thus, the information agency RBC-Ukraine interviewed the Vice Prime Minister for the Reintegration of the Occupied Territories Oleksii Reznikov. He noted the need to introduce police units in the territory of conflict zone after the withdrawal of troops. In particular, the Deputy Prime Minister notes the role of the OSCE mission in this issue "My personal opinion is that the dominant feature should be the OSCE police mission with the involvement of the National Police, whose units will be formed according to a special criterion. The police mission in Donetsk and Luhansk regions is a new challenge for the OSCE. In our concept, it should ensure the protection of public order, be armed with small arms and special equipment" [4]. In the materials devoted to the settlement of the conflict in Donbas, RBC-Ukraine notes the importance of expanding the OSCE department in the context of the implementation of the Minsk agreements on ceasefire. The publication notes that one of the main points of the "action plan" should be considered: "an increase in the number of the OSCE Special Monitoring Mission (SMM) by four times (by 1500 people)" [5].

Consequently, an analysis of the OSCE's work in resolving conflicts has shown that the organisation promptly responds to the emergence of conflicts and uses already developed methods for their solution. Despite that, the Russian-Ukrainian war is still the biggest political and operational challenge for the organisation, gradually turning into another 'protracted' conflict in the OSCE's area of responsibility that cannot be resolved by this structure. It means that the OSCE, which orients on consensus in the decision-making process, will need the political will of all 57 Member States, which, in the light of decades of Russia's rejection of Euro-Atlantic security architecture, cannot be achieved overnight. The activity of the OSCE SMM to Ukraine confirms the necessity to reform the structure and mechanisms of the organisation for preventing and resolving long-lasting conflicts. Such reform is especially necessary and urgent in the light of the resolution of the Ukrainian conflict and the effective resolution and prevention of upcoming regional and international crises [6; 7].

The activities of international human rights organisations contribute to a high-quality display of the situation in Donbas in the context of the armed confrontation taking place there. Thus, the report of the OSCE Mission to Ukraine dated July 21, 2020 states "The Mission continued to monitor the withdrawal of weapons provided for in the Memorandum, as well as the Package of Measures and the Addendum to it. The SMM observed 11 weapons deployed in violation of withdrawal lines in non-government-controlled areas of Donetsk region, including at the training area"[1]. The report also notes that "the Mission also facilitated and monitored adherence to localised ceasefires to enable repairs of power and gas lines in Novozvanivka (government-controlled, 70km west of Luhansk) and Troitske (government-controlled, 69km west of Luhansk); an assessment and maintenance of power lines near Berezivske; as well as vegetation clearance, inspection and maintenance of railway tracks near Vilkhove (government-controlled, 22km north-east of Luhansk); and demining activities near Heivka (government-controlled, 27km north-west of Luhansk)"[2]. Thus, the reports of the OSCE mission to Ukraine emphasise the positive role of its presence in the conflict zone in terms of overall stabilisation of the situation [8; 9].

The mission contributes to a reduction of tensions and maintenance of stability when the Ukrainnian security forces cannot objectively control the border [10]. The role of the OSCE in the observance of the terms of the Minsk agreements is noted in the materials of the online media outlet "European Truth". The outlet testifies "According to the fourth paragraph of the first Minsk agreements of September 2014, Ukraine, Russia, and the OSCE agreed "to ensure constant monitoring on the Russian-Ukrainian state border and verification by the OSCE with the creation of a security zone in the border regions of Ukraine and the Russian Federation" [11]. At the same time, it is noted that this point is violated at the current time. The reports on the human rights situation in Ukraine from the Office of the UN High Commissioner for Human Rights show violations of the current legislation in the context of the conflict in the Ukrainian territory. For example, the OHCHR report for the period 04.2014-04.2020 states "OHCHR noted that the pre-trial detention of persons accused of conflict-related crimes and the protracted nature of the relevant judicial proceedings, as mentioned above, often leads to confession of guilt by the accused. Some defendants complained to OHCHR that the prosecutor threatened further detention and continued pre-trial detention if they did not plead guilty, thus pushing them to conclude a plea agreement [12; 13].

Unsuccessful attempts to appeal the decisions of the courts regarding pre-trial detention, as well as the failure of the Government of Ukraine to take measures to properly investigate the allegations of torture and ill-treatment by the accused led to the loss of hope for a fair trial, and the accused considered it necessary to plead guilty" [3]. The same report deals with the problems with the observance of human rights in the non-government-controlled territories. "Taking into account the mandate of OHCHR to promote and protect the human rights of all people, everywhere, this report assesses the human rights impacts of those living in territory controlled by the self-proclaimed "republics" that result from the latter's quasi-state functions. This assessment does not legitimise the self-proclaimed "republics", their decisions and actions.

1. Daily Report No. 172/2020 Published by the OSCE Special Monitoring Mission to Ukraine (SMM). (2020, July). Retrieved from http://www.publicnow.com/view/F63DAAB03FFC385EECB45A7BBB00CB891409A2EA.
2. *Ibidem,* 2020

Despite the restrictions imposed by both "republics" on access to places of detention and "court" hearings, the human rights violations described in this section have been confirmed in accordance with standard OHCHR methodology"[1].

In 2015, the European Ombudsman Institute presented the book "The European Heart of Human Rights" (presentations were held at the European Commission in Vienna; the Diplomatic Academy of the Ministry of Foreign Affairs of Ukraine in Kyiv; at the office of the Ombudsman in the Russian Federation (Moscow)). The position of the First Ombudsman of Ukraine on the situation in the East of the country was brought up. Thus, we can state the existence of extensive materials on the role of international human rights organisations in the conflict zone on the territory of Ukraine. An objective study of them is necessary for a deep analysis of this topic and the formation of appropriate conclusions.

CONCLUSIONS

The study of the role of international human rights organisations in the context of the conflict in the east of Ukraine gives grounds to draw the following conclusions. The OSCE Mission and representatives of the Office of the UN High Commissioner for Human Rights have been in the zone of hostilities in eastern Ukraine from the very beginning of the armed confrontation and are monitoring the current situation in the region on a daily basis. The reports of these organisations reflect the real situation in the territory of the conflict, and also testify to numerous facts of violation of human rights and international law in this area. In this context, several main aspects of the role played by international human rights organisations in the armed confrontation in eastern Ukraine should be highlighted. Firstly, international organisations carry out a monitoring function, controlling the course of events in the territories involved in the conflict, and registering cases of human rights violations. This contributes to the creation of an objective picture of what is happening due to the fact that the representatives of these organisations do not belong to any of the opposing sides and are not interested parties in terms of placing the emphasis of the conflict. For the same reason, the facts of human rights violations in the territories of hostilities can be considered reflected with maximum objectivity. Secondly, representatives of international organisations are actively involved in the search for ways to peacefully resolve the conflict in Donbas. This is confirmed by the numerous facts of the development and adoption of fundamental documents designed to find ways to resolve it peacefully, such as the Donbas plan. In accordance with the provisions of this document, in order to create optimal conditions for a peaceful settlement of the issues of armed confrontation, it is planned to significantly increase the size of the OSCE mission (several times) in the conflict region. In addition, the OSCE is assigned a significant role in restoring control over certain sections of the Ukrainian-Russian border in the zone of military clashes. Thirdly, the role of the OHCHR and the OSCE in relation to the development of situations in the zone of the armed conflict and in the context of protecting human rights is to monitor compliance with the norms of the current legislation by representatives of the legitimate Ukrainian authorities in relation to representatives of the civilian population.

In general, the activities of international human rights organisations in the context of a conflict on the territory of Ukraine in some way contributes to the normalisation of the situation in the conflict zone and the gradual establishment of conditions necessary for the observance of human rights both in the conflict zone itself and in the territories adjacent to it. OHCHR reports and OSCE mission reports contain information that objectively reflects the current state of affairs in the region and act as a starting point for the development of the settlement process by the parties to the ongoing conflict and the return of peace to the eastern Ukraine.

REFERENCES

[1] Klymenko, L. (2020). Understanding the Donbas war in terms of world war II: A metaphor analysis of the armed conflict in Eastern Ukraine. *Ethnopolitics*, 19(5), 483-500.
[2] Karpachova, N., & Siegele, J. (2015). *European heart of human rights*. Kyiv: Noviy Druk.
[3] Rimpiläinen, E. (2020). Victims, villains, or geopolitical tools? Representations of Donbas displacement in Ukrainian and Russian government media. *Europe – Asia Studies,* 72(3), 481-504.
[4] Kononov, I.F. (2019). Donbass: Laboratory of the modern war and a place of social disaster. *Sotsiologicheskie Issledovaniya,* 2019(7), 152-163.
[5] Kuibida, R., Moroz, L., & Smaliuk, R. (2020). Justice in the east of Ukraine during the ongoing armed conflict. *International Journal for Court Administration*, 11(2), 1-18.
[6] Dorosh, L., & Ivasechko, O. (2020). The OSCE institutional and operational possibilities in the modern conflict resolution. *Security and Human Rights*, 30(1-4), 1-22.
[7] Kostruba, A.V. (2017). Methodological basis of legal personality of the state (civil aspects). *Journal of Legal, Ethical and Regulatory Issues*, 20(Special Issue 1), 15-44.
[8] Sanders, D., & Tuck, C. (2020). The Ukraine conflict and the problems of war termination. *Journal of Slavic Military Studies*, 33(1), 22-43.

1. Human rights in the administration of justice in criminal cases related to conflicts in Ukraine on April 2020, Office of the United Nations High Commissioner for Human Rights. (2020). Retrieved from https://www.ohchr.org/Documents/Countries/UA/Ukraine-admin-justice-conflict-related-cases-ru.pdf.

[9] Ihnatyshyn, M.V., & Burdyuk, L.Yu. (2018). Management of cash flows in the system of calculating payments on the basis of coefficient analysis. *Bulletin of Mukachevo State University. Series "Economy"*, 1(9), 163-169.
[10] Dubský, Z., & Havlová, R. (2017). The role of European security organisations in the conflict in Ukraine. *Central European Journal of International and Security Studies*, 11(1), 31-57.
[11] Medvedeva, A. (2020). The danger of peace in Donbass: What is wrong with Minsk and the quick elections in ORDLO. Retrieved from https://www.eurointegration.com.ua/rus/articles/2020/01/6/7104606/
[12] Kostruba, A.V. (2018). Right deprivation in the legal regulation mechanism of civil property relations. *Journal of Legal, Ethical and Regulatory Issues,* 21(Special Issue 1), 1-15.
[13] Chernychko, T.V., Kuchinka, T.V., & Hlahola, V.A. (2019). Methodology for evaluating mechanism effectiveness of state management of crisis processes in decentralization. *Scientific Bulletin of Mukachevo State University. Series "Economy"*, 2(12), 45-50.

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ЗАХИСТ ПРАВ ЛЮДИНИ В КОНТЕКСТІ ФОРМУВАННЯ ПРИНЦИПУ ВЕРХОВЕНСТВА ПРАВА: МІЖНАРОДНИЙ АСПЕКТ

Анотація. *Охарактеризовано закріплення принципу верховенства в міжнародних документах. Встановлено, що верховенство права в роботі ООН стало темою постійного обговорення. Значну активізацію придбало з 2007 року, затвердившись як одна з найбільш важливих сфер діяльності організації. В документах ООН верховенство права визначається як принцип або як сфера діяльності Організації і країн-членів. Діяльність в області верховенства права Генеральний секретар ООН у доповіді розділяє на три сектори: верховенство права на міжнародному рівні, верховенство права в контексті конфліктних і постконфліктних ситуацій, верховенство права в контексті довгострокового розвитку. У щорічних доповідях Генерального секретаря ООН продовжено спрямування зусиль із сприяння верховенству права на національному і міжнародному рівнях. Діяльність і документи ООН засвідчують, що зміцнення верховенства права на міжнародному рівні неможливо без заохочення, дотримання і здійснення міжнародних договорів, вирішення суперечок мирними засобами, а також захисту прав людини, які мають нерозривний зв'язок з принципом верховенства права. Зазначено сфери діяльності, які зміцнюють верховенство права. Проаналізовано зміст резолюцій «Верховенство права на національному і міжнародному рівнях», за результатами узагальнення змісту і спрямованості сесій Генеральної Асамблеї протягом останніх п'ятнадцяти років, визначено напрями діяльності в цих рамках. Верховенство права визнається одним із засадничих принципів європейської спільноти та закріплено у її регіональних актах. Визначено елементи принципу верховенства права за результатами узагальнення практики ЄСПЛ. Встановлено, що саме в європейському регіоні велику роль у формуванні і тлумаченні концепту верховенства права відіграє його судова інтерпретація, яка здійснюється двома міжнародними судовими установами: ЄСПЛ і Європейський суд справедливості. Верховенство права отримало представлення в роботі Організації по безпеці і співпраці в Європі (ОБСЄ), грає істотну роль в просуванні і захисті прав людини. Значний вклад в розвиток нормативних положень реалізації принципу верховенства права на міжнародному рівні зроблено Міжнародною неурядовою організацією «World Justice Project», яка розробила в 2010 році індекс верховенства права. Охарактеризовано показники виміру індексу верховенства права в державі та проведено їх аналіз в динаміці на міжнародному рівні і розподіл індексу верховенства права по факторам в Україні*

Ключові слова: *принципи права, верховенство права, міжнародних суперечки, права людини, доступ до правосуддя*

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PROTECTION OF HUMAN RIGHTS IN THE CONTEXT OF THE DEVELOPMENT OF THE RULE OF LAW PRINCIPLE: THE INTERNATIONAL ASPECT

Abstract. *The consolidation of the principle of supremacy in international documents is described. It is established that the rule of law in the work of the UN has become a subject of constant discussion. It has gained significant momentum since 2007, establishing itself as one of the most important areas of the organisation. UN documents define the rule of law as a principle or as a sphere of activity of the Organisation and member countries. In their report, the UN Secretary-General divides the rule of law into three sectors: the rule of law at the international level, the rule of law in the context of conflict and post-conflict situations, and the rule of law in the context of long-term development. The UN Secretary-General's annual reports continue to work to promote the rule of law at the national and international levels. UN activities and documents demonstrate that strengthening the rule of law at the international level is impossible without the promotion, observance, and implementation of international treaties, the settlement of disputes by peaceful means, and the protection of human rights that are inextricably linked to the rule of law principle. Areas of activity that strengthen the rule of law are identified. The content of the resolutions " Rule of Law at the national and international levels" was analysed, based on the results of generalisation of the content and direction of the sessions of the General Assembly during the last fifteen years, the directions of activity within this framework were determined. The rule of law is recognised as one of the fundamental principles of the European Community and enshrined in its regional acts. The elements of the principle of the rule of law are identified based on the results of generalisation of the case law of the European Court of Human Rights. It is established that in the European region a great role in the development and interpretation of the concept of the rule of law is played by its judicial interpretation, which is engaged in by two international judicial institutions: the ECtHR and the European Court of Justice. The rule of law is represented in the work of the Organisation for Security and Co-operation in Europe (OSCE) and plays a significant role in the promotion and protection of human rights. A significant contribution to the development of regulations for the implementation of the rule of law at the international level was made by the International Non-Governmental Organisation " World Justice Project", which developed in 2010 the Rule of Law Index. The indicators of measuring the rule of law index in the country are characterised and their analysis in the dynamics at the international level and the distribution of the rule of law index by factors in Ukraine*

Keywords: *principles of law, rule of law, international disputes, human rights, access to justice*

INTRODUCTION

The principle of the rule of law and human rights are closely interrelated. Without respect for human rights, the rule of law will have no meaning and will be meaningless. Moreover, the rule of law can only be fully implemented if human rights are respected. In turn, it is the observance of the rule of law principle that ensures the protection and development of human rights. Moreover, some human rights cannot exist without the rule of law and are interrelated concepts, such as the fairness of the court and freedom of expression. Historically, the rule of law has developed as

a means of limiting the power of the state (government). Human rights were seen as a means of protection against encroachment by the holders of this power (so-called "negative rights"). The rule of law is a universal principle, has international legal practice and the practice of individual regions of the world (EU), as well as wide application at the national level.

The rule of law creates a criterion for assessing the quality of human rights law. Legal provisions at any level (national, international) must be clear and non-discriminatory, applied by independent courts and have procedural guarantees. The principle of the rule of law has been studied by many well-known scholars from various fields of law, both Ukrainian: A. Volchenko [1], V.V. Mikhailenko [2], N.M. Onishchenko [3], S. Shevchuk [4], Yu. S. Shemshuchenko [5], and foreign scientists: D.V. Krasikov [6], N.M. Lipkina [7] and others.

The direct interrelation between the principle of the rule of law and human rights has been investigated by such Ukrainian scholars as S. Holovaty [8; 9], M. Koziubra [10], I.A. Malyutin [11], V.F. Nesterovych [12], R.O. Padalka [13], O.V. Sachko [14], V. Tertyshnyk [15], M.H. Khaustova [16], S.O. Yakymchuk [17], as well as foreign: N.V. Varlamova [18], L.G. Loucaides [19]. All these scholars point to the inseparability of the rule of law principle and human rights. Thus, I.A. Maliutin [11] proposes to interpret this principle as the predominant priority of human rights and freedoms in society. Notably, international organisations have also published numerous studies on these issues and provided assistance in their publication [20; 21]. O.V. Petryshyn [22]. emphasises the dominant role of the judiciary in the mutual application of this principle in human rights protection.

However, despite considerable attention to this issue, the problem of implementing the rule of law through the lens of human rights protection in legal doctrine has not yet become widespread in the scientific achievements of scientists.

1. MATERIALS AND METHODS

Analytical and legal methods of analysis served as the methodological basis of the research. General scientific and special methods are used. The study investigates the main provisions of the legal framework at the international, national level, and in some regional zones. The applied methodology allowed to develop the main directions of optimising the application of the rule of law and its implementation in the national legal system. The methods used allowed to obtain reliable and substantiated conclusions and results. As one of the main methods of analysis, this study employed the comparative method, which allowed to compare the domestic practice of implementing this principle in the process of human rights protection with the legal framework for regulating the object of study in the European Union and internationally.

At the theoretical level of the analysis, a study of the main provisions of the legal framework for the regulation and implementation of the rule of law in the protection of human rights at the international, foreign, and national levels. The descriptive method allowed to present the results of the study in a logical sequence. Methods, synthesis, analogy, system, classification, and analytical methods were also used during the research. The normative method was used to analyse aspects of issues that arise in the framework of the implementation of measures of legal regulation of human rights in the context of the rule of law. The application of the analytical method allowed to draw conclusions about the level of consideration of the recommendations of the UN, the Council of Europe and other international organisations in the national legislative system [23].

The method of synthesis allowed to solve the research problems through its application to primary sources on this issue. The application of the analytical method to these primary sources allowed to make recommendations regarding the implementation of the provisions of European and international legislation into the national legal system; highlight the main areas of experience in its application in the process of human rights protection and the compliance of national systems with the international base and case law in the EU. Methods of induction and deduction are used to analyse the content and structure of legislative texts, the characteristics of legal provisions in the context of the subject matter. In the process of analysis, the historical method was used, which allowed to study the process of development of the principle of the rule of law in rule-making and legal doctrine at different levels. The genetic method allowed to identify stages in the evolution of the rule of law and the system of protection of human rights, to establish their sequence in time and to trace how and under the influence of which factors the provisions governing them changed. Due to the structural-functional analysis it was possible to consider the features of the structural organisation of modern institutions that implement and apply the rule of law and protect human rights and control over their observance, their interaction with each other and with other institutions, the activities of which concern these issues to some extent, as well as to systematise information on the effectiveness of their operation both in Ukraine and abroad, and at the international level. To achieve this goal, a system of methods of cognition of social and legal phenomena was also used, as the development of a legal mechanism for the implementation of international and foreign law in the domestic legal system is a complex problem.

2. RESULTS AND DISCUSSION

The principle of the rule of law is widely enshrined in international instruments. Thus, the importance of the rule of law is emphasised in the Preamble to the Universal Declaration of Human Rights, which states that the purpose of this document is to ensure that human rights are protected by the rule of law in order to ensure that people are not forced to resort to tyranny and oppression. The implementation of the rule of law has been widely used in the activities of the UN, a number of European organisations (EU bodies, the Council of Europe, the Organisation for Security and Cooperation in Europe) and in some non-governmental organisations (e.g. the International Justice Project).

The rule of law in the work of the UN has been the subject of constant discussion, it has gained considerable momentum since 2007, establishing itself as one of the most important areas of the organisation. Although the rule of law is not explicitly enshrined in the UN Charter, the text of its preamble contains provisions that are inconsistent with this principle: "to create actions in which justice and respect for the obligations arising from treaties and other sources of international law"; "to carry out by peaceful means, in accordance with the principles of justice and international law, the settlement or resolution of international disputes or situations that may lead to a breach of peace"[1]. These provisions contain the *pacta sunt servanda* principle and the principle of peaceful settlement of international disputes, compliance with which is an important condition for the exercise of the rule of international law.

An indication of this principle dates back to the middle of the 20th century – from the analytical analysis of the content of the preamble of the Universal Declaration of Human Rights[2], which is considered the first act of the International Bill of Human Rights. The reference to it follows from this text: "it is necessary that human rights be protected by the rule of law". There is good reason to believe that it is the duty of the rule of law to protect human rights by law. Its importance is directly indicated in the UN Millennium Declaration of 2000[3], which reflects the intention of Member States to strengthen universal respect for the rule of law in international and domestic affairs. It is stated that the UN should promote the provision of three fundamental freedoms in order to promote human rights and the rule of law:

– freedom to tackle problems related to peace and security without fear;

– freedom from need to ensure further development;

– freedom to live in decent human conditions.

In 2005, Resolution 60/1[4] of the Heads of State and Government enshrined the need to uphold and apply the rule of law at the national and international levels and reaffirmed the direction of the international order on the rule of law. This document launches a mechanism for the annual preparation by the UN Secretary-General of reports on strengthening and coordinating UN activities to establish the rule of law. The document also contributed to organisational change, including the establishment of a Rule of Law Unit in the UN Secretariat, the Rule of Law Coordination and Resource Group. At the same time, if the previous document defined "rule of law" as a principle, then this document defines it as the scope of the UN and member countries. Since the adoption of this resolution in 2005, the issue of the rule of law has become permanent on the agenda of the annual session of the UN General Assembly. This principle has been widely used in resolutions adopted by the UN General Assembly since 2005, as well as in the annual reports of the UN Secretary-General on the rule of law at the national and international levels.

Thus, in pursuance of the task of the Final Document of the 2005 World Summit, the UN Secretary-General presented this report in 2007 on the comments and information received from governments. The report presents the views of the governments of Austria, Egypt, Finland, France, Germany, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Liechtenstein, Mexico, the Netherlands, Qatar, Sweden, and the United States. The general focus of these countries is to strengthen the rule of law as one of the key elements of the prosperity of the world. In their opinion, strengthening the rule of law at the international level is impossible without the promotion, observance, and implementation of international treaties, the settlement of disputes by peaceful means, and the protection of human rights, which are inextricably linked to the rule of law. States have supported the right of the Security Council to transfer situations to the International Criminal Court, as they see this as strengthening the rule of law. In 2006, the UN Secretary-General divided rule of law activities into three sectors in his report (Table 1).

Subsequent annual reports of the UN Secretary-General continue to focus efforts on promoting the rule of law at the national and international levels. The objects of attention of these reports are the issues of codification, development, and implementation of the international base of provisions and standards, the activities of international and mixed courts and tribunals and non-judicial mechanisms for resolving disputes in the international arena.

The Report "Strengthening and coordinating the activities of the United Nations in the field of the rule of law"[5], which covers a list of means and ways to implement the rule of law, also deserves to be mentioned. Assistance in the field of the rule of law extends to more than 110 countries in different regions of the world, is to promote judicial reform, implementation of national strategies in the field of law, the development of security and fair justice, protection of human rights. This report also lists areas of activity that strengthen the rule of law (Figure 1).

1. Preamble to the UN Statute. (1945). Retrieved from https://www.un.org/ru/sections/un-charter/preamble/index.html.

2. General declaration of human rights. Resolution of the UN General Assembly dated 10th June 1948, 217 A (III). (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.

3. United Nations Millennium Declaration. General Assembly resolution 55/2. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/995_621#Text.

4. Resolution 60/1. General Assembly of the United Nations. 2005 World Summit Outcome Document. (2005, October). Retrieved from http://docs.cntd.ru/document/902131568.

5. Supplement by the UN Secretary General A/63/226 «Amendments and coordination of UN action in the sphere of the rule of law». (2008, August). Retrieved from https://undocs.org/en/A/63/226.

***Table 1**. Rule of law sectors*[1]

Sector	Scope	Areas of implementation
Rule of law at the international level	UN Charter, multilateral treaties, international dispute settlement mechanisms, International Criminal Court, advocacy training and education in the field of international law	
Rule of law in the context of conflict and post-conflict situations	– justice in transition	national consultation processes on issues of justice in transition, truth establishment and reconciliation processes, redress, international and hybrid tribunals, national human rights institutions, control processes and special investigations, fact-finding and commissions of inquiry
	– strengthening national justice systems and institutions	
Rule of law in the context of long-term development	strengthening national justice systems and institutions: – dispute resolution mechanisms; – protection of victims and witnesses and providing them with assistance; – combating and control of corruption, organised crime, transnational crime, and drug trafficking; – legal education; – public law issues; – temporary law enforcement and executive-judicial functions performed by the UN; – security support for national police forces	strengthening legal and judicial institutions, law enforcement, criminal law reform, trust fund management and monitoring

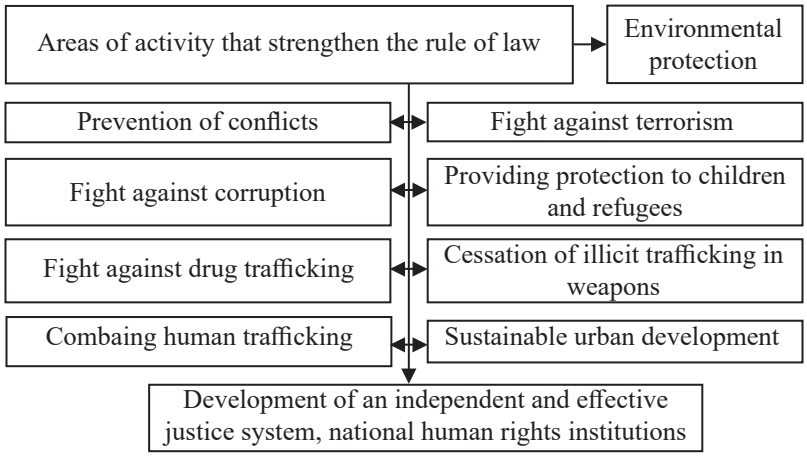

***Figure 1**. Areas of activity that strengthen the rule of law*[2]

In the appendices to this report, the UN Secretary-General reaffirms the relationship between the rule of law and human rights[3]. The Secretary-General further stated in the report that the results of the rule of law should not be assessed in isolation, but rather in the context of achieving broader development goals, promoting human rights and maintaining peace and security[4]. From the content of resolutions "Rule of law at the national and international levels" it is possible to define such directions of maintenance and protection of human rights in the context of development of the rule of law principle (Table 2).

1. Report of the Secretary-General "Consolidating our strengths: revitalizing United Nations efforts to promote the rule of law" (A/61/636^/2006/980). (2006, December). Retrieved from https://undocs.org/ru/S/2006/980.
2. *Ibidem*, 2008.
3. Report of the Secretary-General "Strengthening and coordinating United Nations rule of law activities, addendum". (2014, July). Retrieved from http://www.un.org/ruleoflaw/files/94198_A-68-213-Add.1.pdf.
4. Report of the Secretary-General S/2013/341 "Assessing the effectiveness of support from the United Nations system in promoting the rule of law". (2013, June). Retrieved from https://www.refworld.org.ru/docid/51f63c075b.html.

***Table 2**. Contents of resolutions "Rule of law at the national and international levels"*

Year	Resolution	Establishing relationships	Reference
2006	61/39[1]	human rights, the rule of law and democracy are interrelated and mutually reinforcing and are among the universal and indivisible core values and principles of the United Nations	questioning the views of countries on the rule of law at the national and international levels
2008	63/128[2]	the importance of ensuring the rule of law at the national level and the need to strengthen the support provided to Member States at their request for the implementation of their respective international obligations at the national level	reaffirming the effectiveness of the UN system in addressing the rule of law on a regular basis
2010	65/213[3]	to expand the dialogue between all stakeholders so that national priorities are at the heart of rule of law assistance activities in order to strengthen relevant capacity at the national level	to deal regularly with the rule of law in the course of their activities
2014	69/123[4]	efforts to strengthen the rule of law through voluntary commitments	consider issues individually or collectively based on national priorities

***Source**: generalised and systematised by the author*

Notably, according to the results of the activities and cooperation of states and governments that have recognised the rule of law as important for international cooperation and play a huge role in strengthening international peace and security, human rights, and development, adopted the "Declaration on the Rule of Law on National and International Level"[5]. Over the past fifteen years, based on the results of summarising the content and direction of the sessions of the General Assembly, one can identify the following areas of activity under the theme "Rule of law at the national and international levels": – promotion of the rule of law at the international level; promotion and ensuring the rule of law at the national level; the laws and practices of the Member States in the implementation of international law; the rule of law and justice in transition in conflict and post-conflict situations; the rule of law at the national and international levels; the rule of law and the peaceful settlement of international disputes; exchange of national practical experience of states in the field of strengthening the rule of law by ensuring access to justice; strengthening the support provided to Member States for the implementation of commitments at national level; assistance in the field of the rule of law; the role of multilateral treaty processes in promoting and strengthening the rule of law; exchange of information on the national practice of states in the implementation of multilateral agreements; practical measures to facilitate access to justice for all, including the poorest and most vulnerable; ways and means of further disseminating international law to strengthen the rule of law.

The rule of law is recognised as one of the fundamental principles of the European Community and enshrined in its regional acts. In particular, the Preamble to the Statute of the Council of Europe recognises the commitment of national governments to the spiritual and moral values that are the common property of their peoples and the true source of individual freedom, political freedom, and the rule of law. The Charter proclaims the principles that underpin democracy – individual liberty, political freedom, and the rule of law: "Each member of the Council of Europe must recognise the principle of the rule of law and the principle that all persons under its jurisdiction shall enjoy human rights and fundamental freedoms and cooperate sincerely and actively in the pursuit of the Council's objective set out in Chapter I. Failure by the Members of the Council of Europe to perform these obligations shall result in their exclusion from the Council". "The Venice Commission recognises activities affecting the implementation of the rule of law as one of the priorities"[6]. In the Rule of Law Report, the Venice Commission singled out the criteria proposed to be used to evaluate compliance with the rule of law[7]: "compliance with the rule of law; legal certainty; prohibition of arbitrariness; access to justice; respect for human rights; equality before the law and non-discrimination".

1. Resolution of the UN General Assembly No. 61/39 "Rule of law at the national and international levels". (2006, December). Retrieved from https://undocs.org/ru/A/RES/61/39.

2. Resolution of the UN General Assembly No. 63/128 "Rule of law at the national and international levels". (2008, December). Retrieved from https://undocs.org/ru/A/RES/63/128.

3. Resolution of the UN General Assembly No. 65/213 "Human rights in the administration of justice". (2010, December). Retrieved from https://undocs.org/en/A/RES/65/213.

4. Resolution of the UN General Assembly No. 69/123 "Rule of law at the national and international levels". (2014, December). Retrieved from https://undocs.org/en/A/RES/69/123.

5. Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels. Resolution adopted by the General Assembly [without referral to the Main Committees (A/67/L.1)]. (2012, September). Retrieved from https://www.un.org/ru/documents/decl_conv/declarations/ruleoflaw2012.shtml.

6. Statute for the Sake of Europe. (1949, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_001#Text.

7. Report on the Rule of Law. Approved by the Venice Commission at the 86th Plenary Session. (2011, March). Retrieved from https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-rus.

The preamble to the ECHR notes that the governments of the member states of the Council of Europe are determined, as the governments of European states, which are driven by a common aspiration and with a common heritage of political traditions, ideals, freedom, and the rule of law, to take the first steps to ensure the collective enjoyment of some of the rights proclaimed in universal declaration of human rights. The principle of the rule of law is enshrined in the Preamble and Article 2 of the Treaty on European Union as a universal value together with human dignity, freedom, democracy, equality, and respect for human rights. It is in the European region that its judicial interpretation, carried out by two international judicial institutions: the European Court of Human Rights and the European Court of Justice, plays an important role in shaping and interpreting the concept of the rule of law. In interpreting certain Convention rights, the ECtHR has repeatedly referred to the rule of law as a fundamental principle enshrined in the ECtHR's preamble, giving it substantive content in its practice. According to the results of generalisation of the case law of the European Court of Human Rights[1], one can distinguish the following elements of the principle of the rule of law [24] (Fig. 2).

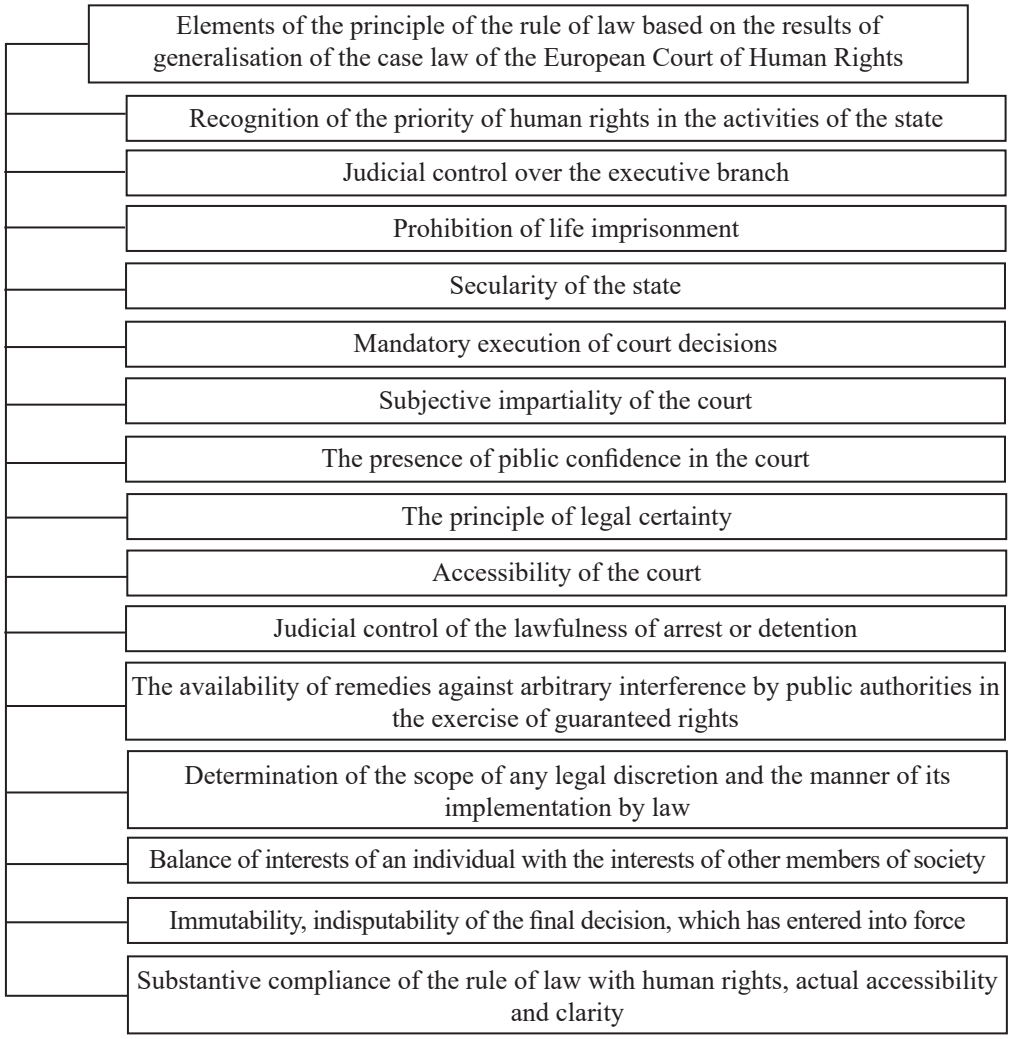

***Figure 2**. Elements of the principle of the rule of law based on the results of generalisation of the case law of the European Court of Human Rights*

The preamble to the Treaty on European Union states that the rule of law, together with human rights, freedom, democracy, and equality, are universal values of the European Union. In accordance with paragraph 2 of Article 6 of the Treaties on the European Union, "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they follow from the constitutional traditions common to the Member States, are part of European Union law as general principles"[2]. The rule of law has been represented in the work of the Organisation for Security and Co-operation in Europe (OSCE). Thus, the Member States have developed international standards and adopted several documents aimed at achieving the efforts of the Office for Democratic Institutions and Human Rights (ODIHR): the Helsinki Final Act of 1975, the Final Document of the Vienna Meeting

1. The former King of Greece et al. v. Greece, No. 25701/94. (2000, November). Retrieved from https://zakon.rada.gov.ua/laws/show/980_007#Text.

2. Treaty on the European Union. – Maastricht. (1992, February). Retrieved from https://zakon.rada.gov.ua/laws/show/994_029#Text.

of 1986, the Vienna Document of the OSCE of 1989, The CSCE Copenhagen Document of 1990, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, and many others. Structural bodies such as the ODIHR, the High Commissioner for Minorities and the Representative on Freedom of the Media play a critical role in ensuring respect for human rights, democracy, and the rule of law.

Thus, the rule of law in the work of the OSCE plays an essential role in the promotion and protection of human rights: "The rule of law, as recognised by the OSCE Member States, is not just a formal legality, but justice based on the recognition and full acceptance of the highest value of the human person and is guaranteed by the institutions that form the structures that ensure its fullest expression"[1].

The rule of law is implemented through transparent, accessible, impartial, and lawful activities of courts, prosecutors, lawyers, human rights defenders, independent courts, prosecuting authorities and other law enforcement agencies. At the same time, the judiciary is limited in its activities, as it does not have a judicial body, unlike the International Court of Justice at the United Nations or the European Court of Human Rights.

A significant contribution to the development of regulations on the implementation of the rule of law at the international level was made by the International Non-Governmental Organisation "World Justice Project", which developed the Rule of Law Index in 2010. This index evaluates the rule of law in the country by measuring the development of the legal system (Fig. 3).

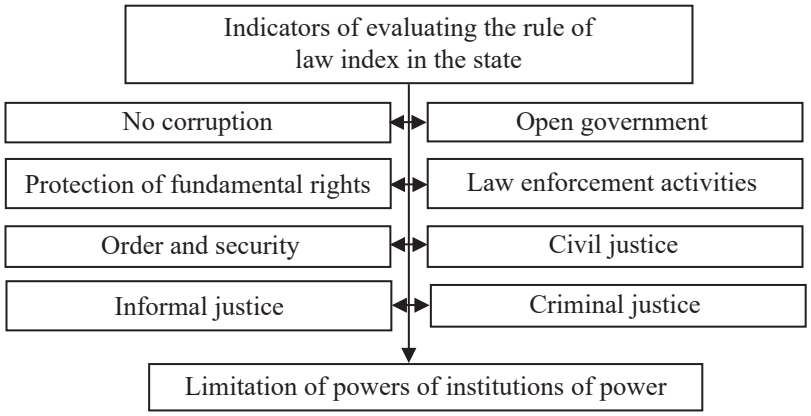

Figure 3. *Indicators of measuring the rule of law index in the state*

Source: *systematised by the author*

Nowadays, the index covers 128 countries and jurisdictions and is based on national surveys of more than 130,000 households and 4,000 legal practitioners and experts to measure how the rule of law is felt and perceived worldwide.

According to the results of the index in 2020, in each region, most countries have rolled back or remained unchanged in their overall rule of law. These trends have affected even Western Europe, which has some of the highest rates in the world. The downward trend is the third year in a row. Most countries have downgraded the overall rating. Congo, Cambodia, and Venezuela had the lowest overall scores – unchanged from 2019.

The first places were taken by Denmark, Norway, and Finland. For comparison, these countries have maintained their positions: in 2016, the top ten countries were Denmark, Norway, Finland, Sweden, the Netherlands, Germany, Austria, New Zealand, Singapore, and the United Kingdom.

In 2020, Ukraine ranked 72nd among 128 countries. Notably, there was a positive trend in a steady increase in the value of the rule of law index with its three-year preservation in recent years and further growth (Fig. 4).

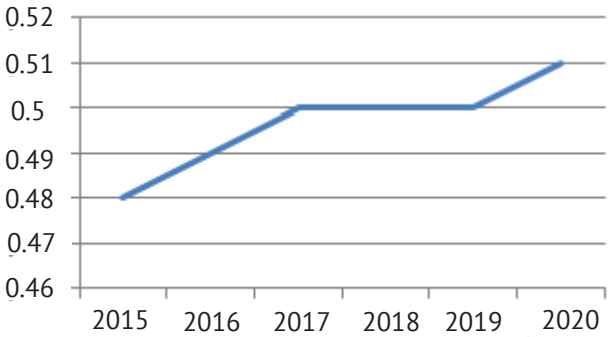

Figure 4. *Dynamics of the rule of law index in Ukraine*[2]

The distribution by factors for Ukraine is presented in Fig. 5. Thus, a negative trend in recent years is the decline in the rule of law in almost all jurisdictions, which has been going on for the third year in a row. The most noticeable decrease is in such an indicator as "limitation of the powers of government institutions", which assesses the existing legal and institutional instruments in the country that allow to bring government officials to justice in accordance with the law. At the same time, the changes are not cardinal in nature and have a negligible pace.

1. Report of the UN Secretary General to the 60th Session of the General Assembly "Implementation of the decisions set out in the 2005 World Summit Outcome document requiring action by the Secretary General". (2005, October). Retrieved from https://digitallibrary.un.org/record/558714/files/A_60_430-RU.

2. World Justice Project – Rule of Law Index. (2020). Retrieved from https://worldjusticeproject.org/rule-of-law-index/country/Ukraine.

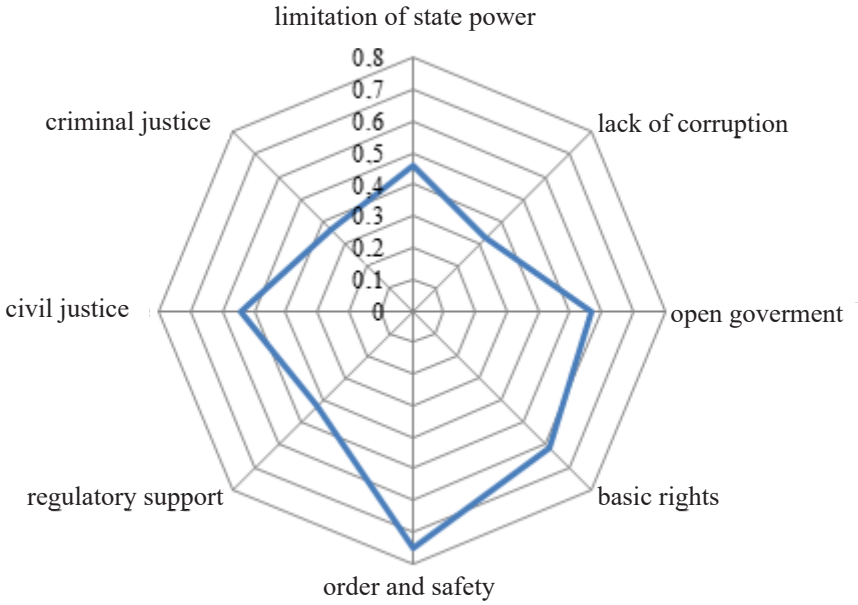

***Figure 5**. Distribution of the rule of law index by factors for Ukraine*[1]

Article 8 of the Constitution of Ukraine recognised and enshrined the principle of the rule of law in Ukraine as mandatory. However, at the regulatory level, its boundaries and implementation mechanism are not defined. First of all, the implementation of the rule of law is aimed at ensuring the implementation of human rights by state institutions. Thus, the principle of the rule of law obliges the court to interpret legal provisions in a way that ensures the priority of human rights in deciding the case. Interpretation cannot restrict human rights and all decisions must be made to uphold and protect them.

Despite the application and consideration of the principle of the rule of law by courts of civil jurisdiction, which is carried out with consideration of the case law of the European Court of Human Rights, the Civil Procedural Code of Ukraine did not find direct consolidation until 2017. Considering this principle was provided by the draft amendments[2], according to which the rule of law is recognised as the basic principle of civil proceedings, and Part 1 of Article 10 is worded as follows: "The court in the case is guided by the principle of the rule of law", and Article 263 states that the court decision should be based on the principles of the rule of law. Unlike civil ones, in administrative proceedings, this principle has been applied since 2005 and is noted in the law – in deciding the case, the court is guided by the rule of law, according to which, in particular, human, their rights and freedoms are recognised as the highest values and determine the content and direction of the state[3]. The principle of the rule of law is approved by the Constitutional Court of Ukraine as the rule of law in society [25]. It requires the state to implement it in law-making and law enforcement activities, in particular, in laws that must be permeated primarily by ideas of social justice, freedom, equality, etc[4].

CONCLUSIONS

Considering the importance and significance of the rule of law for democratically developing rule of law states, it has found wide regulation in many international regulations, interregional documents, and in the acts of individual states. The principle of the rule of law is recognised as one of the fundamental and inviolable ideals of modern democracies, which must be adhered to by all civil society institutions at all levels.

The analysis indicates that both the doctrine and international legal acts on human rights and the rule of law are interrelated in many respects and can be traced in the activities of the UN, EU, OSCE, Council of Europe, ECtHR, and domestic authorities. At the international level, the concepts, legal content, competencies of relevant institutions, areas of implementation and measures to strengthen the protection of human rights at the international, national and conflict situations and the implementation of the rule of law were defined.

1. World Justice Project – Rule of Law Index. (2020). Retrieved from https://worldjusticeproject.org/rule-of-law-index/country/Ukraine.
2. Draft Law of Ukraine No. 6232 «On the introduction of changes to the State Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Judicial Service of Ukraine and the other legislative acts». (2017, March). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61415.
3. Code of Administrative Judiciary of Ukraine: Law of Ukraine No. 2747-IV. (2005, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2747-15#Text.
4. Resolution of the Constitutional Court of Ukraine No. 15-rp/2004. (2004, November). Retrieved from https://zakon.rada.gov.ua/laws/show/v015p710-04#Text.

REFERENCES

[1] Volchenko, A. (2011). *The rule of law. Political encyclopedia*. Kyiv: Parliamentary Publishing House.
[2] Mikhailenko, V.V. (2019). *Implementation of the principle of the rule of law in criminal proceedings*. Kyiv: Palivoda A.V.
[3] Onishchenko, N.M. (2010). The principle of the rule of law and the rule of law: Mutual exclusion or interdependence? *Problems of Jurisprudence and Law Enforcement*, 3, 3-7.
[4] Shevchuk, S. (2011). The principle of the rule of law and the highest legal force of the Constitution of Ukraine. *Law of Ukraine*, 5, 175-187.
[5] Shemshuchenko, Yu.S. (2008). *The principle of the rule of law: Problems of theory and practice*. Kyiv: Legal Opinion.
[6] Krasikov, D.V. (2011). Approaches of international organizations to defining the content of the concept of "rule of law". *Bulletin of the Saratov State Law Academy*, 2, 142-146.
[7] Lipkina, N.M. (2015). Interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights and the rule of law. *Journal of Russian Law*, 4, 130-142.
[8] Holovaty, S. (2011). The triad of European values – the rule of law, democracy, human rights – as the basis of the Ukrainian constitutional order. *Law of Ukraine*, 5, 159-175.
[9] Golovaty, S. (2006). *The rule of law*. Kyiv: Phoenix.
[10] Koziubra, M. (2010). Human rights and the rule of law. *Law of Ukraine*, 2, 24-35.
[11] Maliutin, I.A. (2012). Development of the rule of law in the context of the doctrine of natural law. *Administrative Proceedings*, 3-4, 61-68.
[12] Nesterovych, V.F. (2017). The rule of law and human rights in the temporarily occupied territories of Ukraine. Scientific notes of NaUKMA. *Legal Sciences*, 200, 85-92.
[13] Padalka, R.O. (2017). *The rule of law as a fundamental principle of law*. Kyiv: M.P. Drahomanov National Pedagogical University.
[14] Sachko, O.V. (2018). *Problems of realization of the rule of law at application of special forms and modes of criminal proceedings.* Dnipro: Lira.
[15] Tertyshnyk, V. (2010). Ensuring the rule of law and conceptual problems of harmonization of the legislative process. *Law of Ukraine*, 12, 74-79.
[16] Khaustova, M.H. (2013). The rule of law – as a fundamental principle of the legal system of Ukraine in terms of modernization. *Bulletin of V.N. Karazin Kharkiv National University. Law Series*, 1062(14), 22-26.
[17] Yakymchuk, S.O. (2012). Implementation of the principle of the rule of law in the civil procedural legislation of Ukraine through the prism of decisions of the European Court of Human Rights. *University European Notes*, 1(41), 355-366.
[18] Varlamova, N.V. (2002). The rule of law – a basic principle of the European system for the protection of human rights. *Constitutional Law: An Eastern European Review*, 3, 151-178.
[19] Loucaides, L.G. (2006). The principle of the rule of law and human rights: Taking into particular account the case-law of the European Court of Human Rights. Human Rights. *Practice of the ECHR*, 4, 25-42.
[20] USAID from the American People. (2016). *Practical and methodical manual of the teacher "Rule of law and human rights"*. Kyiv: USAID.
[21] Kostruba, A.V. (2018). Law enforcement as a form of realization of right: Phenomenological analysis experience (Civilized aspect). *Revista de Derecho Civil*, 5(1), 177-190.
[22] Petryshyn, O.V. (2010). Rule of law in the system of legal regulation of suspicious decisions. *Law of Ukraine*, 3, 24-35.
[23] Kostruba, A.V. (2018). Right deprivation in the legal regulation mechanism of civil property relations. *Journal of Legal, Ethical and Regulatory Issues*, 21(Special Issue 1), 1-15.
[24] Golder v. The United Kingdom, 21 February 1975. (1975). Retrieved from https://swarb.co.uk/golder-v-the-united-kingdom-echr-21-feb-1975/#:~:text=Ratio%3A%20G%20was%20a%20prisoner,determination%20of%20his%20civil%20rights%20.%20.
[25] Holovatyi, M. (2014). Multiculturalism as a means of nations and countries interethnic unity achieving. *Economic Annals-XXI*, 11-12, 15-18.

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ОСОБЛИВОСТІ ПРАВОВОГО РЕГУЛЮВАННЯ ПРАВ ЛЮДИНИ ПІД ЧАС ЗБРОЙНИХ КОНФЛІКТІВ

Анотація. *Мета даної роботи полягає у визначенні проблем захисту прав і свобод людини в період збройних конфліктів на основі аналізу чинних міжнародно-правових і національних актів, в тому числі їх особливостей в Україні. В якості одного з основних методів аналізу використано порівняльний, за допомогою якого проведено порівняння вітчизняної практики реалізації системи захисту прав людини з правовою базою регулювання об'єкта дослідження в деяких країнах та на міжнародному рівні та аналіз міжнародного гуманітарного права та міжнародного права прав людини. Зазначено, що значну роль в дотриманні та регулюванні прав людини під час збройних конфліктів відіграє міжнародне гуманітарне право. Охарактеризовано міжнародні акти гуманітарного права та його основні відмінності від міжнародного права прав людини. Проаналізовано захист прав людини у рамках міжнародного права прав людини та у рамках міжнародного гуманітарного права, здійснено ретроспективний аналіз їх становлення. За результатами порівняльного аналізу зроблено висновок, що переважна кількість сучасних збройних конфліктів не носить міжнародного характеру, в зв'язку з чим визначено особливості захисту прав людини в цих умовах. Проаналізовано становлення правового регулювання та його зміни з самого початку збройного конфлікту в Україні та стан захисту прав людини*

Ключові слова: *права людини, міжнародне законодавство, гуманітарне право, тип правового регулювання, Женевська конвенція*

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FEATURES OF LEGAL REGULATION OF HUMAN RIGHTS IN ARMED CONFLICTS

Abstract. *The purpose of this study is to identify the problems of protecting human rights and freedoms during armed conflicts based on the analysis of existing international legal and national acts, including their features in Ukraine. As one of the main methods of analysis, comparative analysis is used, which compares the Ukrainian practice of implementing the human rights protection system with the legal framework for regulating the object of research in some countries and at the international level, and analyses international humanitarian law and international human rights law. It is noted that international humanitarian law plays a significant role in the observance and regulation of human rights during armed conflicts. The study describes the international acts of humanitarian law and its main differences from international human rights law. The study analyses the protection of human rights within the framework of international human rights law and within the framework of international humanitarian law, and provides a retrospective analysis of their development. According to the comparative analysis results, it is concluded that the vast majority of modern armed conflicts are not of an international nature; therefore, the specific features of protecting human rights in these conditions are determined. The study analyses the establishment of legal regulation and its changes from the very beginning of the armed conflict in Ukraine and the state of human rights protection*

Keywords: *human rights, international law, humanitarian law, type of legal regulation, Geneva Convention*

INTRODUCTION

Human rights are inherent in all people, regardless of their nationality, place of residence, gender, religion, language, or any other attribute. These rights are interrelated and are often defined and guaranteed by the provisons of international treaties and international law. Over the past decades, armed conflicts have claimed the lives of millions of people and violated the rights of tens of millions more citizens of different countries. In many armed conflicts, there are violations of international humanitarian law and international human rights law, and Ukraine is no exception. In certain circumstances, some of these violations can be classified as acts of genocide, war crimes, or crimes against humanity. However, the dual codification nature of international humanitarian law (law of war and human rights law) complicates its application and contributes to the duplication of international human rights law.

It was widely believed earlier that the main difference between international human rights law and international humanitarian law lies in the conditions of their application: the first – in peacetime, the second – in armed conflict [1]. Because human rights obligations must be performed in peacetime, during war, and during armed conflicts. In addition, there are no provisions in international law prohibiting their use during armed conflicts. Therefore, international human rights law and international humanitarian law can be considered complementary sources of obligations during armed conflicts. Thus, the human rights committee, in its general comments No. 29 (2001) and 31 (2004), noted that the International Covenant on Civil and Political Rights also applies in situations of armed conflict to which the provisions of international humanitarian law are applied [2; 3]. The human rights council, in its resolution 9/9, also recognises that human rights law and international humanitarian law complement and strengthen each other; human rights require protection equally and that the protection afforded by human rights law continues to operate in situations of armed conflict, taking into account those cases where international humanitarian law is applied as a lex specialis [3].

The authors of this study fully agree with Mohamed Haythem Ahmed Arraji that "The law of internal armed conflicts is increasingly approaching the law of international

armed conflicts" [4]. This is primarily due to the adoption of the Geneva Conventions in 1949[1] and Additional Protocols to them in 1977[2], which quite exhaustively state the regulation of human rights during armed conflict and hostilities[3].

In the context of the confrontation between Ukraine and the Russian Federation and the temporary occupation of part of the territory of the Luhanska and Donetska Oblasts and Crimea, the respect for human rights is becoming one of the most urgent issues within the framework of international humanitarian law. In recent years, the number of studies focused on human rights is steadily increasing. In particular, as one of the new methodological areas of research, the type of legal regulation is used – the corresponding vector that determines the ideology of human-state relations. Thus, the general permissive type makes provision for maximum freedom of the individual, which is mainly guaranteed by non-interference of the state in the relevant spheres of public relations [5]. However, certain human rights, due to their high social significance, namely, human rights during armed conflicts, as will be demonstrated further, require stricter statutory regulation to ensure effective measures of the state, both within the state and in external relations, which, in turn, is ensured by the possibilities of specially permissive regulation.

It is from this standpoint that it is necessary to evaluate various means of restricting warring parties (in particular, regarding the means and methods of warfare), protecting the civilian population, determining the status of combatants, prisoners of war and other categories of persons, such as refugees. This issue attracts great attention from international organisations, which publish thematic, analytical, statistical, and normative collections on its various aspects [5; 6]. This subject is sufficiently studied within the framework of the general analysis of human rights [7]. Among Ukrainian scientists, the study of this issue has become widespread, especially after the events of 2014 [1; 8]. However, despite considerable attention to this issue, the problem of implementing the protection of human rights in the legal doctrine of regulating armed conflicts, which tend to shift to the non-state level, has not yet found distribution in the scientific achievements of researchers.

1. MATERIALS AND METHODS

The methodological framework of the study is represented by the philosophy of individualism, which is considered a cultural guide of development that develops the terminology and allows describing the anthropological block of philosophical and legal problems from a new point of view. In each society, collectivist or individualistic ideas dominate at different stages. Which principle prevails, what content each of these concepts acquires, depends on the epoch, the level of material and spiritual culture, location, specific conditions, type of cultures. The philosophy of individualism absorbed all the progressive achievements of the philosophy of law, laid the foundation for a modern understanding of humanism and human rights, and became the foundation of modern European civilisation [9].

The methodological framework of the study comprises analytical and legal methods of research. General scientific and special methods were used. The study investigated the main provisions of the legislative framework at the international, national level, and in certain regional zones. The applied methodology allowed the authors of the study to develop the main lines of work for optimising the application of international legal provisions and their implementation in the national legal system. The methods used made it possible to obtain reliable and reasonable conclusions and results. Comparative analysis was used as one of the main methods of analysis, which made it possible to compare the Ukrainian practice of implementing the human rights protection system with the legal framework for regulating the subject matter in some countries and at the international level. This principle is also used to critically analyse the content of the study of international humanitarian law and international human rights law. At the theoretical level of the analysis, the study investigated the main provisions of the legislative framework for regulating and implementing the protection of human rights at the international, regional, and national levels.

The descriptive method made it possible to present the results of the study in a logical sequence. The research also uses methods of synthesis, analogy, system, classification, and analysis. The normative method is used to analyse aspects of issues that arise within the framework of implementing measures for the legal regulation of human rights in armed conflicts. The use of the analytical method allowed drawing conclusions regarding the level of consideration of international recommendations for the protection of human rights in armed conflicts. The synthesis method made it possible to solve the issues of this study through its application to primary sources on the subject matter. The application of the analytical method to these primary sources allowed the authors of the study to

1. Geneva Convention (I) for the Amelioration of the Condition of the. Wounded and Sick in Armed Forces in the Field. (1949, August). Retrieved from https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf.

Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. (1949, August). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.31_GC-II-EN.pdf.

Geneva Convention (III) relative to the Treatment of Prisoners of War. (1949, August). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf.

Geneva Convention (IV) relative to the Protection of Civilian Persons in Times of War. (1949, August). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf.

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). (1977, June). Retrieved from https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolI.aspx.

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). (1977, June). Retrieved from https://www.refworld.org/docid/3ae6b37f40.html.

develop recommendations regarding the implementation of international legislation in the national legal system; to highlight the main areas of experience in its application in the process of protecting human rights and the compliance of national systems with the international base and judicial practice. Methods of induction and deduction are used to analyse the content and structure of legislative texts, features of legal provisions in the context of the subject matter.

In the process of analysis, the historical method was used, which allowed investigating the development of the regulatory framework for the protection of human rights during armed conflicts, and its research in the legal doctrine. The genetic method made it possible to identify stages in the evolution of the human rights protection system, to establish their sequence over time and trace how and under the influence of what factors the provisions governing them changed. Due to the structural and functional analysis, it was possible to consider the features and identify changes in the application of human rights protection measures during armed conflicts, as well as analyse their compliance in Ukraine.

2. RESULTS AND DISCUSSION

International human rights law is reflected primarily in the Universal Declaration of Human Rights, as well as in a wide range of international acts (Fig. 1). Therewith, their number is constantly growing.

***Figure 1**. International legal instruments on human rights*

International law obliges states to respect, protect and exercise human rights. In addition, the International Court of Justice often emphasises in its decisions the obligation of states to respect human rights in situations of armed conflict [10-12]. To perform this obligation, states must refrain from creating obstacles or restrictions to the enjoyment of human rights, and protect citizens from violations of their human rights. International humanitarian law plays a significant role in this, being based on four Geneva Conventions (1949) and two Additional Protocols to them (1977), which were ratified by Ukraine (Fig. 2).

In addition, Ukraine has ratified all international agreements on the law of war and armed conflict, and implements their provisions in national legislation, including those aimed at the protection of human rights[1].

One of the reasons for its establishment and development lies in the need to clearly outline the legal status of participants in armed conflicts of an international and non-international nature. The main subjects of protection are persons who have ceased to take part in military operations for various reasons, and especially the civilian population of an armed conflict living or located in its zone. Determining their legal status is necessary primarily to protect their rights in conflict situations and at the same time regulate their behaviour in these conditions.

International humanitarian law constitutes a set of legal provisions aimed at limiting the consequences of armed conflict for people, including civilians, persons who are not involved or are no longer involved in the conflict, and even those who continue to take part in the conflict, such as combatants. To achieve this goal, international humanitarian law covers two areas: the protection of persons and the limitation of the means and methods of warfare.

1. Order of the Ministry of Defense of Ukraine No. 164 "On approval of the Instruction on the procedure for implementation of international humanitarian law in the Armed Forces of Ukraine". (2017, March). Retrieved from https://zakon.rada.gov.ua/laws/show/z0704-17#Text

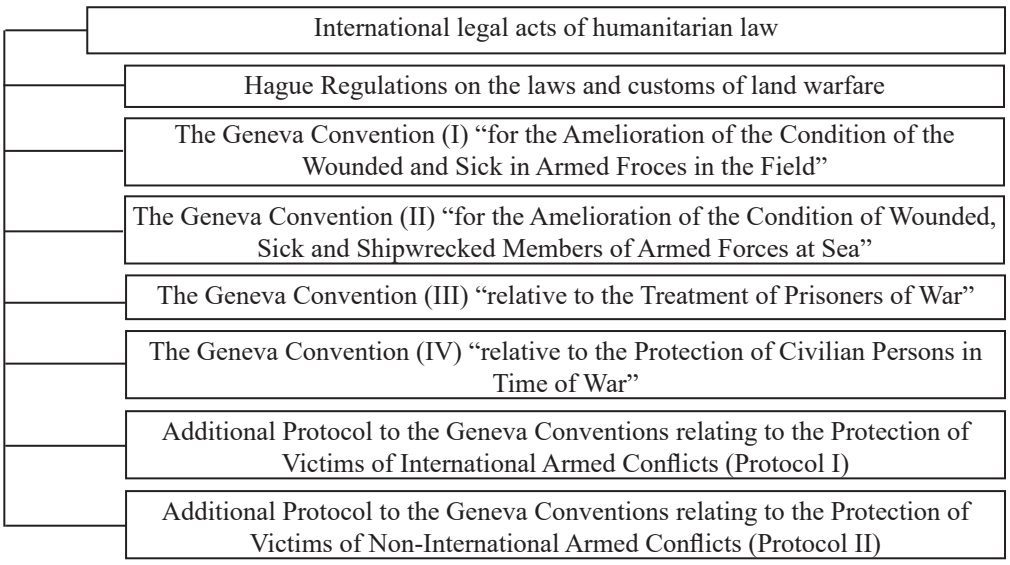

***Figure 2**. International legal acts of humanitarian law*

International humanitarian law aims to limit violence in armed conflicts in order, first of all, to ensure respect for the rights of those who do not take direct part in military operations. International humanitarian law regulates the rights of persons affected by armed conflict by ensuring a balance between humane treatment and military necessity.

There is an opinion that the provisions of international human rights law and international humanitarian law differ and are aimed at protecting different objects. The authors of this study believe that the said provisions are similar in essence, and these sub-branches of rights also protect individuals in a similar way. As a major difference, it should be noted that protection under international humanitarian law varies between civilians and combatants, while the international human rights law does not differentiate. The second difference is that the provisions of international humanitarian law are aimed at protecting only certain human rights and only to the extent that they face a specific threat as a result of armed conflicts. Moreover, they are not incompatible with the very presence of an armed conflict. Consequently, international humanitarian law does not include certain general rights, such as freedom of election and freedom of thought, as objects of its protection. At the same time, it protects a wide range of civil and political rights (the right to life of adversaries who have ceased to take part in hostilities), economic, social and cultural rights (the right to health), as well as collective rights (the right to a healthy environment). A considerable block of rights compriese those that are aimed at the situation of the wounded and sick, refugees. In general, in the limited areas covered by international humanitarian law, protection focuses on rights that are better adapted to the specific problems that arise within the framework of armed conflicts.

International humanitarian law takes a different approach to the protection of civilians than to the protection of combatants, which is particularly evident in the conduct of hostilities. Combatants can be attacked until they have surrendered or otherwise ceased fighting, and civilians can be targeted when they are directly involved in hostilities, and the principles of proportionality and caution provide them with protection from the side effects of attacks on military targets and combatants. This difference also affects the protection of individuals who are in the enemy's possession. The protection stipulated by the Geneva Convention III for captured combatants who become prisoners of war differs from the protection of civilians stipulated by the Geneva Convention IV. Thus, the former cannot be interned without passing any individual procedure, and civilians subject to protection can be deprived of their liberty exclusively within the framework of the criminal proceedings or under a special decision conditioned by imperative security considerations. International humanitarian law also divides civilians into civilians those subject to protection (usually having the nationality of an adversary) and other civilians who enjoy only limited guarantees. Furthermore, the scope of protection of civilians on the territory of one of the belligerents is more limited compared to protection in the occupied territory [13].

International human rights law is more universal and does not contain substantial differences between the categories of citizens. It is described by the adaptation of the law of each category to the specific needs of the persons included in it (the rights of children, women, disabled people, migrants, etc.). The protection of human rights under international human rights law is vested in the state as a whole, regardless of its institutional structure or form of government. Thus, according to the Vienna Convention, "a party cannot refer to the provisions of its national law as justification for non-performance of agreements"[1]. Meanwhile, the protection of human rights by international

1. Vienna Convention on the Law of Treaties. (1969, May). Retrieved from https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

humanitarian law is mainly aimed at states that are parties to armed conflict. For example, in the Geneva Conventions[1], states and their troops[2] involved in an armed conflict are subject to obligations[3], and responsibility for violations is borne by direct participants and, if necessary, their civilian leaders[4].

All participants in armed conflicts are usually divided into two categories: combatants – those who fight, and those who do not fight and are "under protection". All the provisions of the Geneva Conventions are built around these key groups. Notably, these categories are not constant – in certain situations, a combatant can become a protected person (for example, when they are captured or surrendered as a result of a wound, without losing the status of a combatant).

According to the comparative analysis results, it can be concluded that the vast majority of modern armed conflicts are not of an international nature [14]. They constitute fighting between government troops and armed anti-government groups. Therewith, relations between the parties in these armed conflicts are more fierce than in international wars. This leads to massive violations of the fundamental rights and freedoms of both direct participants in armed conflicts and civilians on their territory. This is also justified by the fact that most often the ranks of illegal armed groups include mercenaries, criminal elements for whom violence is the norm and a source of profit. Therefore, in such armed conflicts, there are a considerable number of civilian casualties and violations of their rights.

In recent years, cases of internal armed confrontations and fighting between the Armed Forces of the government and illegal armed groups of various kinds of separatist or opposition movements have been spreading on different continents. Until recently, these armed conflicts did not have a clear legal regulation. In addition, the overwhelming majority of international humanitarian law provisions are aimed at resolving armed conflicts between states (out of 500 provisions of the Geneva Conventions with additional protocols to them, only 20 are aimed at non-international armed conflicts).

The sovereignty of states also stood in the way of applying the current legal provisions to solving internal problems, which, in their opinion, are the prerogative of the state and do not require internal intervention. Moreover, the extension of international humanitarian law provisions to internal armed conflicts would lead to the recognition of rebels, militants, and other members of armed groups as subjects of international law, which is unacceptable for states. At the same time, international humanitarian law imposes obligations on separatists/rebels, which is confirmed by the decision of the International Court of Justice of June 27, 1986 on the dispute between Nicaragua and the United States: "Article 3 of the Additional Protocol No. 2 to the Geneva Conventions of 1949 imposes obligations on Contras".

At present, almost all states perceive the need for a legal settlement of armed conflicts of a non-international nature, which pose no less a threat to people's lives and rights than interstate conflicts. The devastating consequences of the civil war in Russia in the 1920s and in Spain in the 1930s were more significant in scale than some international wars. Current situations in Iraq, Syria, Israel, Ukraine, and other countries clearly indicate the need to apply international rules on the settlement of relations and human rights in internal armed conflicts. In this regard, paragraph 7 of Article 2 of the UN Charter states that the principle of non-interference does not apply to the use of coercive measures against states that violate human and civil rights based on Chapter VII of the UN Charter "actions against threats to peace, violations of peace, and acts of aggression".

Consequently, international law in the field of human rights protection deliberately interferes in the internal affairs of states to achieve the main goal of ensuring the protection and respect of human dignity. International legal protection of human rights in situations of non-international armed conflicts is based on the general principles of modern international law, as well as on the fundamental principles of the law of armed conflicts (humanity; non-discrimination of war victims; international legal responsibility of states and criminal liability of individuals). An essential milestone on this path was the inclusion of a special Article 3 common to all conventions in the Geneva Conventions, which directly covers armed conflicts that are not international in nature and arise on the territory of one of the High Contracting Parties. This made it possible to extend the protection standards of the Geneva Conventions to categories of combatants that were not previously covered by it [15].

As for the situation in Ukraine, its qualification as part of the classification of an armed conflict of an international or non-international nature remains a debatable issue. Regardless, in 2015, international organisations adopted a range of decisions regarding the need to solve a considerable number of problems of ensuring human rights in the context of armed conflict and occupation. This issue became the subject of resolutions of the UN Security Council, the OSCE Parliamentary Assembly, PACE, which considered the issues of refugees and internally displaced persons, illegally detained citizens of

1. Geneva Convention (I) for the Amelioration of the Condition of the. Wounded and Sick in Armed Forces in the Field. (1949, August). Retrieved from https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf.

2. Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. (1949, August). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.31_GC-II-EN.pdf.

3. Geneva Convention (III) relative to the Treatment of Prisoners of War. (1949, August). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf.

4. Geneva Convention (IV) relative to the Protection of Civilian Persons in Times of War. (1949, August). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf.

Ukraine, compliance with the Minsk agreements [16; 17][1]. From the very beginning of the armed conflict in Ukraine, the OSCE took an active part in monitoring and control over the observance of citizens' rights in conflict territories [18; 19]. The armed conflict in Ukraine has led to the need to introduce substantial changes to the current legislation and adopt new regulations. There was also an increase in accession to international provisions and ratification of international documents. Thus, Ukraine has assumed obligations to classify enforced disappearances as crimes in national law, in particular as crimes against humanity[2]. In addition, at the legislative level, the date of the beginning of the temporary occupation of part of the territory of Ukraine is determined – February 20, 2014[3]. This was also largely due to expert opinions that the annexation of Crimea and the fighting in the Donbas Region led to a considerable deterioration in people's rights in Ukraine [13]. The impact of the armed conflict on this process has been noted since 2014 [20; 21].

The legal basis for the status of foreign combatants taking part in the armed conflict in Ukraine on both sides is also defined, which takes into account the provisions of international humanitarian law on these issues[4]. One of the main regulations on the settlement of issues under study was the law on ensuring the rights and freedoms of citizens in the temporarily occupied territory of Ukraine adopted in 2015 [22; 23]. In addition, the current situation has forced Ukraine to make certain changes to the previously adopted provisions of international law, in particular the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms[5]. Certain rights of citizens, both directly on the territory of the conflict and in other regions of Ukraine, in particular the right of free movement, choice of place of stay and residence, have undergone changes in legal regulation[6]. However, in practice, despite a significant breakthrough in legal regulation, the situation with the protection of citizens' rights has not been sufficiently improved. This is also evidenced by the reports of the Office of the United Nations High Commissioner for Human Rights on various issues related to human rights violations during the armed conflict in Ukraine [24-27].

At the same time, according to the survey results, 25.8% of Ukrainians believe that in 2020, the provision of human rights and fundamental freedoms in Ukraine has significantly worsened. 5% believe that the situation has improved, 25.8% – that the situation has worsened, 18% – that with some rights the situation has improved, and worsened with others, 35.7% believe that almost nothing has changed, 15.6% found it difficult to answer [28; 29]. On a 5-point scale, respondents rated respect for cultural rights at 3.2 points, political rights – 3.12 points, civil rights and freedoms – 2.91 points, environmental rights – 2.46 points, social and economic rights – 2.46 points. The study was conducted on October 6-19, 2020 by the ZMINA Human Rights Centre and the Ilko Kucheriv Democratic Initiatives Foundation with the support of the Human Rights for Ukraine Project, which is implemented in Ukraine by UNDP and funded by the Danish Ministry of Foreign Affairs. The survey was conducted in all regions of Ukraine, except for territories not controlled by the Government of Ukraine.

Recent events caused by the pandemic have increased the difficulties for the people in the war zone. "The closure of entry and exit checkpoints has divided families, deprived people of the opportunity to receive social benefits and restricted access to medical care and education", said Matilda Bogner, head of the UN Human Rights monitoring mission in Ukraine[7]. The first decision of the ECHR in the case "Ukraine v. Russia" on January 14, 2021[8], which recognised the fact of human rights violations in the occupied Crimea, should be recognised as a positive aspect of the international level [30; 31].

CONCLUSIONS

World development demonstrates that mass violations of human rights and freedoms, including the most important right – the right to life, constitute the result of armed conflicts, which are largely not international. They are

1. Resolution 2028 "The humanitarian situation of Ukrainian refugees and displaced persons". (2015, January). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21480.
2. Law of Ukraine No. 525-VIII "On Ukraine's Accession to the International Convention for the Protection of All Persons from Enforced Disappearance". (2015, June). Retrieved from https://zakon.rada.gov.ua/laws/show/525-19#Text.
3. Law of Ukraine No. 685-VIII "On Amendments to Certain Laws of Ukraine Concerning Determination of the Date of Commencement of Temporary Occupation". (2015, September). Retrieved from https://zakon.rada.gov.ua/laws/show/685-19#Text; Law of Ukraine No. 1207-VII "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine". (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1207-18#Text.
4. Law of Ukraine No. 716-VIII "On Amendments to Certain Legislative Acts of Ukraine Concerning Military Service in the Armed Forces of Ukraine by Foreigners and Stateless Persons". (2015, October). Retrieved from https://zakon.rada.gov.ua/laws/show/716-19#Text.
5. Resolution of the Verkhovna Rada of Ukraine No. 462-VIII "On the Statement of the Verkhovna Rada of Ukraine "On Ukraine's Derogation from Certain Obligations Defined by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms". (2015, May). Retrieved from https://zakon.rada.gov.ua/laws/show/462-19#Text.
6. Resolution of the Cabinet of Ministers of Ukraine No. 367 "On approval of the Procedure for entry into and exit from the temporarily occupied territory of Ukraine". (2015, June). Retrieved from https://zakon.rada.gov.ua/laws/show/367-2015-%D0%BF#Text.
7. Law of Ukraine No. 685-VIII "On Amendments to Certain Laws of Ukraine Concerning Determination of the Date of Commencement of Temporary Occupation". (2015, September). Retrieved from https://zakon.rada.gov.ua/laws/show/685-19#Text.
8. Law of Ukraine No. 1207-VII "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine". (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1207-18#Text.

mainly violated by the actions on the territory of the state of certain forces seeking a political coup, seizure of power or secession and the establishment of their own state, pursuing separatist goals, creating illegal armed formations, and conducting open hostilities against the state authorities. In response, the state is bound to use force and introduce changes to the legal regulation of the situation in national legislation in order to preserve law and order, protect the rights and freedoms of citizens.

Consequently, the purpose of international humanitarian law is to protect the lives and rights of people in extreme situations of war and armed conflict, primarily from brute force. The provisions of international law constitute the result of a compromise of various interests, primarily the interests of achieving military goals and humanitarian considerations, which is resolved through the application of humanitarian law provisions that restrict the use of force during armed conflicts of an international and non-international nature. Fundamental changes in the nature of modern wars and armed conflicts introduce substantial changes to national legislation and modern international humanitarian law and international human rights law, including in Ukraine.

REFERENCES

[1] Roque, S. (2019). The relevance of human rights council special sessions: The protection of the civilian population in current internal armed conflicts. *Janus.Net*, 10(1), 29-43.

[2] Henao, D.A. (2020). The implementation of the peace agreement and the transformation of the armed conflict in Colombia. *Revista Cientifica General Jose Maria Cordova*, 18(31), 565-584.

[3] Frisso, G.M. (2019). The duty to investigate violations of the right to life in armed conflicts in the jurisprudence of the Inter-American Court of Human Rights. *Israel Law Review*, 51(2), 169-191.

[4] Swed, O. (2018). Promoting human rights under fire: INGOs' mitigating effect on human rights violations during armed conflict. *Social Science Research*, 75, 1-12.

[5] Radanovych, N. (2015). General permitting type of legal regulation as legal means of realizing the concept of civil society. *Wrocławsko-Lwowskie Zeszyty Prawnicze*, 6, 35-53.

[6] Aksamitowska, K. (2020). Traditional approaches to the Law of armed conflict. *Journal of International Humanitarian Legal Studies*, 11(1), 5-35.

[7] Krakow, C.A. (2020). The international law and politics of water access: Experiences of displacement, statelessness, and armed conflict. *Water (Switzerland),* 12(2), Article number 3409.

[8] Weir, D., McQuillan, D., & Francis, R.A. (2019). Civilian science: The potential of participatory environmental monitoring in areas affected by armed conflicts. *Environmental Monitoring and Assessment,* 191(10), Article number 618.

[9] Pylypyshyn, P.B. (2021). The principle of human self-worth as a novelty of modern philosophy. In *Actual problems of reforming the system of legislation of Ukraine: Proceedings of the international scientific-practical conference.* Zaporizhzhia: Zaporizhzhia City Public Organization "Istyna".

[10] Advisory opinion on the Legality of the Threat or Use of Nuclear Weapons. (1996). Retrieved from https://www.un.org/law/icjsum/9623.htm.

[11] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. (2004). Retrieved from https://www.icj-cij.org/en/case/131.

[12] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). (1999). Retrieved from https://www.icj-cij.org/en/case/116.

[13] Sonowal, B., & Dube, D. (2019). Reparative approach towards victims of armed conflict: Global experiences and lessons for India. BRICS Law Journal, 6(1), 127-158.

[14] Wallace, S., & Mallory, C. (2018). Applying the European convention on human rights to the conflict in Ukraine. *Russian Law Journal*, 6(3), 8-78.

[15] Bokhonkova, Yu.O., Burovina, O.V., & Serbin, I.V. (2020). Development of non-conflict interaction of accentuated adolescents with the environment. *Scientific Bulletin of Mukachevo State University. Series "Pedagogy and Psychology"*, 1(11), 255-258.

[16] Unanimously Adopting Resolution 2202. (2015). Retrieved from https://www.un.org/press/en/2015/sc11785.doc.htm.

[17] WMA declaration of Helsinki – Ethical principles for medical research involving human subjects. (1964). Retrieved from https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/.

[18] Thematic report "Protection of civilians and freedom of movement in Donetsk and Luhansk oblasts". (2015). Retrieved from http://www.osce.org/uk/ukraine-smm/157021?download=true.

[19] Thematic report "Freedom of movement across the administrative border with Crimea". (2015). Retrieved from http://www.osce.org/uk/ukraine-smm/172121?download=true.

[20] Kadir, A., Shenoda, S., Goldhagen, J., & Pitterman, S. (2018). The effects of armed conflict on children. *Pediatrics*, 142(6), Article number e20182586.

[21] Stejskal, P. (2019). The interplay of fields of international law in case of foreign investments affected by armed conflict. *Czech Yearbook of Public and Private International Law*, 10, 396-409.

[22] Moen-Larsen, N. (2020). "Suitcase–shelling–Russia": Narratives about refugees from Ukraine in Russian media. *East European Politics*, 36(1), 124-142.
[23] Kostruba, A.V. (2017). Methodological basis of legal personality of the state (civil aspects). *Journal of Legal, Ethical and Regulatory Issues*, 20(Special issue 1), 15-44.
[24] Report on the human rights situation in Ukraine November 16, 2019 – February 15, 2020. (2020). Retrieved from https://www.ohchr.org/Documents/Countries/UA/29thReportUkraine_UA.pdf.
[25] Violations of human rights and international humanitarian law in the context of the events near Ilovaisk in August 2014. (2018). Retrieved from https://www.ohchr.org/Documents/Countries/UA/ReportOnIlovaisk_UA.pdf.
[26] Human rights in the context of the administration of justice in criminal cases related to the conflicts in Ukraine April 2014 – April 2020. (2020). Retrieved from https://ukraine.un.org/uk/88803-prava-lyudini-v-konteksti-vidpravlennya-pravosuddya-u-kriminalnikh-spravakh-povyazanikh-z.
[27] Thematic report "The situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)". (2017). Retrieved from https://www.ohchr.org/documents/countries/ua/crimea2014_2017_ukrainian.pdf.
[28] Wittke, C. (2020). The politics of international law in the post-soviet space: Do Georgia, Ukraine, and Russia "speak" international law in international politics differently? *Europe – Asia Studies*, 72(2), 180-208.
[29] Kostruba, A.V., & Vasylyeva, V.A. (2020). International regulation of termination of rights in the field of civil and intersubjective state relations. *Astra Salvensis*, 1, 131-153.
[30] ECHR Grand Chamber Declares Admissible the Case of Ukraine v. Russia re Crimea. (2021). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-207622%22]}.
[31] Shytikova, L.V. (2019). Theoretical aspects of effective human resources management in modern economic conditions. *Scientific Bulletin of Mukachevo State University. Series "Economy",* 2(12), 86-90.

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ДОТРИМАННЯ ГЕНДЕРНОЇ РІВНОСТІ ЯК СКЛАДОВА ЦИВІЛЬНОГО ДЕМОКРАТИЧНОГО КОНТРОЛЮ НАД ВІЙСЬКОВОЮ ОРГАНІЗАЦІЄЮ ДЕРЖАВИ

Анотація. *Аналіз численних наукових публікацій свідчить неабияку актуальність ґендерних досліджень на сучасному етапі українського суспільного розвитку, практично у всіх сферах соціальних відносин. Що ж стосується забезпечення паритетної участь чоловіків і жінок у функціонуванні воєнної організації держави – то реалізація такого ґендерного балансу сприяє поліпшенню цивільного контролю над нею завдяки можливості розвитку потенціалу контролюючих органів в ґендерних питаннях, сприянню щодо налагодження діалогу між спільнотою та органами контролю, залученню уваги громадськості до проблем підзвітності інститутів даної організації. Основною метою даної роботи є висвітлення стану дотримання ґендерної рівності у військовій організації держави через призму здійснення цивільного демократичного контролю. Визначено стан законодавчого урегулювання поняття військової організації держави та цивільного демократичного контролю. Проаналізовано запровадження ґендерної перспективи в Україні в досліджуваній проблематиці та динаміку встановлення ґендерного балансу у військовій організації держави; вплив на наявні тенденції законодавчих ініціатив. Констатовано, що сучасна українська армія більшою мірою є «чоловічою», жінки хоч і допускаються до військової служби, однак участі у прийняття суспільно важливих рішень не беруть, високих військових посад не займають, кар'єрне зростання для них утруднене. Зазначено основні проблеми реалізації ґендерної рівності в Збройних силах України та інших структурах Сил оборони України, які більшою мірою ґрунтуються на суспільних стереотипах заздалегідь визначених ролей для чоловіків і жінок. Охарактеризовано цивільний контроль над збройними силами як соціально-політичний процес в даній сфері*

Ключові слова: *ґендер, цивільний демократичний контроль, воєнна організація, ґендерний баланс, Збройні сили, військовослужбовці*

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RESPECT FOR GENDER EQUALITY AS A COMPONENT OF CIVILIAN DEMOCRATIC CONTROL OVER THE MILITARY ORGANISATION OF THE STATE

Abstract. *The analysis of numerous scientific publications demonstrates the great relevance of gender studies at the current stage of Ukrainian social development, in almost all spheres of social relations. As for ensuring equal participation of men and women in the functioning of the military organisation of the state, the implementation of such a gender balance contributes to improving civilian control over it through the possibility of developing the capacity of regulatory bodies in gender issues, promoting dialogue between the community and control bodies, and drawing public attention to the problems of accountability of institutions of this organisation. The main purpose of this study is to highlight the state of gender equality in the military organisation of the state through the lens of civilian democratic control. The study determined the state of legislative regulation of the concept of military organisation of the state and civil democratic control. The study analysed the introduction of a gender perspective in Ukraine in the subject matter and the dynamics of establishing a gender balance in the military organisation of the state; the impact on existing trends of legislative initiatives. It is stated that the modern Ukrainian army is mostly "male". Despite the fact that women are allowed to serve in the military, they do not take part in making socially important decisions, they do not hold high military positions, and career growth is challenging for them. The study identified the main problems of implementing gender equality in the Armed Forces of Ukraine and other structures of the Defence Forces of Ukraine, which are more based on social stereotypes of pre-defined roles for men and women. Civil control over the Armed Forces is described as a socio-political process in this area*

Keywords: *gender, civil democratic control, military organisation, gender balance, Armed Forces, military personnel*

INTRODUCTION

Over the past decades, international and regional organisations and states have adopted numerous regulations and commitments to ensure gender equality and the inclusive and meaningful participation of women in all areas of society. This process began with the adoption of the United Nations Convention on the elimination of all forms of discrimination against women in 1979[1]. Studies of international organisations indicate that there is a correlation between gender inequality and society's propensity for civil or interstate conflicts [1]. The report on gender equality in the SPECA countries (UN Special Programme for the Economies of Central Asia) notes that women still make up only 4.2 percent of military personnel in United Nations peacekeeping missions; new data released in May 2019 show record levels of political violence against women; only 41 percent of Member States have adopted National Action Plans on women and peace and security, and only 22 percent of all plans at the time of adoption included a budget for their implementation [2].

The National Action Plans for the implementation of the SCR (Security Council Resolution) of the UN No. 1325[2], drawing on the activities of women groups and on the experience of conflict, have provided a key basis for bringing together and increasing transparency of various aspects

1. United Nations Convention About the liquidation of all forms of discrimination against women. (1979, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_207#Text.
2. Security Council, Resolution 1325. (2000, October). Retrieved from https://www.osce.org/files/f/documents/d/d/75309.pdf.

concerning the role of women in ensuring peace and security: from the right to vote and represent in political and supervisory bodies to increasing the number of women in the security forces, army, and police. The security sector, which is based on human security, takes into account the needs of men, women, boys and girls, ensures the full and rightful participation of women in meeting the needs of the entire population and contributes to the creation of a peaceful and reliable society [3]. The presence of armed forces with a more pronounced diversity of personnel, as well as with a wider composition of regulatory bodies, leads to a change in society's views on who is the defender and who is the one protected, which makes security issues a matter of concern for the entire society. Similarly, systematic gender mainstreaming can transform the image of the armed forces from an institution primarily associated with violence and warfare to an institution more closely linked to peace consolidation and democratisation. Many studies among scientists around the world investigate the consideration of the functioning of the military organisation of the state [4-6], but they practically do not concern its gender aspects [7-11], or only its individual aspects [12-14]. Analytical materials based on the results of expert opinions of various agencies and organisations [5] or methodological materials [15; 16], electronic publications [17; 18] and conference abstracts [19; 20] are generally in open access.

Despite the growing attention to the military organisation of the state, the adoption of measures to reform the Armed Forces in Ukraine after the events of 2014 and the introduction of the Anti-Terrorist Operation and the Joint Forces Operation, there was almost no increase in the number of publications covering gender aspects in this area in the scientific community. Even the adoption of relevant acts on gender issues, including in the field of ensuring national security of the state, also did not lead to an increase in scientific interest in this issue, and in particular in the military organisation of the state. Notably, the Ministry of Defence of Ukraine and the General Staff of the Armed Forces of Ukraine can be considered the only agencies that have taken an active position on this issue and started performing the main goals of partnership with NATO in gender aspects of military service and the provisions of UN Security Council Resolution 1325 "Women, Peace, Security"[1]. In addition, Ukraine is the only state that adopted UN Security Council Resolution 1325 under conditions of war. Thus, the implementation and provision of gender parity as a component of civilian democratic control over the military organisation of the state requires special attention on the part of scientists and military practitioners.

1. MATERIALS AND METHODS

The methodological framework of the study comprises a set of philosophical, general scientific, and special legal methods of scientific cognition. The applied methodology made it possible to identify the main problems of establishing and implementing gender equality in the military organisation of the state; to develop the main directions for solving gender problems. The methods used allowed the authors to obtain reliable and reasonable conclusions and results. As one of the main methods of analysis, comparative analysis was used, which allowed comparing the Ukrainian practice of realising the gender issue in the military organisation of the state with the legal framework for regulating the object of research in other countries and at the international level, as well as in national practice in the dynamics of recent years.

At the theoretical level of the analysis, the main provisions of the legislative framework for regulating the right of women's access to the structures of the military organisation of the state at the international, foreign, and national levels were studied. The descriptive method made it possible to present the results of the study in a logical sequence. The research also uses methods of synthesis, analogy, system, classification and analytical. The normative method is used to analyse aspects of issues that arise within the framework of legal regulation of women's rights in the context of participation in the military organisation of the state.

The use of the evaluation method allowed the authors of the study to draw conclusions regarding the level of gender equality consideration and implementation of recommendations of international organisations in the national legislative system to ensure gender balance. The study also investigated the main provisions of the legislative framework for regulating the right of women to take part in the military organisation of the state and their status in it.

The synthesis method made it possible to solve research problems of analysing the primary sources of the subject matter. And the application of the analytical method to these primary sources made it possible to identify the most effective provisions that can be implemented in the national legal system. Methods of induction and deduction are used to analyse the content and structure of the legislative texts, features of legal provisions in the context of the subject matter. The historical method was used to analyse the process of establishing gender equality and developing civil democratic control in rule-making and legal doctrine at different stages of state development.

The genetic method made it possible to identify the stages in the evolution of women's right of access to take part in the military organisation of the state, establish their sequence over time and trace how and under the influence of what factors the provisions governing them changed, as well as civil democratic control developed. Due to the structural and functional analysis, it was possible to consider the features of the structure of the military organisation of the state and control over the compliance of these structural elements with gender perspectives, their interaction with each other and with other institutions whose activities in affect these issues in a certain way.

1. Order of the Cabinet of Ministers of Ukraine No. 113-r. "On approval of the National Action Plan for the implementation of UN Security Council Resolution 1325 "Women, Peace, Security" for the period up to 2020". (2016, February). Retrieved from https://www.kmu.gov.ua/npas/248861725.

2. RESULTS AND DISCUSSION

The military organisation of Ukraine as a state comprises: the Armed Forces of Ukraine and other components of the State Defence Forces and law enforcement agencies (the Security Service of Ukraine, the National Guard of Ukraine, the State Special Transport Service, the State Special Service of Communications and Information Protection, the State Security Department of Ukraine) and other military formations established in accordance with the law. The Armed Forces are a specific organisation of government bodies, military formations, institutions, and organisations that for a part of it. The latter, as a state military organisation, are structurally part of the military organisation of the state and act as a basic component of the military organisation of the state. Ukraine has adopted fundamental laws "On Defence of Ukraine"[1], "On National Security of Ukraine"[2], which allow governing legal relations on general issues of organisation and development of the Armed Forces, other troops, military formations and bodies, issues of military duty and military service, social protection of military personnel. At the same time, the regulatory framework of the military organisation of the state is not a single integral system that would allow regulating the issues of ensuring the military security of the state in accordance with the legislative procedure.

The Law of Ukraine "On National Security" does not say a word about the military organisation of the state. The laws "On Military Construction", "On the Military Organisation of the State", "On Territorial Defence"[3] and others have not yet been adopted. Legislative acts in this area are more outdated[4,5], have numerous amendments and revisions, which necessitates the adoption of new statutory documents. Thus, the Law of Ukraine "On Democratic Civilian Control over the Military Organisation and Law Enforcement Bodies of the State" (repealed) defines a military organisation of the state as a set of public authorities, military formations, covered by a single leadership and established in accordance with the Constitution and laws under the democratic control of society and, in accordance with the Constitution and laws of Ukraine, directly aimed at protecting the interests of the state from external and internal threats; the law also defines the democratic civilian control over the military organisation and law enforcement agencies as a set of legal, organisational, informational measures to ensure strict observance of the rule of law and openness in the activities of all components of the military organisation and law enforcement agencies of the state, promotion of their effective activities and performance of their functions, strengthening state and military discipline[6].

The Law of Ukraine "On the Fundamentals of National Security of Ukraine"[7] (repealed) also contained the definition of the military organisation of the state as a set of state authorities, military formations established in accordance with the laws of Ukraine, whose activities are under democratic civilian control by society and are directly aimed at protecting the national interests of Ukraine from external and internal threats. These laws lost their force with the adoption of the Law of Ukraine "On National Security of Ukraine", where there is no definition of the military organisation of the state, but the concept of democratic civil control is covered as a set of legal, organisational, informational, personnel, and other measures carried out in accordance with the Constitution and laws of Ukraine to ensure the rule of law, legality, accountability, transparency of security, and defence sector bodies and other bodies whose activities are related to the restriction in certain cases of human rights and freedoms, promoting their effective activities and performing the functions assigned to them, strengthening the national security of Ukraine. Unfortunately, these regulations do not in any way regulate the gender aspects of women's participation in the military organisation of the state.

The integration of gender equality in the security, defence, and military protection sectors of the state is important for any country for the following reasons:

– ensuring respect for universal principles of human rights;

– improving the effectiveness of management decisions made with the participation of men and women;

– the use of gender equality ensures a balance both in operational management and in the future.

The beginning of the implementation of the gender perspective in Ukraine was realised through the Law of Ukraine "On Ensuring Equal Rights and Opportunities for Women and Men"[8] and the Presidential Decree "On Improving the Work of Central and Local Executive

1. Law of Ukraine No. 1932-XII "On defense of Ukraine". (1991, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1932-12#Text.
2. Law of Ukraine No. 2469-VIII "On the national security of Ukraine". (2018, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2469-19#Text.
3. Draft Law No. 4504. "On territorial defense". (2020, December). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70682.
4. Law of Ukraine No. 1934-XII. "On the Armed Forces of Ukraine". (1991, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1934-12#Text.
5. Resolution of the Verkhovna Rada of Ukraine No. 1659-XII "On the concept of defense and construction of the Armed Forces of Ukraine". (1991, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1659-12#Text.
6. Law of Ukraine No. 975-IV (repealed) "On democratic civilian control over the military organization and law enforcement agencies of the state". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/975-15#Text.
7. Law No. 964-IV "On the foundations of national security of Ukraine". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/964-15#Text.
8. Law of Ukraine No. 2866-IV "On ensuring equal rights and opportunities for women and men". (2005, May). Retrieved from https://zakon.rada.gov.ua/laws/show/2866-15#Text.

Authorities to Ensure Equal Rights and Opportunities for Women and Men"[1]. However, it follows from Article 6 of the above law that compulsory military service for men cannot be considered discrimination on the grounds of sex, and the law allows women to hold mostly "peaceful positions" in military service[2]. The changes introduced in 2016[3] allowed women to hold positions not only as signalmen, accountants or cooks, as previously assumed by the current procedure, but also as grenade throwers, snipers, and other more than 100 combat specialties. The appointment should be preceded by appropriate training in educational institutions of the Armed Forces of Ukraine, taking into account the level of physical fitness and the ability to moral and psychological stress in combat conditions. Since 2018, legislative changes[4] have made it possible to accept women for contract service and in the ranks of the Armed Forces of Ukraine, which practically equalised men and women in their rights[5] with the exception of issues of ensuring maternal and child protection. Similarly, women on an equal footing with men received the right to be called to active duty, to enroll voluntarily (under contract), to enroll in the military reserve, to be in reserve, to be on the military register.

This regulation also removed the previous restrictions on the age of service for women aged 18-40 – both on call and under contract. For officers, restrictions on the ability to perform military service under a contract have also been lifted. Previously, women had this right only until the age of 40, at present – until the age limit for military service of officers. Restrictions on the service of women in the military reserve were lifted and pregnant women were exempted from passing training camps, and those with children under 14 years of age – from carrying out a duty without their consent. Clearly, the legal status of female military personnel has currently improved; their number has increased, including in the highest military positions. The law establishes the principle of equal military service for women and men, equal access to positions and military ranks [21]. To ensure gender equality, women and men, respectively, are given equal responsibilities under military service duties. These legislative changes have had a positive impact on the gender structure of the security and defence sector. The dynamics of the number of women in military service in Ukraine is presented in Figure 1.

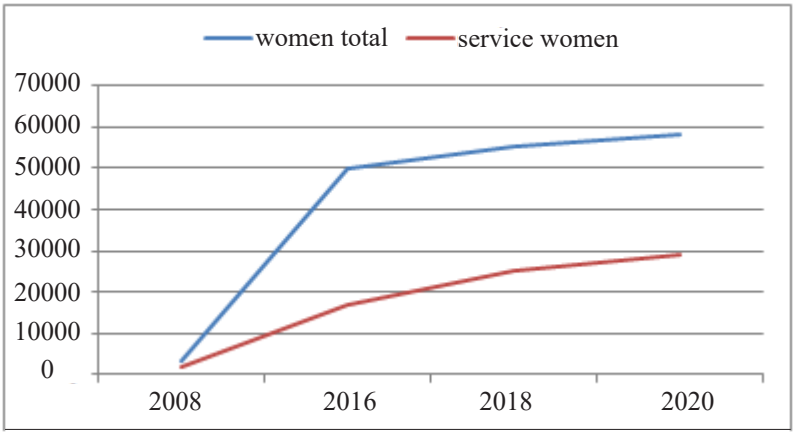

***Figure 1**. Dynamics of the number of women in the Armed Forces of Ukraine*
***Source**: compiled by the author based on data from [22]*

As of mid-2016, the number of women who worked and served in the Armed Forces of Ukraine was 49.552, including 17.147 female military personnel (8.5%), of which 2.092 were officers and 14,607 were female sergeants and soldiers [23; 24]. In 2014, when the war in the Donbas began, almost 140 thousand people served in the Ukrainian troops, and during the four years of the war, the number of military personnel increased by more than 100 thousand people. In 2020, more than 250 thousand military personnel serve in the Armed Forces of Ukraine. As of 2016, more than 1.500 female servicemen received the status of a combatant, more than 600 of them were awarded distinctions of the Ministry of Defence of Ukraine, and more than 30 were awarded state awards [25]. In 2018, 25.000 women served in

1. Presidential Decree No. 1135/2005 "On improving the work of central and local executive bodies to ensure equal rights and opportunities for women and men". (2005, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1135/2005#Text.
2. Order of the Ministry of Defense of Ukraine No. 337 "On Provisional list of regular positions of privates, sergeants and sergeants". (2014, May). Retrieved from https://zakon.rada.gov.ua/laws/show/z0600-14#Text.
3. Order of the Ministry of Defense of Ukraine No. 292 "On approval of changes to the temporary lists of military accounting specialties and staff positions of privates, sergeants and non-commissioned officers and female servicemen and tariff lists of positions of the above-mentioned servicemen". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/z0880-16#Text.
4. Order of the Ministry of Defense of Ukraine No. 627 "On approval of lists of military accounting specialties and staff positions of privates, sergeants and sergeants and tariff lists of positions of the above-mentioned servicemen". (2018, December). Retrieved from https://zakon.rada.gov.ua/laws/show/z1507-18#Text.
5. Law of Ukraine No. 2523-VIII "On amendments to certain laws of Ukraine concerning ensuring equal rights and opportunities for women and men in military service in the armed forces and other military formations". (2018, September). Retrieved from https://zakon.rada.gov.ua/laws/show/2523-19#Text.

the Armed Forces of Ukraine (in 2017 – more than 23.000), of which more than 3.000 were officers, and a total of 55.000 women served and worked in the forces. Since 2008, when there were only 1.800 of them, their number has increased 15-fold. In 2014-2018, 170 thousand servicewomen signed a contract with the Armed Forces of Ukraine. In 2019, there were 27 thousand of servicewomen [26; 27].

In 2020, 58 thousand women work and serve in the Armed Forces of Ukraine, that is, 23% of the total number of military personnel, of which 29 thousand were in military service. Among female military personnel, almost 4 thousand were officers, 7 thousand were sergeants and 17 thousand were soldiers. In 2020, more than a thousand cadets study in military educational institutions. More than 12 thousand women received the status of a combatant [28]. As of 2020, 9,916 women received the status of participants in military operations, 166 were awarded state awards of Ukraine. Thus, modern women, who through the lens of long-established stereotypes about femininity began to acquire masculine traits, increasing their representation in the Armed Forces of Ukraine, carrying out military service on a par with men, moreover – taking an active part in military and special legal measures of Ukrainian law enforcement agencies, aimed at counteracting the activities of illegal Russian and pro-Russian armed groups in the war in eastern Ukraine [29; 30].

Comparing the number of women in the army with the same in other countries, Ukraine lags far behind in this indicator. For example, there are more than 200 thousand women in the US Armed Forces. A comparative analysis of the career movement of women in the army also indicates a considerable lag in Ukraine. Thus, in Ukraine, women have only the rank of senior officers (colonels, more often in military medicine), as for the rank of general, it is not awarded to any woman. Meanwhile, in the armies of Great Britain, the United States, Italy, and France, there are many female generals. Thus, General D. Holland heads the West Point Military Academy, where women received the right to study 50 years ago. In countries such as Germany, Spain, and Norway, women even serve as Defence Ministers. The introduction of 19 gender advisers in the Ministry of Defence of Ukraine since September 2018 should also be noted as a positive aspect. In the future, it is planned to introduce such advisers in all military units of the Armed Forces of Ukraine and structural divisions of the Defence Ministry. The main problems of implementing gender equality in the Armed Forces of Ukraine are as follows (Figure 2).

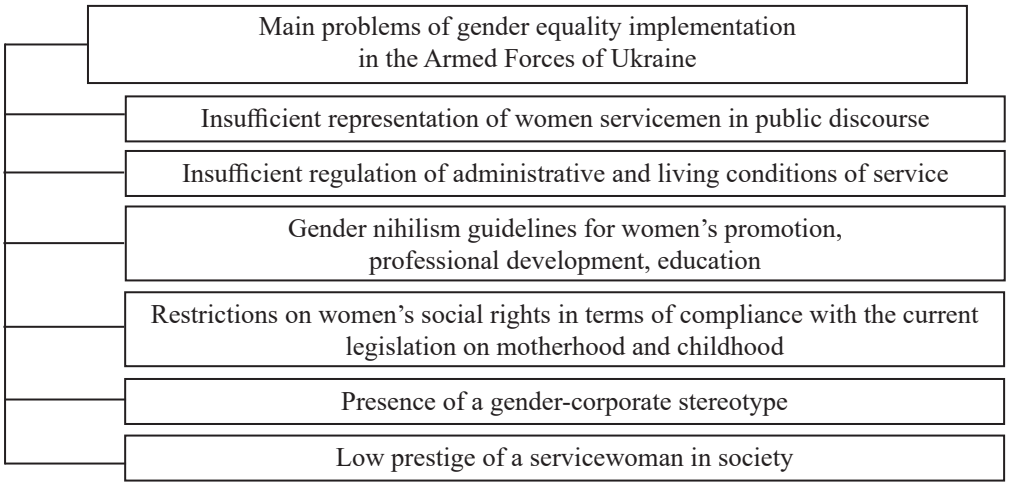

***Figure 2**. Main problems of gender equality implementation in the Armed Forces of Ukraine*
***Source**: identified by the author*

In terms of this study, the results of a survey among servicewomen are of interest:

– 37% of young women with a fairly high level of education are dissatisfied with the low-content nature of military activities, which does not allow for personal self-fulfilment [31];

– 33% of mothers of military personnel report difficulties associated with the need to care for children, especially preschool age [14];

– the prestige of a female serviceman in society: about 32% of female servicemen are rated at an average level, 15% – below average, about 17% – completely absent, 15% – difficult to determine [14].

– the attitude of female military personnel towards their military career: 46% – have no prospects to make a military career, 23% – rather have no prospects, 12% – rather have prospects, 8% – certainly have such prospects [14].

In addition, according to female military personnel, the infrastructure of the Armed Forces of Ukraine is equipped to meet the needs of men and excludes women with their specific needs from the Army [32; 33]. Despite the fact that these surveys were conducted even before the introduction of legislative changes to improve gender perspectives and the intensive development of the state's military organisation after the events in the east of the country, these issues remain unresolved and are still relevant to date. Civilian control over the Armed Forces as a socio-political process is a kind of interaction between the state and society regarding the role of the military organisation of the state and its security forces [34]. The necessity and high importance of civil control is conditioned by the fact that law enforcement agencies can get a high degree of independence and weight of influence on the national policy, provided that there is no effective leadership and control.

One of the first systems of civilian control over

the army can be considered the model laid down in the US Constitution of 1789[1]. According to its provisions, the Congress is responsible for the formation and support of the army, its financing, in order to avoid the danger of concentration of power with the forceful support of the President. In addition, it is Congress, not the executive branch, that has the right to declare war to avoid making hasty decisions that can no longer be changed. At the same time, according to the Constitution, the president holds the rank of Commander-in-chief of the Army, the US Navy and the US police, which gives him quite extensive powers to repel attacks by foreign states and protect the nation.

However, the US Constitution does not contain provisions on civil control. This is primarily conditioned by the fact that the system of civil control during the development of American statehood, in fact, was represented by one key principle – the principle of a citizen-soldier. This principle meant that every citizen was responsible for protecting the nation and freedoms, and therefore, if necessary, such citizen would go to war, which acted in conjunction with the ideology that the Armed Forces should embody democratic principles and encourage citizen participation. M. Weber also noted that the state monopoly on the legitimate possession of force and the use of this force is one of the main attributes of the state. Only the state has the right to create and use an army [35; 36]. The history of the development of civilian control over the army has developed a number of fundamental principles for its organisation. Among them, of great importance for understanding the nature of control over the army is the thesis that control over the Armed Forces is the prerogative of the society that created them [37; 38].

One of the main tasks of military reform is to increase civilian control and control by citizens. Standing parliamentary committees on defence and civil society institutions should include men and women who understand the importance of gender mainstreaming so that they can ensure that the different needs of men, women, boys and girls are taken into account in all regulations and programmes adopted in the defence sector. Women's civil society organisations and research institutes involved in the gender dimension of the state's military organisation need to be involved in civil control processes. This will ensure that an integrated approach to the security concept is applied. The integration of gender into the military reform process opens up opportunities for a much wider segment of the population to be capable of taking an active part in security and in the work structures that make decisions in the security sector. This is especially important from the standpoint of ensuring national support for the activities of security sector institutions, since women make up as much as 50% of society [22].

CONCLUSIONS

Democratic governance of the Armed Forces is based on the participation of civil society in political decision-making processes and on monitoring the activities of the Armed Forces. For civil society to perform these roles in the management of the security sector, it is necessary that: firstly, it has the capacity to monitor and make a constructive contribution to political discussions regarding security priorities, and secondly, that the political environment allows civil society to play an active role in the military organisation of the state. A military organisation of the state is proposed to be understood as an organisation where the state, represented by authorities, organisations, officials, and citizens, is organised into a system in such a way that in case of a military threat to security, each of its elements would perform its strictly defined functions.

In Ukraine, the solution of the gender issue in the field of national security and defence has been on pause for a long time. The global mainstreaming of gender studies and the increasing gravity of women's legal status in all spheres of public life have led to a gender breakthrough in women's military service in Ukraine. Today, the representation of women in the military organisation of the state, especially in the field of defence, is growing, which corresponds to global trends in the development of the state. Military service gains its prestige and becomes interesting for women, where due to legislative changes, the specifics of their legal status, as well as the specifics related to motherhood and childhood are taken into account.

REFERENCES

[1] Pathways for peace: Inclusive approaches to preventing violent conflict. (2018). Retrieved from https://openknowledge.worldbank.org/handle/10986/28337.

[2] Beijing + 25 Review: Gender Equality and Women's Empowerment in SPECA Countries. (2020). Retrieved from https://www.unescap.org/sites/default/files/ESCAP_B25_Central_Asia_Report_20200911_RUS.pdf.

[3] Gender Impact Assessment on the Security and Defense Sector of Ukraine. (2017). Retrieved from https://ngu.gov.ua/sites/default/files/gender_assessment_report_ua_final_26_oct_2017_0.pdf.

[4] Tedford, A.G., Pribyslavska, V., Bryant, L.G., & Scudamore, E.M. (2020). A comparative analysis of army body composition standards for women. *International Journal of Exercise Science*, 13(7), 1275-1282.

[5] Singh, S. (2020). Sounding the battle cry: Supreme Court on women in the Army. *Economic and Political Weekly,* 55(10), 12-14.

[6] Stiehm, J.H. (2018). Army opinions about women in the army. In *Women in the Military* (pp. 71-81). Florida: Taylor and Francis.

[7] Bolzenius, S. (2019). Asserting citizenship: Black women in the women's army corps (WAC). *International Journal of Military History and Historiography*, 39(2), 208-231. doi: 10.1163/24683302-03902004.

1. Constitution of the United States. (1789). Retrieved from http://www.hist.msu.ru/ER/Etext/cnstUS.htm.

[8] Kaminska, N.V., Chernyavskyi, S.S., & Perunova, O.S. (2020). *Legislation and international standards of gender equality*. Kyiv: National Academy of Internal Affairs.
[9] Kovalchuk, L.G. (2017). *Women. Peace. Security*. Kyiv: Ministry of Social Policy of Ukraine.
[10] Levchenko, K. (2019). *Gender attraction*. Kharkiv: Folio.
[11] Martseniuk, T., & Bogdan, O. (2017). *Gender for all. A challenge to stereotypes*. Kyiv: Osnovy.
[12] Gritsay, I.O. (2018). Integration of the principle of gender equality in the Armed Forces of Ukraine as a strategy for the development of the defense sector. *Law and Society*, 4, 27-31.
[13] Dubchak, N.I. (2008). Women in the Armed Forces of Ukraine: Problems of gender policy. *Strategic Priorities*, 4, 187-192.
[14] Klymenko, N. (2014). The role and place of women servicemen in Ukraine. *Economics and State*, 5, 116-119.
[15] Krimets, L.V. (2018). *Methodical guide on the formation of the mentality of the personnel of the unit (military unit) of the Armed Forces of Ukraine on the basis of European values*. Kyiv: National Defense University of Ukraine.
[16] Watson, K. (2020). *Gender issues in the defense sector.* Geneva: Geneva Centre for Security Sector Governance.
[17] Chekhovska, M.M. (2020). Development of public discourse on gender policy in the security and defense sector. Retrieved from http://academy.ssu.gov.ua/ua/page/page_1581346610.htm.
[18] Voshchevska, V.A. (2016). Gender stereotypes and the war in Ukraine. Retrieved from https://www.obozrevatel.com/blogs/03189-gendernyie-stereotipyi-i-vojna-v-ukraine.htm.
[19] Kaminska, N.V., & Romanova, N.V. (2018). Implementation of the UN gender equality policy in the security and defense sector of Ukraine. In *International Scientific-Practical Conference "Status and Prospects of Reforming the Security and Defense Sector of Ukraine"*. Kyiv: Taras Shevchenko National University of Kyiv. Retrieved from https://nmapo.edu.ua/n/p/3742-stan-i-perspektyvy-reformuvannia-sektori-bezpeky-ta-oborony-ukrainy.
[20] Michyke, K. (2016). Issues of gender equality and human rights in the context of democratic governance in the security sector. In *Proceedings of the Second International Conference "Governance in the Security Sector: The Role of Democratic Institutions and Best International Practices"* (pp. 40-44). Kyiv: Razumkov Center.
[21] Equality of women and men during military service: The President signed the law. (2018). Retrieved from https://sud.ua/ru/news/ukraine/126896-ravnopravie-zhenschin-i-muzhchin-vo-vremya-voennoy-sluzhby-prezident-podpisal-zakon.
[22] Bolzenius, S.M. (2018). *Glory in their spirit: How four black women took on the army during World War II.* Illinois: University of Illinois Press.
[23] Main Directorate of Personnel of the General Staff of the Armed Forces. (2017). Retrieved from https://www.mil.gov.ua/ministry/struktura-generalnogo-shtabu/golovne-upravlinnya-personalu.html.
[24] Baydiuk, N.V. (2019). Use of innovative interactive technologies of gender education in the process of professional training of future teachers. *Bulletin of Mukachevo State University. Series "Pedagogy and Psychology"*, 1(9), 59-62.
[25] Zyatiev, S.I. (2016). Nurses and snipers. *People's Army,* 8, Article number 7.
[26] The Number of Women in Our Army Has Increased 15-Fold in Ten Years. (2019). Retrieved from https://www.mil.gov.ua/news/2019/09/17/kilkist-zhinok-u-nashomu-vijsku-za-desyat-rokiv-zbilshilas-u-15-raziv/.
[27] Kostruba, A.V. (2018). Law enforcement as a form of realization of right: Phenomenological analysis experience (Civilized aspect). *Revista de Derecho Civil,* 5(1), 177-190.
[28] Today, 29,000 women serve in the Armed Forces of Ukraine. (2020). Retrieved from https://bykvu.com/ru/bukvy/segodnja-v-vooruzhennyh-silah-ukrainy-sluzhat-pochti-30-tys-zhenshhin/.
[29] Bobrova, Yu.Yu., & Bobrov, Yu.O. (2020). Gender and militarization: a modern concept. *Legal Bulletin*, 14, 9-15.
[30] Atabekova, A. (2020). University discourse to foster youth's sustainability in society amidst COVID19: International and Russian Features. *Sustainability (Switzerland)*, 12(18), 2463.
[31] Monay, S. (2018). Women in the Swiss army: A socialization to Male dominance. *Societes Contemporaines*, 112(4), 45-71. doi: 10.3917/soco.112.0045.
[32] Andresova, K. (2019). Women and children in the military camps of the thirty years' war. *Historicka Demografie,* 43(1), 21-46.
[33] Serdali, B.K., Beldibekova, A.T., Zhaxylykbaeva, R.S., Uzbekova, G., & Tursyn, K. (2018). Democratic principles of education in media environment. *Espacios*, 39(30), 1-16.
[34] Jakubowska, H., & Licen, S. (2019). The role of newspapers in the formation of gendered national identity: Polish coverage of women's and men's basketball championship. *International Review for the Sociology of Sport*, 54(3), 302-324. doi: 10.1177/1012690217719566.
[35] Weber, M. (1919). Politics as a vocation. Retrieved from https://avys.omu.edu.tr/storage/app/public/cagatay.cengiz/125313/Weber%20Politics%20as%20a%20Vocation.pdf.
[36] Kostruba, A.V. (2018). The place and role of right depriving legal facts in the legal regulation mechanism of civil property relations. *Utopia y Praxis Latinoamericana*, 23(82), 171-183.
[37] Minhas, J.S., & Arora, N. (2020). Combating gender inequality and shortage in Indian armed forces. *International Journal of Business and Globalisation*, 26(4), 379-389. doi: 10.1504/IJBG.2020.111648.
[38] Atabekova, A. (2019). Technology-facilitated harm to individuals and society: Cases of minor's self-produced sexual content in Russia. *Journal of Critical Reviews*, 6(6), 410-415.

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СВОБОДА ВИРАЖЕННЯ ПОГЛЯДІВ ТА ІСЛАМ: УРОКИ CHARLIE HEBDO

Анотація. *Стаття присвячена дослідженню особливостей ісламського розуміння свободи вираження поглядів і наявності у цьому зв'язку значних відмінностей з європейським розумінням змісту цієї свободи. В ісламі свобода вираження поглядів також визнається, але при цьому має свої суттєві та усталені особливості. Зокрема, в ісламі існує абсолютна заборона на зображення Пророка Мухаммеда, і тим більше на його карикатурне зображення. Так, з точки зору мусульман, зображення Пророка Мухаммеда із собачою головою є особливо цинічним, оскільки в ісламі собака вважається нечистою твариною, контакти з якою небажані. Також в ісламі сформувалося своє усталене сприйняття гумору та прийнятності його застосування. Наприклад, в ісламі не можна жартома вигадувати небилиці або лякати іншу людину; не слід жартувати із особою, старшою за віком, із вчителями, науковцями, керівництвом, з особою, яка не розуміє жартів, із незнайомими між собою чоловіком і жінкою; жарт має бути необразливим, таким, що не принижує гідність людини або її сім'ї; не можна жартувати на заборонені теми, розповідати вульгарні історії, розголошувати інтимні подробиці, використовувати наклеп тощо. Підкреслюється, що зображення європейцями карикатур на Пророка сприймається ними як прояв свободи вираження поглядів, натомість для мусульман такі карикатури порушують низку заборон, що встановлені в ісламі, а тому завдають глибокої образи релігійним і культурним почуттям мусульман. Як наслідок, такі образи можуть спровокувати релігійні конфлікти з людськими жертвами, як це сталося у січні 2015 р. в будівлі редакції французького сатиричного щотижневика Charlie Hebdo. Задля запобігання подібним і більш тяжким трагедіям у майбутньому і зняття напруги у відносинах між мусульманами та європейцями, насамперед, в Європейському регіоні, у статті досліджуються правові підстави та умови для можливих легальних обмежень свободи вираження поглядів, що сформульовані в універсальному міжнародному праві, у Конвенції про захист прав людини і основоположних свобод 1950 р., а також у доречній практиці Європейського суду з прав людини. Акцентується увага на необхідності підвищення обізнаності суддів як національних судів європейських країн, так і суддів Європейського суду з прав людини з особливостями ісламу як релігії та особливостями власне ісламського права. Для досягнення поставлених завдань дослідження автори статті використали низку загально-наукових і спеціальних методів пізнання, зокрема, соціологічний, статистичний, діалектичний, формально-стилістичний, аксіологічний, герменевтичний, системний порівняльно-правовий, формально-юридичний та ін.*

Ключові слова: *скандал з карикатурами, доктрина ісламу, Коран, ісламське право, обмеження свободи вираження поглядів, практика ЄСПЛ*

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FREEDOM OF EXPRESSION AND ISLAM: CHARLIE HEBDO'S LESSONS

Abstract. *This article studies specifics of Islamic understanding of freedom of expression and significant differences between Islamic and European understanding of that concept. Freedom of expression is recognized in Islam; however, it has significant and deeply-rooted peculiarities. In particular, Islam strictly prohibits imaging Prophet Muhammad, let alone making cartoons of him. For instance, from the perspective of Muslims, imaging Prophet Muhammad as a dog is extremely cynical, since a dog in Islam is an unclean animal inadvisable to contact with. Also, there is long-established perception of humour and its admissibility in Islam. For example, under Islamic law one shall not tell lies or scare another person; one shall not joke with an older person, a teacher, a scientist, a manager, a person who does not understand jokes, an unknown man or woman; a joke shall not be offensive or degrading a man or a family; one shall not joke about prohibited issues, tell dirty stories, disclose intimate details, resort to insults or slander. The article points out that Europeans perceive drawing cartoons of the Prophet as freedom of expression. However, in the eyes of Muslims such cartoons constitute violation of a number of prohibitions existing in Islam and therefore deeply insult their religious and cultural feelings. Such insults may cause religious conflicts with many victims, like the one that happened in the January of 2015 in the office of Charlie Hebdo French satirical weekly newspaper. To prevent similar and even more terrible tragedies in the future and release tension between Europeans and Muslims, primarily in Europe, the article explores the legal framework and conditions for restriction of freedom of expression set out in universal international law, the European Convention on Human Rights and relevant case-law of the ECHR. The set of the general and specific scientific methods of research were used by the authors according to the subject and scope of the study: sociological, statistical, dialectical, formal stylistic, axiological, hermeneutic, systemic, comparative legal method etc.*

Keywords: *cartoon scandal, doctrine of Islam, Quran, Islamic law, restriction of freedom of expression, case-law of the ECHR*

INTRODUCTION

On 7 January 2015, the international community was deeply shocked by the tragedy at the office of Charlie Hebdo (Charlie Weekly) French satirical weekly newspaper. That day at about 11:30 am, two brothers, Saïd and Chérif Kouachi, forced their way into the editorial office and killed 12 people and injured 11 others with firearms. Among the killed were two police officers Franck Brinsolaro, 49, and Ahmed Merabet, 42, and 10 editorial staff members, including the top journalists and cartoonists of the weekly: Cabu (Jean Cabut), 76, Elsa Cayat, 54, Charb (Stéphane Charbonnier), 47, Philippe Honoré, 73, Bernard Maris, 68, Mustapha Ourrad, 60, Michel Renaud, 69, Tignous (Bernard Verlhac), 57, Georges Wolinski, 80. 42-year-old Frédéric Boisseau was on his first day at work at Charlie Hebdo office. Following the tragedy, hundreds of thousands of people all over the world took to the streets with the slogan "Je suis Charlie" ("I am Charlie") to show solidarity and support the freedom of expression [1].

Charlie Hebdo newspaper was founded in 1970. Since then, its editorial policy has been based on the premise that humour knows no taboos. The newspaper constantly published offensive cartoons targeting famous politicians, public figures and representatives of various religions. The key motive for the armed attack on the office was the repeated publishing of offensive cartoons of Islam, Muslims and Prophet Muhammad in Charlie Hebdo. Also, it is worth noting that the Charlie Hebdo offices were attacked after Muslim public organizations had brought

numerous lawsuits for public offences and incitement to religious hatred against the newspaper, all of which had resulted in acquittal of the journalists by French courts.

That is why plenty of world media outlets, including the top-ranking ones, published articles under a common title "I am not Charlie". In particular, David Brooks, an Op-Ed columnist for The New York Times, directly accused Charlie Hebdo of "deliberately offensive humour that newspaper specializes in" [2]. Writer Josh Healy stated: "Charlie Hebdo is cruel, vulgar, and what in their eyes would be the harshest criticism possible, just not funny" [3]. Even Pope Francis commented on the tragedy: "You cannot provoke. You cannot insult the faith of others. You cannot make fun of the faith of others" [4].

In this regard K. Giaxoglou studies the emergence and circulation of hashtags #CharlieHebdo and #JeSuisCharlie in their polylingual instantiations [5]. F. Giglietto and Ye. Lee reveal that users of the hashtag #JeNeSuisPasCharlie employed various discursive strategies and tactics to challenge the mainstream framing of the shooting as the universal value of freedom of expression being threatened by religious extremism, while protecting themselves from the risk of being viewed as disrespecting victims or endorsing the violence committed [6]. D. Ghilani et al. draw historical analogies between the Paris attacks and past events [7]. Y. Horsman aims to outline the precise nature of the journal's sense of humour and its implicit critique of religion [8]. G. Julin provides a rough guide for assessing constructive from destructive satire in a world where satire's reach and impact can have catastrophic consequences [9]. F. Peonidis argues that no basic rights of French Muslims were violated, and no violent actions were committed against them as a result of their publication [10]. M.N. Politzer and A.O. Alcaraz examine representations of Islam and Muslims by analyzing The New York Times and The Wall Street Journal headlines two months before and after the Charlie Hebdo attack indicating covert Islamophobia [11]. J. Sumiala et al. study the relationship between media events and the idea of liveness and conclude that incidents are interpreted 'en direct', but within the framework of older mnemonic schemes and mythologization of certain positions (e.g. victims, villains, heroes) in the narrative. This condition, they claim, further accelerates the conflict between the different participants that took part in the event [12]. A. Godioli analyses the cartoon controversies at the European Court of Human Rights and discusses how forensic humour studies can set the basis for a consistent treatment [13].

Authors of this article *express their deepest and sincerest condolences* to the people, who were killed and injured in the tragedy, and aiming to prevent similar incidents in the future, would like to raise the following questions: What were the causes of the tragedy? How could it have been avoided? Could the offensive cartoons (or other similar content) cause more serious consequences? And what legal formalities, conditions or restrictions in modern society may apply to freedom of expression? In our article, we will deal with these complex issues and try to find appropriate solutions.

1. MATERIALS AND METHODS

The set of methodological instruments used by the authors was determined by the subject and scope of the study. Using sociological and statistical methods, we have found that the modern European society is undergoing significant ethnic and religious changes, in part due to the substantial growth of Muslim populations in most European countries. An analysis of these changes enables us to make a scientific prediction regarding the stable trend towards further growth of the Muslim community and its increasing effect on pan-European issues. Using philosophical methods, such as the dialectical approach, we highlight the correlation between quantitative changes in the structure of society and its qualitative features. The European society is becoming ever more multicultural, encompassing the values of different ethnic and religious social groups. An analysis of classical European values and Islamic values in regard to freedom of expression and potential restrictions thereof was done through the axiological method. It enabled us to identify significant differences, revealing their historical origins and the different approaches to legal regulations in this realm. Specifically, in Europe the concept of freedom of expression has taken shape alongside the gradual development of the Western legal tradition, which for centuries implemented Christian values, and later a secular doctrine of human rights. Whereas in Islam the concept of human rights stems from the conviction that only the Almighty is the author of law and the source of all human rights.

The comparative legal method was used to analyse the differences between legal regulations of freedom of speech in European law and Islamic law. The authors utilized macro- and microcomparison, synchronic and diachronic comparison, regulatory and operational comparison. The comparative analysis found that both systems recognize the fundamental freedom of expression and its importance for personal and social progress. However, the system of restrictions on this freedom is markedly different. Thus, in Islam the divine origin of human rights means they cannot be restricted or overturned by the state, society or individual persons. No one has the right to change their number, content or limitations at their discretion. Depicting any living creatures and humans, much less the Prophet Muhammad is strictly prohibited by Islamic law. An analysis of the operating principles of Islamic law, namely the personal nature of the law, found that a Muslim must to obey its norms regardless of the country of residence or temporary stay. Thus, we have revealed fundamental and systemic contradictions between both the values of the two social systems and their legal regulations. Misunderstanding mutual differences is the key reason for numerous religious conflicts in modern Europe.

The formal stylistic method was used to analyse the cartoons of Muslims and the Prophet Muhammad published in some European outlets, including the French satirical weekly Charlie Hebdo, that have led to numerous religious conflicts. Hermeneutic methods were used to interpret this artistic imagery and conclude that the magazine follows a specific editorial policy to create and publish Islam-themed cartoons. The technical legal method and the

systematic method were used to examine the development of the practice of the European Court of Human Rights regarding restrictions on freedom of expression in relation to the norms and principles of Islamic law. We prove that at present the ECHR practice remains inconsistent, and in our opinion one of the reasons for such inconsistency is that the judges of both national European courts and the ECHR lack sufficient understanding of Islam as a religion and the specifics of Islamic law as a separate legal system. The authors recommend ways of improving the relevant current laws, which should protect society from further religion-motivated conflicts.

All the general and specific scientific methods of research were used in conjunction to accomplish different objectives within the specified scientific purpose. The authors have also described a number of unsolved scientific problems that should form the subject of further scholarly research.

2. RESULTS AND DISCUSSION

2.1. Muslim factor in 21st century Europe

First of all, it is worth mentioning that due to external migration, the structures of national and religious communities in Europe have significantly changed over the last decades. The Islamic community shows the fastest growth rate in all European countries.

According to the Pew Research Centre, the number of Muslims in Europe exceeded 25.5 million people (which is 5% of the total population of European countries) back in 2016. These figures exclude about 20 million Muslims residing in Russia. The size of the Islamic community is about 1.2 million people in the Netherlands, 2.8 million people in Italy, 4.1 million people in the UK, 4.9 million people in Germany and 5.7 million people in France. Moreover, the Islamic population grows not only in absolute numbers – the share of Muslims in the total population of European countries also increases. For instance, the Islamic community accounts for 4.8% of the population in Italy, 6.1% in Germany, 6.3% in the UK, 7.1% in the Netherlands and 8.8% in France [14; 15]. According to social predictions, the trend towards increase of the Islamic population and its share in the society will persist in the next decades. According to the Pew Research Centre forecast, the Islamic community in Europe may reach 14% in 2050. In his turn, Philip Jenkins of Pennsylvania State University estimates that by 2100, Muslims will comprise about 25% of Europe's population and their influence on the social relations will become more and more meaningful [16]. At the same time, the last few decades saw an increase in the number and scale of social conflicts between the Islamic and other communities in Europe. For instance, in February 2005, a law prohibiting the wearing of any signs demonstrating religious affiliation of a person in public and educational institutions was adopted in France. Specifically, Muslim women were prohibited from wearing the hijab, i.e. the traditional headscarf covering the head and neck except the face. This led to mass demonstrations by Muslims, who claimed it was a violation of their rights. In September 2005, Danish daily Jylland-Posten published 12 cartoons of the Prophet Muhammad. Some of them showed the prophet with a bomb on his head. Many European newspapers reproduced the cartoons, which resulted in numerous victims, economic and political losses for many European countries. In 2007, Swedish artist Lars Vilks created a series of drawings that depicted the Prophet Muhammad as a dog. This led to protests, two terrorist attacks in Stockholm and repeated attempts upon the life of the author, who now lives under permanent police protection. A referendum resulting in banning the construction of new minarets was held in 2009 in Switzerland.

When the first drawings controversy broke out Charlie Hebdo took a firm stand on protecting of freedom of expression and against its restriction. As regards the interaction between European and Muslim cultures, the newspaper began to pursue a policy of fuelling Islamophobia. On 1 March 2006, for instance, Charlie Hebdo published the so-called "Manifest of the Twelve" ("Manifeste des douze") calling on all the people of Europe to oppose to the Islamic threat. Islamism was placed on a par with Fascism, Nazism, and Stalinism as a major totalitarian global threat for Europe [17].

It is necessary to mention that in 2006, following the publishing of the first cartoons of the Prophet Muhammad, Islamic public organizations Paris Great Mosque and the Union of Islamic Organizations of France accused the editors of Charlie Hebdo of inciting to inter-ethnic hatred and sued them. They claimed that the weekly had insulted Muslims by publicly abusing a group of people because of their religion and therefore violated the Law on the Freedom of Press[1]. Pursuant to French legislation such violation is punishable by imprisonment for up to 6 months and a fine of EUR 22,500. In the first instance, the case was heard by Tribunal de grande instance de Paris (High Court of Paris). Three cartoons of the Prophet Muhammad were subject to examination, in particular the one representing Muhammad wearing a turban with a bomb in it. During the hearings in the aforementioned case, the newspaper was supported by famous national politicians, namely Nicolas Sarkozy, François Bayrou and François Hollande, who publicly defended the weekly. The trial ended on 22 March 2007 with acquittal.

The appeal did not result in a review of the first instance decision. On 12 March 2008, the Court of Appeal of Paris[2] ruled that the cartoons were aimed at a certain group of people and not at the Islamic community in general, did not represent offences or personal and direct insults against a group of people because of their religion and did not exceed the admissible limit of freedom of expression. The Court of Appeal observed that French society is secular and pluralistic, which requires respect for all the opinions as well as the freedom to criticise of religions.

1. Law on the Freedom of the Press. (1881, July). Retrieved from https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=vig.

2. Paris Court of Appeal, 11th Chamber, section A. Judgment. (2008, July). Retrieved from http://www.exculturae.com/charlie-hebdo-caricatures/.

Special attention should be paid to Charlie Hebdo's 2015 response to the death of Alan Kurdi, a 3-year-old refugee Syrian boy, who drowned crossing the Mediterranean Sea. His lifeless body was washed ashore near the Turkish city of Bodrum. The photo of the dead boy shocked the entire world. However, a week later Charlie Hebdo published another issue mocking the death of Muslim children. The cartoon published in the newspaper depicted Alan lying on the beach and featured the caption 'So close to the aim'. Next to the boy was an advertisement for McDonald's that read 'Two children's menus for the price of one'. It would be interesting to know how Charlie Hebdo's journalists would feel if they were the dead boy's parents. Would they dare to mock the death of their own child? Could the death of a child ever be the subject of a cartoon? What kind of feelings towards Europeans could such a publication call up in the child's parents, Syrians, and Muslims in general? We strongly believe that the answers to these questions are *blatantly obvious.*

2.2. Peculiarities of understanding of freedom of expression in the Islamic world

Unfortunately, it has to be admitted that we, Europeans, *barely* understand the doctrine of Islam, specifically the peculiarities of the Islamic concept of freedom of expression, which significantly differs from the European one. This misunderstanding, in its turn, leads to conflicts between representatives of different cultures. In Islam, the human rights concept is based on the belief that God is the author of law and the source of every human right [18]. Due to the divine origin, human rights granted by Allah may be neither amended nor cancelled by state, society or individuals. No one has the right to change them at his/her own discretion. Freedom of expression is one of the fundamental rights of a Muslim. Islam considers the human being a creature that God endowed with a mind which is necessary to find truth. Freedom of expression is an essential tool on the path towards truth. In view of this, the assumption that Islam is a religion hostile to knowledge, science, discussions and art is completely wrong. The advances made by Islamic countries in mathematics, astronomy, medicine and other areas contributed significantly to laying the foundation for modern European and global science. Admissibility of different views is recognized even in the matters of theology and Sharia, which results in the division of Muslims into Sunni and Shia, as well as numerous religious-law schools (madhhabs) (madhhabs) [19]. However, it is believed that, given the limited abilities of man, Allah himself has set forth some truths. According to Islam, learning such truths independently is beyond the limits of the human mind and thinking. These basic doctrines are set out in the Quran and the Sunnah. They must be believed and not assessed subjectively. Therefore, from the point of view of a devout Muslim, the issues categorized as prohibited under the Sharia need no rational reasoning or proof. At the same time, Islamic theology attempts to explain the existing prohibitions at the doctrinal level. Islam requires people to exercise freedom of expression in cases where it is beneficial to people. If these freedoms harm people, the prohibition is in place.

In the framework of legal consequences all Muslim activities may be divided into five categories: obligatory, recommended (encouraged), permissible (neutral), reprehensible (but not punishable) or forbidden (punishable) [20]. Making images and statues of animate beings is a prohibited action; specifically it is one of the 76 major sins in Islam [21]. This prohibition is clearly established in the Quran and derives from the Hadiths of the Prophet. For instance, the hadith collection Fath al-Bari tells of a man who came to Ibn Abbas and said: "O Abu Abbas, I am a man who lives by what his hands make, and I make these images". Ibn Abbas said: "I will only tell you what I heard the Messenger of Allah say. I heard him say: "Whoever makes an image, Allah will punish him until he breathes life into it, and he will never be able to do that". The man became very upset. So, Ibn Abbas said to him: "Woe to you! If you insist on making images, then make images of these trees and everything that does not have a soul (994 (2225))" [22]. The collection of hadiths (Sunnah) is one of the primary sources of Islamic theology and law along with the Quran. The practice established by the Prophet Muhammad is sacred and must be strictly followed by all devout Muslims. To make it more understandable to a Western reader, it may be compared to case law in the English legal system. Islamic theology explains the origin of this rule as the prohibition against imitating Allah, who has created everything, as well as the prohibition against worshiping idols and other gods, who almost always had a certain artistic representation. Over the years, the prohibition against depicting people and animals ceased to be strict, especially among the Shia.

These rules used to be interpreted quite ambiguously when it came to photographic images of animate beings. Lately Islamic theologians authorized to issue fatwas have acknowledged that photographic images are permitted, subject to certain limitations. For instance, according to a fatwa by Yusuf al-Qaradawi, one of the most respected modern Islamic theologians and chairman of the International Union of Muslim Scholars, photography is not an act of creation prohibited in hadiths, but only a mirroring of reality. Therefore, the scholar has concluded that photography is unlike the work performed by sculptors and painters [23]. The same applies to depicting the Prophet Muhammad. For the majority of Muslims, the prohibition *is absolute* , i.e. any images of Muhammad and any other Islamic prophets are unconditionally prohibited and considered idolatry. They are considered perfect and immaculate figures and therefore may not be subject to any artistic interpretation, particularly if it may lead to disrespect or insult to the prophets. A key to understanding the angry response of Muslims to cartoons of the prophet is the perception of roles and limitations in Islamic humour. Islam encourages bringing joy to other people through humour and jokes. However, no one may exceed the limits established by God. The joke shall be truthful; one shall not tell lies or scare another person; one shall not joke with an older person, a teacher, a scientist, a manager, a person who does not understand jokes, an unknown man or woman; a joke shall be smart, relevant and understandable, it shall not be offensive or degrading a man or a family;

one shall not joke about prohibited issues, tell dirty stories, disclose intimate details, resort to insults or slander [24]. It is important to realize that the cartoons by Lars Vilks depicting the Prophet Muhammad as a dog were perceived by Muslims as extremely cynical, since a dog in Islam is an unclean animal that should not be touched.

Therefore, we can conclude that cartoons of the Prophet Muhammad violated a number of prohibitions existing in Islam and hurt the innermost feelings of Muslims. Faith and religious shrines are at the top of the hierarchy of values protected by Islam. All other values protected thereby, namely life, mind, family and wealth are subordinate to the major values [25; 26]. The nature and magnitude of Muslims' negative response to the aforementioned situation equally stem from Islamic premises. Islam obliges Muslims to protect their faith and beliefs using the force of arms if necessary. So may the freedom of expression be absolute? Obviously not, since absolute freedom of expression may provoke a religious (civilizational) war between Muslims and Christians. One can only imagine how long such a war may last, what forms and consequences it may have. Therefore, by *protecting absolute* freedom of expression the European society may cause significant human losses and lose all its rights and freedoms (including the freedom of expression) and, possibly, its own civilization. Hence, we suggest considering the legal framework and conditions for restricting freedom of expression in Europe and globally.

2.3. Legal framework and conditions for restriction of freedom of expression in Europe and globally

The legal framework and conditions for restriction of freedom of expression globally are set out primarily in Article 29(2) of the Universal Declaration of Human Rights[1], which states that "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". Article 19(2) of the International Covenant on Civil and Political Rights[2] also contributes to such a framework. Article 19(3) of the Covenant stipulates that "The exercise of the rights provided for in para 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals".

The key to restricting of freedom of expression is the "necessity" of such restriction in a democratic society. In particular, according to para 10 of Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights[3], whenever a limitation is required in the terms of the Covenant to be "necessary", this term implies that the limitation: "(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim. Any assessment as to the necessity of a limitation shall be made on objective considerations". However, the scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned (para 2) and in applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation (para 11). The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state (para 12). In turn, Principle 1.3 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information[4] proclaims that: "to establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that: (a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principle".

General Comment No. 34 "Article 19: Freedoms of opinion and expression"[5] stipulates that restrictions must be "necessary" for a legitimate purpose (para 33) and restrictions must not be overbroad (para 34). What is more, when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat (para 35). For instance, para 7.3 of the Communication No. 926/2000, *Shin v. Republic of*

1. Universal Declaration of Human Rights. (1948, December). Retrieved from https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

2. International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

3. Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights. Annex, UN Doc E/CN.4/1984/4. (1984, September). Retrieved from https://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/SiracusaPrinciples.pdf.

4. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information. (1995, October). Retrieved from https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf.

5. General Comment No. 34. "Article 19: Freedoms of opinion and expression". (2011, July). Retrieved from https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

6. Communication No. 926/2000 "Case Shin v. Republic of Korea". (2004, March). Retrieved from https://www.ohchr.org/Documents/Publications/SDecisionsVol8en.pdf.

Korea[6] states that the State party must demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes caused by the author's conduct, as well as why seizure of the painting and the author's conviction were necessary. Preamble of the Human Rights Council Resolution 7/36[1] stresses the need to ensure that invocation of national security, including counter-terrorism, is not used unjustifiably or arbitrarily to restrict the right to freedom of opinion and expression. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression[2] in para 19 emphasizes that Governments must "demonstrate the risk that specific expression poses to a definite interest in national security or public order, that the measure chosen complies with necessity and proportionality and is the least restrictive means to protect the interest, and that any restriction is subject to independent oversight".

2.4. Legal framework and conditions for restriction of freedom of expression in the practice of the European Court of Human Rights

Article 10(2) of the European Convention on Human Rights[3] provides the legal framework and conditions for restriction of freedom of expression: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". The application of the above provision is described in the relevant documents of the Council of Europe and case-law of the ECHR. In particular, para 19 of the Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis[4] stipulates that "member states should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined". On the other hand, para 23 thereof envisages that "media professionals need to adhere, especially in times of crisis, to the highest professional and ethical standards, having regard to their special responsibility in crisis situations to make available to the public timely, factual, accurate and comprehensive information while being attentive to the rights of other people, their special sensitivities and their possible feeling of uncertainty and fear".

Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media[5] sets out in para 68 that "any action sought against media in respect of content should respect strictly applicable laws; above all international human rights law, in particular the provisions of the European Convention on Human Rights, and comply with procedural safeguards. There should be a presumption in favour of freedom of expression and information and in favour of media freedom". The purpose of the Recommendation has been to ensure the highest protection of media freedom and to provide guidance on duties and responsibilities. At the same time, the aforementioned Recommendation envisages that the development of professional and ethical standards to a large extent reflects people's expectations (para 53), and that media content creators, editors and distributors should adhere to relevant professional standards, including those designed to combat discrimination and stereotypes and to promote gender equality. They should exercise special care to ensure ethical coverage of minority and women's issues also by associating minorities and women to creation, editorial and distribution processes (para 86). Case-law of the ECHR affirms the right of a state to restrict freedom of expression. At the same time, limitation of human rights and freedoms is recognized admissible only if it is provided for by law and respects the essence of those rights and freedoms (Rekvényi v. Hungary[6], Refah Partisi (The Welfare Party) and Others v. Turkey[7]). Considering the nature of the assessed freedom, the ECHR also repeatedly stated that necessity for restricting rights must be convincingly established (Autronic AG v. Switzerland[8], para 61; Worm v. Austria[9], para 47).

1. Human Rights Council Resolution 7/36 "Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression". (2008, March). Retrieved from http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_7_36.pdf.
2. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. (2016, September). Retrieved from https://www.un.org/ga/search/view_doc.asp?symbol=A/71/373&Lang=E.
3. European Convention on Human Rights. (1950, November). Retrieved https://www.echr.coe.int/Documents/Convention_ENG.pdf.
4. Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis. (2007, September). Retrieved from https://rm.coe.int/foe-crisis-eng/16809e43e5.
5. Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media. (2011, September). Retrieved from https://www.osce.org/odihr/101403?download=true.
6. Judgment of The European Court of Human Rights No. 25390/94 "Case of Rekvényi v. Hungary". (1999, May). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58262%22]}.
7. Judgment of The European Court of Human Rights No. 41340/98, No. 41342/98, No. 41343/98 and No. 41344/98 "Case of Refah Partisi (The Welfare Party) and Others v. Turkey". (2003, February). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60936%22]}.
8. Judgment of The European Court of Human Rights No. 12726/87 "Case of Autronic AG v. Switzerland". (1990, May). Retrieved from http://hudoc.echr.coe.int/eng?i=001-57630.
9. Judgment of The European Court of Human Rights No. 83/1996/702/894 "Case of Worm v. Austria". (1997, August). Retrieved from http://hudoc.echr.coe.int/eng?i=001-58087.

In Társaság a Szabadságjogokért v. Hungary[1] (para 27) |the ECHR ruled that in view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship. In its practice, the ECHR elaborated a legal position according to which freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or a part of the population. Such are the demands of that pluralism, tolerance and broad mindedness without which there is no "democratic society" (Gawęda v. Poland[2], para 33; Handyside v. The United Kingdom[3], para 49).

In Öztürk v. Turkey[4] (para 49), the ECHR pointed out that Article 10 of the Convention applies not only to the content of information, but also to the means of dissemination, since any restriction imposed on the means necessarily interferes with the right to receive and impart information. The ECHR practice demonstrates that admissibility of restriction of freedom of expression is established considering the content of the disseminated information and the threat it poses to interests in respect of which Article 10 of the Convention allows restriction of the aforesaid freedom (including the interests of national security), i.e. it shall be established whether the aforementioned restriction is really necessary.

The test of necessity in a democratic society requires the ECHR to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. In doing so, the ECHR has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (Grinberg v. Russia[5], para 27). In the case of Kommersant Moldovy v. Moldova[6] regarding a ban on publishing of a periodical endangering national security and territorial integrity the ECHR ruled that the domestic courts did not give relevant and sufficient reasons to justify the interference, limiting themselves essentially to repeating the applicable legal provisions. In particular, the courts did not specify which elements of the applicant's articles were problematic and in what way they endangered the national security and the territorial integrity of the country. The ECHR found that the aforesaid approach demonstrated that the restrictions had not "based themselves on an acceptable assessment of the relevant facts" (paras 36-38). In Lyashko v. Ukraine[7] (para 47), the ECHR ruled that justifiability of an interference and the necessity thereof in a democratic society are defined considering, in particular, the relevance and sufficiency of the reasons given by the national authorities in justification for such interference.

Inadmissibility of the bans on the future publishing of entire newspapers whose content was unknown at the time of a national court's decision was established by the ECHR in Ürper and Others v. Turkey[8] (paras 42-44). The Court noted that the state could apply less restrictive measures and that the practice of banning the future publishing of entire periodicals went beyond any notion of "necessary" restraint in a democratic society and, instead, amounted to censorship. However, there are a number of cases, in which the ECHR acknowledged the necessity of restriction of freedom of expression. For instance, in the 1994 case of Otto-Preminger-Institut v. Austria[9], the ECHR considered as lawful the measures applied by the Austrian government, specifically the seizure of the film showing collusion between Jesus and the devil to punish of humanity by syphilis before the premiere. In the 1996 case of Wingrove v. The United Kingdom[10] a similar decision was taken in relation to the ban on dissemination a film showing sex fantasies about Jesus. In the 2005 case of

1. Judgment of The European Court of Human Rights No. 37374/05 "Case of Társaság a Szabadságjogokért v. Hungary". (2009, April). Retrieved from http://hudoc.echr.coe.int/eng?i=001-92171.
2. Judgment of The European Court of Human Rights No. 26229/95 "Case of Gawęda v. Poland". (2002, March). Retrieved from http://hudoc.echr.coe.int/eng?i=001-60325.
3. Judgment of The European Court of Human Rights No. 5493/72 "Case of Handyside v. The United Kingdom". (1976, December). Retrieved from http://hudoc.echr.coe.int/eng?i=001-57499.
4. Judgment of The European Court of Human Rights No. 22479/93 "Case of Öztürk v. Turkey". (1999, September). Retrieved from http://hudoc.echr.coe.int/eng?i=001-58305.
5. Judgment of The European Court of Human Rights No. 23472/03 "Case of Grinberg v. Russia". (2005, July). Retrieved from http://hudoc.echr.coe.int/eng?i=001-69835.
6. Judgment of The European Court of Human Rights No. 41827/02 "Case of Kommersant Moldovy v. Moldova". (2007, January). Retrieved from http://hudoc.echr.coe.int/eng?i=001-78892.
7. Judgment of The European Court of Human Rights No. 21040/02 "Case of Lyashko v. Ukraine". (2006, August). Retrieved from http://hudoc.echr.coe.int/eng?i=001-76714.
8. Judgment of The European Court of Human Rights No. 14526/07, No. 14747/07, No. 15022/07, No. 15737/07, No. 36137/07, No. 47245/07, No. 50371/07, No. 50372/07 and No. 54637/07 "Case of Ürper and Others v. Turkey". (2009, October). Retrieved from http://hudoc.echr.coe.int/eng?i=001-95201.
9. Judgment of The European Court of Human Rights No. 13470/87 "Case of Otto-Preminger-Institut v. Austria". (1994, September). Retrieved from http://hudoc.echr.coe.int/eng?i=001-57897.
10. Judgment of The European Court of Human Rights No. 17419/90 "Case of Wingrove v. The United Kingdom". (1996, November). Retrieved from http://hudoc.echr.coe.int/eng?i=001-58080.

İ. A. v. Turkey[1] the ECHR called a book containing blasphemous comments about the Prophet Muhammad "an abusive attack on the Prophet of Islam". In Axel Springer AG v. Germany[2] (para 95) the ECHR considered that the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of an interference with the exercise of freedom of expression.

Unfortunately, we must conclude that at present the ECHR practice under Article 10 of the European Convention on Human Rights remains inconsistent, and in our opinion one of the reasons for such inconsistency is that the judges of both national European courts and the ECHR lack sufficient understanding of Islam as a religion and the specifics of Islamic law itself.

CONCLUSIONS

The Charlie Hebdo tragedy was primarily the result of cultural and religious differences between European and Islamic cultures. In light of the fact that Europeans (Christians) and Muslims have to coexist in their already-common Europe, it is necessary to explore and understand those differences and search for a new balance of tolerance for each other. It is important to prevent such tragedies in the future. The mass media, which are the most powerful tool of influencing society, should implement an appropriate editorial policy, while the state should efficiently perform its regulatory and supervisory functions. Unfortunately, the clearly inefficient and untimely actions of the French government contributed to an escalation of the conflict with the Islamic community in Europe. An appropriate court ruling at an early stage of the conflict would have facilitated its peaceful resolution, saved human lives and prevented a major estrangement of the Islamic community from the European one.

The legal framework should reflect the actual relationships within the society. Thus, changes in the ethnic, religious and cultural composition of the European population due to the current migration processes should result in a different proper regulation or at least in changes in interpreting the existing legal framework. In the areas prone to serious inter-religious conflicts adequate regulatory instruments, including bans and restrictions, should be used. According to Article 10(2) of the European Convention on Human Rights, relevant case-law of the ECHR and universal international law, freedom of expression is not absolute; it carries with it duties and responsibilities and may be subject to restrictions. Cases involving Muslims should be examined by officials and judges who understand the specifics of Islam. This also applies to the ECHR judges. In the absence of judges with relevant expertise, experts and representatives of the Islamic community should be involved.

Finally, it may be noted with cautious optimism that in July 2015, Laurent Sourisseau, chief editor of Charlie Hebdo, stated that his periodical would no longer publish cartoons of the Prophet Muhammad [27]. This decision may be interpreted both as a certain confession of guilt of offending the Islamic community and as a step towards reconciliation with all Muslims.

REFERENCES

[1] Charlie Hebdo attack. Latest news and comment on the Charlie Hebdo attack in Paris. (2019). Retrieved from https://www.theguardian.com/world/charlie-hebdo-attack?page=11.
[2] Brooks, D. (2015). I am not Charlie Hebdo. Retrieved from https://www.nytimes.com/2015/01/09/opinion/david-brooks-i-am-not-charlie-hebdo.html.
[3] Healy, J. (2015). I will grieve. I will laugh. But I am not Charlie. Retrieved from https://www.commondreams.org/views/2015/01/13/i-will-grieve-i-will-laugh-i-am-not-charlie.
[4] Relph, S. (2015). Pope Francis: "I'll PUNCH anyone who insults mother". Retrieved from https://www.mirror.co.uk/news/world-news/pope-francis-ill-punch-anyone-4987451.
[5] Giaxoglou, K. (2018). #JeSuisCharlie? Hashtags as narrative resources in contexts of ecstatic sharing. *Discourse, Context and Media*, 22, 13-20.
[6] Giglietto, F., & Lee, Ye. (2017). A hashtag worth a thousand words: Discursive strategies around #JeNeSuisPasCharlie after the 2015 Charlie Hebdo shooting. *Social Media and Society*, 3(1). Retrieved from https://journals.sagepub.com/doi/10.1177/2056305116686992.
[7] Ghilani, D., Luminet, O., Gruev-Vintila, A., & Linden, N.V. (2020). Long live the past: A multiple correspondence analysis of people's justifications for drawing historical analogies between the Paris attacks and past events. *Journal of Social and Political Psychology*, 8(2), 721-747.
[8] Horsman, Y. (2020). What was Charlie Hebdo? Blasphemy, laughter, politics. *Patterns of Prejudice*, 54(1-2), 168-181.
[9] Julin, G. (2018). Satire in a multi-cultural world: A Bakhtinian analysis. *Comedy Studies*, 9(2), 150-170.
[10] Peonidis, F. (2019). Freedom of expression, secularism and defamation of religion: The case of Charlie Hebdo. *Social Sciences*, 8(10). Retrieved from https://www.mdpi.com/2076-0760/8/10/276/htm.

1. Judgment of The European Court of Human Rights No. 42571/98 "Case of İ. A. v. Turkey". (2005, September). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-70113%22]}.

2. Judgment of The European Court of Human Rights No. 39954/08 "Case of Axel Springer AG v. Germany". (2012, February). Retrieved from http://hudoc.echr.coe.int/eng?i=001-109034

[11] Politzer, M.N., & Alcaraz, A.O. (2020). Covert islamophobia: An analysis of the New York Times and The Wall Street Journal headlines before and after Charlie Hebdo. *Comunicacion y Sociedad*, 17. Retrieved from https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj2sJvyiNbvAhUiyYUKHSpNDm0QFjAAegQIAxAD&url=http%3A%2F%2Fwww.comunicacionysociedad.cucsh.udg.mx%2Findex.php%2Fcomsoc%2Farticle%2Fdownload%2Fe7601%2F6230&usg=AOvVaw1DhIGnUFh7sIH6kg1apSpE.
[12] Sumiala, J., Tikka, M., & Valaskivi, K. (2019). Charlie Hebdo, 2015: 'Liveness' and acceleration of conflict in a hybrid media event. *Media, War & Conflict*, 12(2), 202-218.
[13] Godioli, A. (2020). Cartoon controversies at the European court of human rights: Towards forensic humor studies. *Open Library of Humanities*, 6(1). Retrieved from https://olh.openlibhums.org/articles/10.16995/olh.571/.
[14] Muslims make up 4.9% of Europe's population in 2016. (2017). Retrieved from https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/pf_11-29-17_muslims-update-20/.
[15] Europe's growing muslim population. (2017). Retrieved from https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/.
[16] Jenkins, Ph. (2006). Demographics, religion, and the future of Europe. *Orbis*, 50(3), 519-539.
[17] Remy, J. (2006). Le manifeste des douze: Ensemble contre le nouveau totalitarisme. Retrieved from https://www.lexpress.fr/actualite/societe/le-manifeste-des-douze-ensemble-contre-le-nouveau-totalitarisme_482860.html.
[18] Sykiyanen, L.R. (2014). *Islam and human rights in the dialog of the cultures and religions*. Moscow: Sadra.
[19] Behruz, H. (2006). *Islamic law tradition*. Odesa: Yurydychna Literatura.
[20] Masse, A. (1961). *Islam: Historical essay*. Moscow: Vostochnaya Literatura.
[21] Adh-Dhahabi, I. (2012). *The major sins.* London: Dar Al Taqwa.
[22] Al-Bukhari, S. (2003). *Muhtasar*. Moscow: UMMA.
[23] Al-Qaradawi, Yu. (1999). *Contemporary fatawa*. Delhi: Islamic Book Service.
[24] Ramazanov, K. (2010). The humor in Islam. Retrieved from http://ansar.ru/society/yumor-s-tochki-zreniya-islama-kak-shutil-prorok-mir-emu.
[25] Sodiq, M.Y.M. (2008). *The human rights in the Islam*. Saint Petersburg: Dilia.
[26] Auda, J. (2014). *The goals of Sharia*. Moscow: Mardjani Publishing House.
[27] Charlie Hebdo editor says the paper is done with prophet Muhammad cartoons. (2015). Retrieved from https://www.washingtonpost.com/news/worldviews/wp/2015/07/17/charlie-hebdo-editor-says-the-paper-is-done-with-prophet-muhammad-cartoons/?noredirect=on&utm_term=.b1e5c19802d0.

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ПІДХОДИ ДО РОЗУМІННЯ КАТЕГОРІЇ «ОСОБЛИВІ ПРАВОВІ РЕЖИМИ»

Анотація. *У статті досліджуються основні підходи до розуміння правових категорій «правові режими», «особливі правові режими», надається їх класифікація. Особливі правові режими виступають юридичною підставою обмеження прав і свобод людини й громадянина, отже актуальність дослідження поняття, видів і основних ознак особливих правових режимів не викликає сумніву. Автори розглядають співвідношення між категоріями особливий правовий режим надзвичайного стану та воєнного стану, а також характеризують основні підстави їх впровадження. Наголошується на необхідності чіткого, послідовного правового впорядкування моделі поведінки, направленої на подолання і ліквідацію негативних наслідків надзвичайного та воєнного характеру. Акцентується увага на тому, що в Україні впорядкування суспільних відносин, що виникають у зв'язку з надзвичайними та військовими ситуаціями, набуло особливого значення після виникнення воєнного конфлікту на території нашої держави та розповсюдження вірусу COVID-19. У статті надається авторське бачення категорій «правові режими» та «особливі правові режими». Під першими запропоновано розуміти порядок регулювання, який виражений в комплексі правових засобів, що характеризують особливе поєднання взаємодіючих між собою дозволів, заборон та зобов'язань, здійснюючи при цьому особливу спрямованість регулювання. Під другим – форму державного управління, яка передбачає обмеження правосуб'єктності фізичних та юридичних осіб, що вводиться в якості тимчасового заходу, що забезпечується засобами адміністративно-правового характеру, і спрямований на забезпечення безпеки особистості, суспільства та держави. Здійснено класифікацію особливих правових режимів та запропоновано виділяти за змістом та підставою виникнення наступні види: надзвичайний стан, військовий стан, стан облоги, стан війни, стан суспільної небезпеки, стан напруженості, стан оборони, стан загрози, стан готовності, стан пильності*

Ключові слова: *режим, правовий режим, особливий правовий режим, воєнний стан, надзвичайний стан, права людини, обмеження прав*

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APPROACHES TO UNDERSTANDING THE CATEGORY "SPECIAL LEGAL REGIMES"

Abstract. *The study investigates the main approaches to understanding such legal categories as "legal regimes" and "special legal regime", and provides their classification. Special legal regimes serve as the legal basis for restricting human and civil rights and freedoms; therefore, the relevance of the study of the concept, types, and main features of special legal regimes is beyond doubt. The authors of the study consider the relationship between the categories of special legal regime of a state of emergency and martial law, and describe the main grounds for their imposition. The authors noted a need for a clear, consistent legal regulation of the model of behaviour aimed at overcoming and eliminating negative consequences of an emergency and military nature. Attention is focused on the fact that in Ukraine, the regulation of public relations arising in connection with emergencies and military situations has become particularly important after the emergence of a military conflict on the territory of Ukraine and the spread of the COVID-19 virus. The study provides the author's vision of the categories "legal regimes" and "special legal regimes". it is proposed to interpret the legal regimes as the regulatory procedure, which is expressed in a set of legal means that describe a special combination of interacting permits, prohibitions, and obligations, while implementing a special focus of regulation. The latter should be interpreted as a form of public administration that makes provision for the restriction of the legal personality of individuals and legal entities, introduced as a temporary measure provided by means of administrative and legal nature, and aimed at ensuring the security of the individual, society, and the state. The study provides the classification of special legal regimes and contains proposals to distinguish them according to the content and basis of occurrence as follows: state of emergency, martial law, state of siege, state of war, state of public danger, state of tension, state of defence, state of threat, state of readiness, state of vigilance*

Keywords: *regime, legal regime, special legal regime, martial law, state of emergency, human rights, restriction of rights*

INTRODUCTION

Considering the fact that special legal regimes serve as the legal basis for restricting human and civil rights and freedoms, the relevance of the study of the concept, types, and main features of special legal regimes is beyond doubt. Within each country of the modern age and in the international space, emergency situations have repeatedly arisen (aggression, threat to the constitutional order of the state, life and health of people and citizens, natural and anthropogenic emergencies, and other exceptional circumstances), when the normal functioning of society and the state had been complicated. In such circumstances, there is an increasing need for a clear, consistent legal regulation of the behaviour model aimed at overcoming and eliminating the negative consequences of emergency situations.

In Ukraine, the regulation of public relations arising in connection with emergencies has become particularly important after the emergence of a military conflict on the territory of Ukraine and the spread of the Severe Acute Respiratory Syndrome-2 virus (SARS-CoV-2). Thus, starting from January 30, 2020, the World Health Organization declared the coronavirus outbreak a public health emergency, which causes international concern. Within one month, given the alarming level of spread, the World Health Organization announced an outbreak of a global pandemic [1, p. 167]. Political leaders around the world considered the COVID-19 outbreak to be "a war against an invisible enemy" [2], "the biggest challenge since World War II" [3], or "the saddest hours of the state" [4]. Using the term "war" as a metaphor, the leaders of many states announced a number of comprehensive measures to protect against it [1, p. 168].

In this regard, the process of implementing human and civil rights requires more imperative methods of

regulation, justifiably acquires the form of an extraordinary or special order of influence on socio-legal relations, relying not only on means of encouragement, but also on means of coercion. Special legal regimes stipulated by law are introduced to combat the consequences of emergencies and martial law. Special legal regimes are conditioned by natural, socio-biological phenomena of an emergency situation or artificially created hazards, which lead to the establishment of a special administrative and legal regime, described by the introduction of measures that strengthen the powers of state and municipal authorities in order to restore and maintain the proper order of public life, as well as to ensure the security of the individual, society, and the state. The main feature of the special legal regime is the restriction of the legal personality of individuals and legal entities, which is particularly relevant at present and requires further scientific research to develop sustainable solutions to overcome problems in this area. It should be borne in mind that the special legal regime is contradictory in its legal nature, since, on the one hand, its purpose is to restore safe living conditions for a person, and on the other hand, it makes provision for the adoption of measures that restrict human rights and freedoms.

Restriction of human rights and freedoms is an extremely relevant, necessary, and important subject, which is conditioned just by a considerable number of scientific studies of scientists, teachers of higher educational institutions, special academic disciplines, but also by the practical aspect of the coexistence of members of society within the state and global space, when it is necessary to determine how to ensure order in society; which rights can be restricted and which cannot; what is the due procedure for such restriction; how to implement the institution of restriction of human and civil rights and freedoms and still comply with such legal principles as the balance of interests of the individual, society, state, rule of law, legality, proportionality, humanism, etc. In this regard, the legal system of Ukraine is faced with the task of creating legal tools for restrictions on human and civil rights and freedoms under special regimes, aimed at preventing illegal interference in human rights, on the one hand, and ensuring a common interest in maintaining peace and security on the territory of Ukraine, on the other hand.

For a long time, legal science has not paid much attention to the study of special legal regimes. The scientific doctrine of emergency security measures is far from being diverse. In the 19th century in Europe it was represented by the scientific studies of G. Stein [5, p. 57], K. Mittermeier [6, p. 584], T. Reinaha [7, p. 125], which, however, touched only on some aspects of the issue covered in this study. In Soviet legal science, certain issues of legal regimes related to restrictions on human and civil rights and freedoms were investigated in the studies of S. Alekseev [8, p. 187; 9, p. 245], V. Isakov [10, p. 291], and some other scientists.

Some aspects of special legal regimes have become the subject of consideration by modern Ukrainian scholars D. Kosse [11], I. Sokolova [12, p. 11], L. Taran [13, p. 72], Z. Kisil [14, p. 326], N. Kharchenko [15, p. 27], O. Petryshyn [16, p. 146]. Among foreign researchers, some aspects of this subject have become the subject of N. Rusi [1, p. 167], P. Wicke [2], N. Thomas [5, p. 57], P. Cane [17, p. 204], M. Dewey [18, p. 242], M. Tannenberg [19, p. 78], F. Tamburini [20, p. 78], and others. The arguments expressed in legal science regarding the concept and content of legal regimes can be taken into account upon considering the essence of special legal regimes within the framework of this study.

At the same time, a complete theoretical legal study of the category of special legal regimes, which can be considered as a part in relation to the general category of legal regimes in the legal doctrine and in the system of regulations is nowhere to be found. Thus, the main purpose of the study is to identify and specify the inherent features of special legal regimes.

To carry out the study, a system of methods of scientific

1. MATERIALS AND METHODS

cognition was applied, in particular general philosophical, general scientific (dialectical, analysis, synthesis, abstraction, analogies), particular methods of scientific cognition used in the branches of many sciences (comparative analysis, quantitative and qualitative analysis), as well as special legal methods (formal legal, comparative legal, system-structural). The authors of this study applied the general philosophical (universal) method of cognition at all stages of the cognitive process. The dialectical method was used to analyse doctrinal approaches to the definition of the terms "legal regimes" and "special legal regimes". Using the method of analysis, the study covered the inherent features and identified the individual features of legal regimes, analytical interpretation made it possible to engage in reverse engineering of the concept, in particular, to distinguish a special legal regime and investigate it as a separate part of the whole. Using the analysis method, special legal regimes were also studied and their constituent elements were identified – a special legal regime of state of emergency and martial law, each of the selected elements was considered separately.

Using the abstraction method, the author defines the categories "legal regimes", "special legal regimes", "special legal regimes of a state of emergency", "special legal regimes of martial law". The method of deduction made it possible, based on the doctrinal opinions of scientists, to draw a general conclusion regarding the inherent features of special legal regimes, the existing grounds for their classification. Inductive method of cognition of the provisions of the Law of Ukraine "On the Legal Regime of the State of Emergency"[1] and the Law of Ukraine "On the Legal Regime of Martial Law"[2] provided an opportunity to obtain a general opinion on the inherent

1. Law of Ukraine No. 1550-III "On the Legal Regime of the State of Emergency". (2000, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1550-14#Text.

2. Law of Ukraine No. 389-VIII "On the Legal Regime of Martial Law". (2005, May). Retrieved from https://zakon.rada.gov.ua/laws/show/389-19#Text.

features of the state of emergency and martial law. The historical method of cognition contributed to the coverage of the term "legal regimes" from the standpoint of its origin and development in the legal doctrine, made it possible to achieve an in-depth understanding of its essence and justify new recommendations for its improvement.

Special legal methods have also been used, in particular, formal legal and system-structural methods used in the development and research of the terminology of this paper, namely, in clarifying the content of the categories "legal regime", "special legal regime", as well as upon formulating the definition of the specified legal categories.

The regulatory framework for this study includes the current laws of Ukraine regulating social and legal relations that arise in connection with the conduct of special legal regimes on the territory of the Ukrainian state, in particular: the Law of Ukraine "On the Legal Regime of the State of Emergency" and the Law of Ukraine "On the Legal Regime of Martial Law"; sub-legislative acts that establish the specific features of the conduct of these legal regimes, in particular: Resolution of the Cabinet of Ministers of Ukraine No. 573 "Issues of Introduction and Implementation of Certain Measures of the Legal Regime of Martial Law" of July 8, 2020[1]; Resolution of the Cabinet of Ministers of Ukraine No. 733 "On Approval of the Regulation on the Organisation of Notification of the Threat or Occurrence of Emergency Situations and Communications in the Field of Civil Protection" dated September 27, 2017[2]. In addition, the study uses doctrinal sources that cover the content and features of legal and special legal regimes.

2. RESULTS AND DISCUSSION

The legal regime is a meaningful legal phenomenon that connects an integral set of legal means of influencing public relations in accordance with the methods of legal regulation and its types. In general terms, a legal regime can be interpreted as the regulatory procedure, which is expressed in a set of legal means that describe a special combination of interacting permits, prohibitions, and obligations, while implementing a special focus of regulation. Each regime contains all the listed methods of legal regulation, one of which is dominant depending on the intended purpose of a particular regime. Proceeding from the degree of imperativeness of a particular regime, its concept may include mainly restrictions.

D. Kosse noted that the legal regime constitutes a meaningful feature of specific regulations that should organise a certain part of human life. The legal regime can make provision for a specific mechanism of legal regulation, its special procedure, which is aimed at particular types of subjects and/or objects of law [11]. V. Isakov defined the legal regime as a social regime of an object (phenomenon or process), which is enshrined in legal provisions and provided with a set of legal means. Proceeding to cover this thesis further and based on the meaning of the French term "regime" (i.e., management, regulation), Isakov addresses such an essential feature of the legal regime as its purposefulness, and explains that the social regime itself constitutes a relatively stable relationship of some social object (phenomenon, process, subsystem) with other social objects, which ensures the achievement of certain goals. The author defines the content as the most complex element of the legal regime, as it reflects the connection between the object (carrier) and the environment within which this object exists, as well as the main features of their interaction [10, p. 291]. In this opinion, the legal regime is considered in an objective focus, without taking into account the subjective factor. The problem of objective and subjective conditions of determination becomes relevant in modern conditions of social development in connection with the reassessment of social values towards humanisation and increasing the role of human dignity in social creation. The realisation of a person's status – to be a subject of the social process, that is, the human factor, is determined by objective and subjective conditions and their dialectical unity.

O. Petryshyn aptly noted that the term "legal regime" defines a holistic set of legal means developed from the elements of legal regulation to be applied – methods (dispositive and imperative), means (permissions, prohibitions, and obligations), types of regulation (generally permitted and specially permitted). This ratio is determined by the different degree of dominance of some and the auxiliary role of other methods, means, and types of legal regulation, it constitutes an expression of the degree of rigidity of regulation, the presence of certain restrictions and benefits, the limits of legal independence of subjects [16, p. 146].

P. Cane noted that the interpretation of government systems in a given state and the model of distribution of state power reflect the inherent features of government regimes. The government regime establishes the exercise of administrative power within the country. It is a structural element of a management system comprising a certain set of institutions, provisions, and legal practices. It is useful to distinguish between three types of control of administrative power, which can be called political, legal, and bureaucratic, respectively. Political control is related to the political goals and results of administration; legal control concerns the issue of whether the government regime is implemented in accordance with the spirit and the letter of the law; and the problems of bureaucratic control can be summarised in the classic three components of state audit (economy, efficiency, and effectiveness) and the values of the process, such as fairness, consistency, and immediacy [17, p. 204].

M. Dewey suggests to understand the regulatory

1. Resolution of the Cabinet of Ministers of Ukraine No. 573 "Issues of Introduction and Implementation of Certain Measures of the Legal Regime of Martial Law". (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/573-2020-%D0%BF#Text.

2. Resolution of the Cabinet of Ministers of Ukraine No. 733 "On Approval of the Regulation on the Organisation of Notification of the Threat or Occurrence of Emergency Situations and Communications in the Field of Civil Protection". (2017, September). Retrieved from https://zakon.rada.gov.ua/laws/show/733-2017-%D0%BF#Text.

regime as the infrastructure used by regulatory authorities to achieve regulatory goals [18, p. 242]. In this regime, it is necessary to distinguish three groups of legal entities between which there are analytical differences:

1. Persons who set the rules (political figures who establish regulatory regimes and receive the right to make laws as a result of temporary political control over the state);

2. Persons who enforce these rules (state agencies, ministries, departments, etc., who monitor compliance with regulatory prescriptions and are entrusted with legal competence to ensure compliance with legislative requirements);

3. Persons who accept the rules (individual and collective entities that are required to comply with the law by virtue of their participation in a particular activity).

The legal regime in its simplest form can be interpreted as a system of rules for performing certain actions consolidated by legal provisions. These provisions regulate the rights and obligations of all participants in certain relations and express the degree of inclusiveness of legal regulation, the presence or absence of restrictions, and the limits of legal activity of subjects of the law. The very category of legal regime, from its procedural side, describes the breadth of coverage, the level of statutory regulation, and the principles of implementation of legal relations. And it is the theory of law that is designed to show what regimes are needed, whether special statutory regulation of certain types of activities is justified, and to which territories and objects can a particular special regime apply. Summarising the previously expressed positions, it is proposed to interpret the legal regime as an officially established special regulatory procedure that reflects the totality of legal and organisational means used to consolidate the social and legal state of objects of influence and is aimed at ensuring their sustainable functioning. The legal regime is expressed in a certain combination of legal means that create the desired social status and a specific degree of favourability or disadvantage to satisfy the interests of legal entities.

The main features of the legal regime include: 1) the establishment and guarantee of the legal regime by the state and its institutions; 2) orientation towards the value dimension of law in the establishment of legal regimes; 3) the presence of a goal determined by objective factors to regulate public relations in a specific way, highlighting the specific subjects and objects of law in time and space; 4) a special set of legal means and their variable combination.

The scientific literature contains many grounds for classifying legal regimes. S. Alekseev was one of the first researchers to propose the division of legal regimes into primary and secondary (special regimes) [8, p. 187]. The author understands primary legal regimes as complexes of legal means that express the general order of correlation of means of legal regulation in a certain sphere of social existence. Secondary legal regimes constitute modifications of general regimes that make provision for either special benefits reflected in additional rights, or special restrictions reflected in additional prohibitions or obligations [9, p. 245]. Based on the specified classification, I. Sokolova suggests to divide legal regimes into general and special, which can be preferential or restrictive. If the norm of law establishes a different, but also the same range of subjective rights and legal obligations of certain subjects of law in relation to the same object of legal regulation, a new type of legal regime arises – a special one [12, p. 11].

L. Taran suggests to interpret the the special legal regime as a special order of legal regulation of certain social relations, which is established for a particular range of objects or areas of their activity and which differs from the general regime by a preferential or restrictive nature of regulation, which is conditioned by public interest manifested in all elements of its mechanism, in particular, through guarantees, benefits, forms of state support, restrictions, prohibitions, and additional grounds for legal liability [13, p. 72]. Z. Kisil classified legal regimes according to the scale of the will of citizens and organisations to use their opportunities to exercise their subjective rights – to preferential and restrictive regimes; according to the depth of changes in the constitutional status of citizens and organisations – to ordinary and emergency regimes [14, p. 326]. N. Kharchenko justifiably proposes to supplement the general theoretical classification of legal regimes with such types of legal regimes as regimes of legal conditions (state of emergency, martial law, quarantine zones) [15, p. 27].

When considering the legal regime as a specific type of legal regulation, it should be taken into account that it can be expressed in a certain set of legal restrictions. In this regard, it is possible to distinguish such a type of legal regimes as a legal regime of restriction, which, among all types of means, is filled with obligations and prohibitions, non-performance of which leads to the possibility of using coercion. Such legal restriction regimes include state of emergency and martial law regimes, which make provision for a considerable reduction in the content of human and civil rights and freedoms. Therewith, it should be emphasised that there is a close interrelation between the direct content of the legal regime, which includes appropriate restrictions on human and civil rights and freedoms with the goals for which it is introduced and operates. These circumstances largely determine the degree of imperativeness of specific regulation of relations arising in connection with certain restrictions, which reaches the highest degree in a state of emergency or martial law.

Classifying special legal regimes as varieties of legal regimes, the following types can be distinguished according to the content and basis of occurrence: 1) state of emergency (Great Britain, India, Canada, Portugal, USA); 2) martial law (Bulgaria, Netherlands, Poland, Romania); 3) state of siege (Argentina, Brazil, Hungary, Greece, Spain, France); 4) state of war (Belgium, Italy); 5) state of public danger (Italy); 6) state of tension (Federal Republic of Germany); 7) state of defence (Federal Republic of Germany, Costa Rica, Finland); 8) state of threat (Spain); 9) state of readiness (Norway); 10) state of vigilance (Gabon), and others.

At the beginning of the 21st century, attention to the study of special legal regimes has increased. This fact is caused by an increase in the number of military conflicts, natural and anthropogenic emergencies, and epidemiological hazards. In this context, it is important

to remember that the main and fundamental human right, which occupies a central place in the system of non-property rights aimed at ensuring the natural existence of an individual, is the human right to life [21, p. 175]. On the other hand, the legal consciousness of people has developed a belief regarding the dangers of inaction of state and international institutions, civil society institutions in the occurrence of conditioned situations, on the one hand, and threats of excessive, non-legal use of their powers by power structures under special regimes, on the other hand. The above tasks the legal science to engage in additional consideration of a number of scientific issues caused by the emergence of special legal regimes. The main of these circumstances include: a) the use of different terminology in describing special legal regimes, including concepts such as "extraordinary legal regime", "state legal regime", "special legal regime", and "emergency legal regime", which lack clear differentiation in the scientific literature; b) the extension of such regimes to different rights and obligations of the subjects of regime regulation; c) participation of norms of various branches of law – constitutional, administrative, international, criminal, military, financial, etc. – in the construction of these regimes. Hence, there is a need for scientific research aimed, first of all, at a clearer terminological definition of the concept and content of special legal regimes. According to the results of the study, it is proposed to interpret the "special legal regime" as a form of public administration that makes provision for limiting the legal personality of individuals and legal entities and is introduced as a temporary measure, provided by means of an administrative and legal nature and is aimed at ensuring the security of the individual, society, and the state. The main purpose of such regimes is to ensure constitutional security in the event of threats to the sovereignty of the state. Special legal regime is the procedure for functioning of legal entities determined by extraordinary circumstances, aimed at regulating public relations in the state or in its particular administrative-territorial unit, by applying specific methods and means stipulated in the legal provisions.

The current legislation of Ukraine stipulates such a term as the legal regime of a state of emergency. The Law of Ukraine "On the Legal Regime of the State of Emergency"[1] defines the content of such a regime, the grounds for its introduction, the rights and obligations of state and municipal authorities in the conditions of the state, responsibility for violations of human and civil rights and freedoms, and its legitimate interests. Based on the analysis of this law, it is proposed to interpret the emergency regime as a special legal regime of activity of state authorities determined by life circumstances, which allows limiting the legal personality of individuals and legal entities, introduced as a temporary socially objective and legal measure to ensure the safety of a person and citizen, society, and the state. In addition to the legal state of emergency, the current legislation of Ukraine makes provision for a special legal regime of martial law. Thus, the Law of Ukraine "On the Legal Regime of Martial Law"[2] defines such a state, covers its content, establishes the procedure for its imposition, as well as the powers of state and municipal authorities, specially created military bodies (command, administrations), guarantees of respect for human and civil rights and freedoms, their legitimate interests. Resolution of the Cabinet of Ministers of Ukraine No. 573 "Issues of Introduction and Implementation of Certain Measures of the Legal Regime of Martial Law" of July 8, 2020[3] establishes the procedure for implementing measures during the introduction of curfews and the establishment of a special blackout regime in certain areas where martial law has been introduced.

Depending on the grounds for imposition of a special legal regime, the latter can be classified into:

– special state of emergency;

– special martial law regime.

Notably, special legal regimes should include not only states of emergency and military nature, but also other special legal regimes that include the need to apply special measures, which in terms of the scope of legal restrictions are significantly inferior to those used under the state of emergency and martial law. This refers to the presence of certain restrictions and prohibitions in conditions when a state of emergency or martial law has not been declared. In particular, the Resolution of the Cabinet of Ministers of Ukraine No. 733 "On Approval of the Regulation on the Organisation of Notification of the Threat or Occurrence of Emergency Situations and Communications in the Field of Civil Protection" dated September 27, 2017[4] defines the procedure for organising notification of state and municipal authorities and the population of the country on the threat of emergency situations, their further informing in order to take security measures. That is, from the moment of notice on a threat, a special special regime may arise, which would make provision for restrictions on human and civil rights and freedoms in order to prevent dangerous consequences.

Similar to the reaction to war or natural disaster are the current measures aimed by Ukraine and other countries of the world at combating the pandemic, which are described by restrictions on human rights and freedoms, and which the public authorities need to combine with the democratic principles of government. The most common

1. Law of Ukraine No. 1550-III "On the Legal Regime of the State of Emergency". (2000, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1550-14#Text.

2. Law of Ukraine No. 389-VIII "On the Legal Regime of Martial Law". (2005, May). Retrieved from https://zakon.rada.gov.ua/laws/show/389-19#Text.

3. Resolution of the Cabinet of Ministers of Ukraine No. 573 "Issues of Introduction and Implementation of Certain Measures of the Legal Regime of Martial Law". (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/573-2020-%D0%BF#Text.

4. Resolution of the Cabinet of Ministers of Ukraine No. 733 "On Approval of the Regulation on the Organisation of Notification of the Threat or Occurrence of Emergency Situations and Communications in the Field of Civil Protection". (2017, September). Retrieved from https://zakon.rada.gov.ua/laws/show/733-2017-%D0%BF#Text.

of these measures, applied by almost all states in the fight against COVID-19, is the restriction of people's freedom of movement. Other restrictions that are caused by the need to contain the pandemic include restrictions on social gatherings, the closure of schools, offices, and universities. Notably, the society does not always have a positive and approving attitude towards the stipulated restrictions and expresses such disagreement through protests and rallies. There are cases when the authorities of democratic countries restrict the freedom of expression of citizens, enlisting the support of the military [22]. Therewith, the government usually justifies why the regime they have chosen has the right to use coercion. M. Tannenberg lists the factors that condition the use of coercion as follows: general results of government process that are favourable to society; personality of the leader; rational legal procedures; ideology [19, p. 78].

In some places, the use of coercion does not correspond to the principles of reasonableness and balance of interests of the state, society, and the individual. Thus, F. Tamburini cites the example of North African countries (Egypt, Algeria, and Morocco), which have been severely affected by COVID-19 compared to other African countries. Therewith, North African governments have taken active legal measures to combat the virus threat, protecting public health, but also used repressive and invasive mechanisms that in some cases jeopardise fundamental freedoms and rights. A comparative analysis of the legislation against COVID-19 indicates that the legislative measures of these countries reflect the level of transition to democracy, the lack of transparency of certain regimes, the use of the pandemic to strengthen repressive control over society, violating the balance of health safety of the country's population and democratic institutions [20, p. 78].

CONCLUSIONS

In emergency and military situations (aggression, threat to the constitutional order of the state, life and health of people and citizens, natural and anthropogenic emergencies and other exceptional circumstances), when the normal functioning of society and the state is impossible, the need for a clear, consistent legal regulation of the behaviour model aimed at overcoming and eliminating the negative consequences of emergencies increases. In Ukraine, the regulation of public relations arising in connection with emergencies and military situations has become particularly important after the emergence of a military conflict on the territory of Ukraine and the spread of the COVID-19 virus. In this regard, the process of implementing human and civil rights requires more imperative methods of regulation, justifiably acquires the form of an extraordinary or special order of influence on socio-legal relations, relying not only on means of encouragement, but also on means of coercion. Special legal regimes stipulated by law are introduced to combat the consequences of emergencies and martial law.

The legal regime is a meaningful legal phenomenon that connects an integral set of legal means of influencing public relations in accordance with the methods of legal regulation and its types. In general terms, a legal regime can be interpreted as the regulatory procedure, which is expressed in a set of legal means that describe a special combination of interacting permits, prohibitions, and obligations, while implementing a special focus of regulation. Each regime contains all the listed methods of legal regulation, one of which becomes dominant depending on the intended purpose of a particular regime. The higher the degree of imperativeness of a particular regime, the more restrictions it will contain. According to the results of the study, it is proposed to interpret the "special legal regime" as a form of public administration that makes provision for limiting the legal personality of individuals and legal entities and is introduced as a temporary measure, provided by means of an administrative and legal nature and is aimed at ensuring the security of the individual, society, and the state. The main purpose of such regimes is to ensure constitutional security in the event of threats to the sovereignty of the state. Special legal regime is the procedure for functioning of legal entities determined by extraordinary circumstances, aimed at regulating public relations in the state or in its particular administrative-territorial unit, by applying specific methods and means stipulated in the legal provisions.

Based on the analysis of the current legislation of Ukraine, it is proposed to interpret the emergency regime as a special legal regime of activity of state authorities determined by life circumstances, which allows limiting the legal personality of individuals and legal entities, introduced as a temporary socially objective and legal measure to ensure the safety of a person and citizen, society, and the state.

RECOMMENDATIONS

The scientific value of the study lies in the fact that it develops the author's concept of the legal category "special legal regime" based on the study of theoretical and statutory issues problems, provides its main features, and classifies its types. The conclusions obtained as a result of the study can be used in research work – for further general and special scientific research in the field of law; in law-making – in the process of developing and improving national legislation, harmonising Ukrainian legislation with international legal provisions; in the educational process – during the study in legal educational institutions of academic disciplines of general theory of law and the state, constitutional law.

REFERENCES

[1] Rusi, N., & Shqarri, F. (2020). Limitation or derogation? The dilemma of the states in response to human rights threat during the COVID-19 crisis. *Academic Journal of Interdisciplinary Studies*, 9(5), 166-176.

[2] Wicke, P., & Bolognesi, M. (2020). How we conceptualize and discuss the pandemic on Twitter. Plos one. Retrieved from https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0240010.

[3] DW News. (2020). Merkel: Coronavirus is Germany's greatest challenge since World War II. Retrieved from https://www.dw.com/en/merkel-coronavirus-is-germanys-greatest-challenge-since world-war-ii/a-52830797.
[4] BBC News. (2020). Coronavirus: Death toll jumps again in Italy's 'darkest hour'. Retrieved from https://www.bbc.com/news/world-europe-51805727.
[5] Nipperdey, T. (1998). *Deutsche Geschichte 1800–1866. Bürgerwelt und starker Staat*. München: C. H. Beck.
[6] Ebert, I., & Fijal, A. (2001). Mittermaier, Karl Josef Anton. In *Neue Deutsche Biografie 17 (NDB)* (pp. 584-585). Berlin: Duncker & Humblot.
[7] Yuzhakov, S.N. (1904). *Big encyclopedia: In 22 volumes: Vol. 14*. Saint Petersburg: Publishing Association "Prosveshchenie".
[8] Alekseev, S.S. (1989). *General permissions and general prohibitions in Soviet law.* Moscow: Yurid. lit.
[9] Alekseev, S.S. (1995). *The theory of law.* Moscow: Publishing house BEK.
[10] Isakov, V.B. (1985). *Problems of the theory of legal facts* (Doctoral dissertation, Sverdlovsk Law Institute named after R.A. Rudenko, Sverdlovsk, Russian Federation).
[11] Kosse, D.D. (2009). Legal regime and mechanism of legal regulation: Features and relations. *State and Law*, 44, 25-31.
[12] Sokolova, I.O. (2011). *Legal regime: Concepts, features, varieties* (Doctoral thesis, Yaroslav Mudryi National Law University, Kharkiv, Ukraine).
[13] Taran, L.V. (2004). *Special legal regime of entrepreneurial activity in free economic zones of Ukraine (comprehensive research).* Kharkiv: Vidavets SPD FO Vapnyarchuk N.M.
[14] Kisil, Z.R., & Kisil, R.V. (2011). *Administrative law*. Kyiv: Lviv State University of Internal Affairs.
[15] Kharchenko, N.P. (2018). Types of legal regimes: Pluralism of scientific approaches. *Prykarpattya Legal Bulletin*, 1, 25-28.
[16] Petryshyn, O.V. (2020). *General theory of law*. Kharkiv: Pravo.
[17] Cane, P. (2016). *Controlling administrative power: An historical comparison.* Cambridge University Press., 1, 583-591
[18] Dewey, M., & Carlo, D. (2021). Governing through non-enforcement: Regulatory forbearance as industrial policy in advanced economies. *Regulation and Governance*, 15, 242-251
[19] Tannenberg, M., & Bernhard, M. (2021). Claiming the right to rule: Regime legitimation strategies from 1900 to 2019. *European Political Science Review*, 13, 77-94
[20] Tamburini, F. (2021). The COVID-19 Outbreak in North Africa: A legal analysis. *Journal of Asian and African Studies,* 3, 78-89.
[21] Hyliaka, O., Mernyk, A., Yaroshenko, O., Gnatenko, K.V., & Slyusar, A.M. (2020). The right to euthanasia as the fourth-generation human right. *Georgian Medical News*, 11, 175-180.
[22] Newburger, E. (2020). Trump activates National Guard in California, New York and Washington state: This is a war. Retrieved from https://www.cnbc.com/2020/03/22/trump-activates-national-guard-in california-new-york-and-washington-state-to-fight coronavirus-outbreak.html.

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СВІТОВИЙ ДОСВІД ВПРОВАДЖЕННЯ ЕЛЕКТРОННИХ АДМІНІСТРАТИВНИХ ПОСЛУГ

Анотація. *Одним із факторів розвитку громадянського суспільства у демократично розвинутих країнах є дієвий, налагоджено функціонуючий інститут надання адміністративних електронних послуг. Незважаючи на інтенсивність та широкий спектр досліджень, присвячених різним аспектам надання електронних адміністративних послуг населенню, багато питань у цій сфері залишаються досить дискусійними, а також недостатньо дослідженими, що й обумовило актуальність роботи. Стаття направлена на дослідження особливостей впровадження електронних адміністративних послуг у практиці країн з найбільш розвинутими механізмами електронного урядування. При дослідженні проблематики були використані сукупність загальнонаукових та спеціальних методів пізнання, зокрема провідними методами були: діалектичний, порівняльно-правовий, аналізу, синтезу, тлумачення. Проаналізовано критерії оцінки електронних адміністративних послуг в провідних країнах Європейського Союзу та США. Досліджено базові електронні адміністративні послуги для громадян в онлайновому режимі, що надаються у країнах Європейської співдружності. Вивчено світовий досвід впровадження електронних адміністративних послуг у таких країнах, як: США; Франція; Великобританія; Німеччина; Естонія та Швеція. Сформульовано авторський підхід до визначення поняття електронних адміністративних послуг, що ґрунтується на власному розумінні цього поняття, з позиції загальнотеоретичного аналізу. Зроблено висновок про те, що одним із кращих способів стимулювання надання адміністративних послуг в електронній формі у країнах Європейського Союзу є стандартизація їх надання – розробка чітких організаційних та техніко-технологічних правил та вимог, а головна їх позиція полягає в тому, що надання послуг через електронні засоби зв'язку має доповнювати, а не заміняти собою інші канали комунікації*

Ключові слова: *електронне урядування, інформаційно-комунікаційні технології, інформаційне суспільство, адміністративні послуги, електронні послуги, Інтернет*

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GLOBAL EXPERIENCE IN IMPLEMENTING ELECTRONIC ADMINISTRATIVE SERVICES

Abstract. *One of the factors for the development of civil society in democratically developed countries is an effective, well-functioning institution for providing administrative electronic services. Despite the intensity and wide scope of research covering various aspects of providing electronic administrative services to the population, many issues in this area remain quite debatable, as well as understudied, which conditioned the relevance of the study. The study is aimed at investigating the specific features of implementing electronic administrative services in the practice of countries with the most developed e-government mechanisms. In the study of the problem, a set of general scientific and special methods of cognition was used, in particular, the leading methods were: dialectical, comparative legal, analysis, synthesis, interpretation. The study analysed criteria for evaluating electronic administrative services in the leading countries of the European Union and the United States. The study examines the basic electronic administrative services for citizens in online mode provided in the countries of the European Commonwealth. The study examines the global experience of implementing electronic administrative services in such countries as: USA; France; Great Britain; Germany; Estonia and Sweden. The author's approach to defining the concept of electronic administrative services is formulated, based on a personal interpretation of this concept from the standpoint of general theoretical analysis. It is concluded that one of the best ways to encourage the provision of administrative services in electronic form in the countries of the European Union is to standardise their provision – the development of clear organisational and technical-technological rules and requirements, and their main position is that the provision of services through electronic means of communication should complement, and not replace other communication channels*

Keywords: *e-governance, information and communication technologies, information society, administrative services, electronic services, Internet*

INTRODUCTION

A necessary component of the development of e-governance is the widespread use of information and communication technologies in the field of public administration. The current state of providing administrative services in electronic form in the countries of the European Union is described by significant achievements. The achievements of the European Union countries indicate an increase in the attention of the member states to the development of the information society, expanding the scope of application of information and communication technologies in the public sector, etc. However, the development of e-governance in Ukraine, including the provision of administrative services in electronic form, is hindered by the presence of a large number of legal, organisational, material, and technical problems. One of the components of the development of the information society is e-governance – a fundamentally new way of exercising state power towards developing democracy through the use of a wide range of advanced and innovative electronic information and communication technologies that ensure the provision of qualitatively new

and diverse public services in real time for all categories of persons, both internationally and nationally and egionally [1].

Its main purpose is to create such relations in society where public administration is carried out based on the principles of openness and transparency, qualitatively new forms of activity of public administration bodies, their interaction with citizens and business entities through access to managerial information resources with the prospect of providing electronic administrative services, to exercise their attitude towards state and local government bodies using Internet resources.

In the legal literature, there are also different opinions regarding the term "service". Some scientists believe that a service is an activity aimed at obtaining an intangible result [2]. It is possible to distinguish a number of features that are inherent in the institution of administrative services: provision at the request of an individual or legal entity; concerns the rights and/or obligations of such a person, that is, an administrative service is rendered for the sake of providing conditions for the acquisition, change, or termination of the rights and/or obligations of persons; rendering by administrative bodies (primarily executive authorities, local self-government, other state bodies) necessarily through the exercise of power, because the administrative body has a "monopoly' on the provision of a specific administrative service [3].

Defining a new mission setting political goals and objectives of a new quality and developing a strategy for government bodies lead to the development of new management functions and new ways of providing public services. They aim to adjust administrative services and search for new information technologies for providing public services. First of all, political goals are formulated at the state level, taking into account national interests and opportunities for their implementation on the part of the authorities. Then tasks are defined that require the provision of certain services to citizens, businesses, and other government organisations and institutions based on administrative services. And only last of all is attention paid to technologies that ensure the implementation of administrative services. The concept of the state as a consumer-oriented service organisation has become a methodological tool for changes in the provision of public services. The ideological basis of administrative reform should be the introduction of the doctrine of administrative services. Recognition of a person, their life and health, honour and dignity as the highest social value requires rethinking the role of the state and radically changing relations between the authorities and citizens.

In the activities of any organisation, including the state one, there are three levels of processes: 1) primary activity (implementation of the functions of the institution prescribed in the relevant regulatory documents); 2) secondary activity (aimed at improving the main function: information systems and technologies of the organisation); 3) activity aimed at improving the function (development of the strategy and architecture of information technologies of the organisation) [4]. The introduction of administrative services in electronic form is one of the main ideas of e-governance. In general, electronic services are understood as various types of tangible and intangible services provided in electronic form using ICT, including the Internet [5]. The above leads to the implementation of a study of the provision of administrative services in electronic form on the example of the experience of countries with the most developed e-government mechanisms, which in the future will contribute to improving the quality of administrative services to the population and adapting Ukrainian legislation to EU legislation. In addition, Ukrainian science does not pay enough attention to the issue of studying the specific features of the introduction of electronic administrative services in the practice of foreign countries, and a large number of researchers have not yet agreed on many key issues of the subject matter under consideration.

The study of the features of the introduction of electronic administrative services in the practice of countries with the most developed e-government mechanisms and the generalisation of the existing array of developments on this issue is not easy, which explains its scientific lack of research. Some aspects of this issue, in one way or another, have been studied by such foreign and Ukrainian scientists as: M. Kaluti [6], A. Klich [7], S.A. Marzooqi [8], H.M. Park [9], J. Rocha [10], A. Al-Refaie [11], D.A. Špaček [12], O.M. Andreeva [13], Ye.O. Arkhipova [14], V.M. Babaiev [5], V.P. Gorbulin [15], M.S. Demkova [16], S.V. Dziuba [17], O.N. Yevtushenko [18], I.V. Klymenko [19], Ya.V. Kozhenko [20], N. Kozachenko [3], V. Kuznetsov [21], A.I. Semenchenko [22].

The purpose of the study is to investigate the features of the introduction of electronic administrative services in the practice of countries with the most developed mechanisms of e-government based on the generalisation of the existing array of developments of well-known Ukrainian and foreign scientists and researchers, as well as in the provision of the author's concept and conclusions regarding electronic administrative services.

1. MATERIALS AND METHODS

To achieve the formulated goals and objectives, the study uses general scientific and special methods of scientific cognition. This made it possible to carefully analyse all the issues related to the specifics of implementing electronic administrative services in the practice of countries with the most developed e-government mechanisms. Thus, the dialectical method made it possible to describe and study the content and ideas of electronic administrative services, which are one of the elements of the structure of e-government, and represent a certain process of finding new approaches to analysing the structure of state processes and searching for new models for describing state activities, which in turn make it more convenient, faster, and more efficient. The comparative legal method was used to study and compare foreign experience and an array of accumulated data from leading foreign and Ukrainian scientists, namely, the study investigated the world experience of implementing basic electronic administrative services for citizens online, provided in the USA and Europe.

The synthesis method helped to establish that a

fully electronic administrative service is considered when online interaction is possible at all four stages that are inherent in each type of service: 1) informing – providing online information about the public service; 2) one-way interaction – provided the ability to download document forms; 3) two-way interaction – provided the ability to process document forms, including authentication; 4) conducting electronic transactions – provided the ability to deliver them (for example, payments). Moreover, this method has helped to cover the content of such an important component of electronic administrative services as cross-border administrative services in the European Union countries, which are stipulated in the regulations of the European Parliament and of the Council. The method of analysis helped to identify the list of basic public services in the European Commonwealth countries for business entities, which includes: social deductions for employees; corporate taxes: declaration, etc.; value-added tax: declaration, notification; registration of a new company; submission of statistical data; customs declaration; obtaining permits related to environmental protection; public procurement.

Furthermore, European countries believe that the provision of services through electronic means of communication should complement and not replace other communication channels. Conventional ways of obtaining services (by telephone, mail, or by personal contact) will continue to exist, constantly improving so that all citizens have better access to information and services from their governments. Citizens can choose their channel of communication with their government and pan-European structures. Using the method of interpretation, it became possible to give the author's innovative and legal definition of the concept of electronic administrative services, based on their understanding of this term, from the standpoint of theoretical and legal analysis and modern challenges to the development of society. Using the system method, the content of such an important component of electronic administrative services as cross-border administrative services was covered, which will help in combining individual electronic services into a unified web portal, the functions of which will ensure the provision of a wide scope of public services in electronic form throughout the European Union.

The generalisation method has demonstrated that the introduction of electronic administrative regulations is not so much automation as finding new approaches to analysing the structure of state processes and searching for new models for describing state activities. Moreover, improving the system of providing electronic administrative services for the Member States of the European Union is politically important, since this is how the authorities constantly communicate with citizens on a daily basis.

In addition, the phenomenological method helped to classify electronic administrative services for the possibility of automation: fully automated – administrative services where the relevant processes (acceptance of applications, rendering of services, payment, delivery of the result of administrative services, etc.) are performed in electronic form; partially automated – administrative services in which part of the processes is performed in electronic form, and – part – in "manual mode"; services provided in "manual mode" – administrative – services where all relevant processes are not automated.

2. RESULTS AND DISCUSSION

2.1. The concept of electronic administrative services and the service approach to the essence of the state

In the context of the modern development of the information society, the main requirement on the part of subjects applying for administrative services of state and local authorities is the availability and transparency of the provision of these services, which is also effectively ensured by the gradual transfer of these services to electronic form. Such services are also called electronic administrative services. It is the provision of electronic administrative services that is the main prerequisite for bringing the authorities closer to the average citizen, meeting their needs and one of the main priorities for the development of e-governance in the world. The methodological basis for the development of the infrastructure of interaction between the authorities and citizens is the concept of state service to the citizen – the service concept of public administration as a modern understanding of the social purpose of the state, where the priority task of democratic governance is to serve civil society, and the main form of activity of government institutions is the provision of public services [23].

The introduction of administrative services in electronic form is one of the main ideas of e-governance. In general, electronic services are understood as various types of tangible and intangible services provided in electronic form using ICT, including the Internet [17]. In this regard, M.S. Demkova and M.V. Figel express a correct opinion, believing that the provision of electronic administrative services is when a citizen, by filling out a questionnaire (registration card, etc.) directly on the website of a particular body or by filling out a questionnaire in elect¬ronic form and sending it by e-mail to the appropriate authority, can receive a particular administrative service, such as registering as a subject of entrepreneurial activity [16].

That is why, based on all the above, it is still considered necessary to interpret it in a slightly different form: an electronic administrative service is any state information service of a public administrative nature, implemented through the use of information and communication technologies and the Internet, provided to the subject of appeal by state and local government bodies in electronic form, and has the goal of improving the quality and improving the process of their provision. Proceeding from the above, the introduction of electronic administrative regulations is not so much automation as finding new approaches to analysing the structure of state processes and searching for new models for describing state activities.

In the process of developing and using e-government institutions in public administration, the state itself is increasingly considered as a service, that is, providing services to the population [6]. The service concept of the state, which became widespread in the United States and a number of Western European countries in the 1980-1990s,

considers the purpose of the state in serving the individual, and, in its literal interpretation, almost any state activity that covers interaction with the individual is a state service [20]. The service approach to the essence of the state is associated with such areas of optimization of power and legal activities as the development of network forms of management interaction, the development of "e-government", communication technologies of control and planning, the development of "online" services, the development of multilateral ties that allow citizens to actively take part in communication with the authorities.

According to O.N. Yevtushenko, the development of a model of "service state", which should deal with the provision of services, is associated with a change of direction in the state: the understanding that the state exists for people, and not vice versa. In addition, the development of such a model is facilitated by modern technologies and open standards that allow for the transformation of the state into a service organisation for providing services to the population (citizens) and companies [18].

2.2. International experience in the development of electronic administrative services

Ensuring the availability of administrative services in electronic form is in the field of view of governments of all countries that implement electronic services. Each country defines its strategy and methodology for providing electronic administrative services. As for the European Union, the criteria for evaluating electronic administrative services in the European Union are as follows: the level of interactivity, the quality of access for the user and the response time from the administrator; the availability of e-services, including the provision of interactive communication 24 hours a day and access for special groups of the population; the advantages and benefits of using e-services – saving time and money for users, improving the efficiency of personnel management and reducing costs for the authorities; the degree of reorganisation of government processes and improving their efficiency; the impact of the proposed e-service on the growth of the number of users, on raising awareness of citizens, etc.; the degree of solving key problems, in particular, improving the security indicators of network operation, the degree of preservation of operational aspects of the implementation of services rendered, such as the use of outsourcing (transfer of part of its tasks or processes by the company to third-party performers on subcontracting terms), expansion of public-private partnership; availability of experience and the degree of use of the potential of administrative employees [15].

In the countries of the European Community, basic electronic administrative services are provided for citizens online: income tax (declaration, etc.); job search through employment services; social assistance; unemployment assistance; child benefit; reimbursement of medical services; tuition fees; personal documents (passport, driver's license); registration of a car (new, used, imported); submission of applications for construction; informing the police (for example, in case of theft); public libraries (availability of catalogues, search tools); birth certificates, marriage (request and provision); application for admission of information about changes in place of residence to a higher educational institution; services related to medicine (interactive consultations, availability of medical services in different hospitals, application for treatment in a particular institution, etc.) [17].

The list of basic public services in the European Commonwealth countries for business entities includes: social deductions for employees; corporate taxes: declaration, etc.; value-added tax: declaration, notification; registration of a new company; submission of statistical data; customs declaration; obtaining permits related to environmental protection; public procurement. Online implementation of 20 basic public services (12 for citizens and 8 for businesses), tracked at the level of the European Community, is represented by four phases: publication of information; one-way interaction; two-way information exchange; full implementation of transactions in electronic form, including the provision and payment of services [21].

For example, 12 basic electronic administrative services for citizens are as follows: birth and marriage certificate, car registration, income taxes, license registration, personal documents (passport, driver's license), health services, relocation notices, social security payments, job search, police report, higher education registration, public libraries. An administrative service is considered fully electronic when online interaction is possible at all four stages that are inherent in each type of service: 1) informing – providing online information about the public service; 2) one-way interaction – provided the ability to download document forms; 3) two-way interaction –provided the ability to process document forms, including authentication; 4) conducting electronic transactions – provided the ability to deliver them (for example, payments) [15].

For example, France has the longest history of building the service component of e-government in all of Europe. It all started with a network of Minitel terminals in 1984, which allowed paying bills, gave access to some public services, and served as a telephone directory. In the late 1980s and early 1990s, Minitel spread from France to some other countries, but lost out in the competition to the Internet, the abilities of which the devices could never surpass. They became seriously interested in the development of electronic services in France only in 1998, and developed a certain vision and strategy by 2004. The regulatory act in the field of e-government appeared in 2005, and the year of the actual beginning of the existence of e-government can be considered 2008. In 2014, this country became the first and only one in the world where the level of switching public services to online mode was 100%. From 2012 to 2014, France made great progress in developing its electronic services, and now the country is also exploring options for switching to free alternatives to existing services and other ways to save money. The French get access to public services through a single portal mon.service-public.fr using a personal ID. In addition, the Service-Public.fr portal launched in October 2000 is still operating. This is an access point to popular information covering all ordinary events in a citizen's life [24]. Here one can find information, documents (published reports of

government agencies), information about user rights and administrative procedures. The new policy, introduced in 2012, is aimed at reducing the cost of ICT, encouraging innovation and attracting other actors, such as local authorities and developer communities, joint production of electronic services [25].

Nowadays, there are two approaches to creating administrative service portals in the world – centralised, which is built on the "top-down" principle, and meta-system, built on the "bottom-up" principle. The UK Government Portal is a centralised Internet resource built according to the "top-down" scheme. Its purpose is to integrate Internet services of all authorities to provide public services in a unified information space. The portal is a set of its services and gateways to portals and subports, and is also a single centre of responsibility for providing services for applicants.

In the UK, as a former member of the European Union, it operates Gov.uk – a unified state information website developed by the State Digital Service to create a unified access point for all public services. The beta version of the website was launched on February 1, 2012, and on October 17 of the same year Gov.uk brought together two previously existing major electronic service providers: Directgov and Business Link. The main reason for combining previously existing service providers was to create a unified point of access to public services. The main purpose of Gov.uk is replacement for hundreds of websites of government departments and organisations. Thus, by May 1, 2013, the websites of 24 ministries and 28 state organisations were moved to Gov.uk. Gov.uk is a rather complex and systematic set of links to specific websites of institutions and/or sectors, but does not directly provide services to these institutions [26].

In the United States, there is a different approach to developing public service portals. The portal is built according to the "bottom-up" principle. Since regional and local authorities already had developed systems for providing public services using ICT at the time of the creation of the federal portal, the purpose of such a metasystem was to create a kind of database of metadata about public services. All information on the portal is divided into four groups: for citizens, for businesses, for civil servants, and for guests of the country. The internet resource itself is a unified functional centre that provides its visitors with the opportunity to search for and ob¬tain information about the procedure for providing public services and additional services [17]. In Germany, the classification of electronic administrative services takes into account two criteria: the depth of service coverage of the "value chain": information service – communications – transactions. This is a well-known scheme that is widely used. Therewith, it is estimated that about a third of the services are mainly informational in nature (however, in many cases these services include some additional functions, apart from simply publishing information on the Web), another third are procedures for processing various applications that require the implementation of complex processes and regulations and contain components for performing transactions; the content of the service [19].

A unified portal for state and municipal services eesti.ee was established in Estonia in 2003. Currently, the portal provides more than a hundred personal services in electronic form to the portal user who has entered the portal's working environment through mandatory authorisation. The user of the portal, for example, due to the Department of the State Information System can get access to the entire legislative framework of the Republic of Estonia, legislative acts and decisions of various ministries and departments, find and print out the necessary form or certificate, send a request to state and municipal institutions. Among the services that are most actively used are motor¬ transport insurance, family benefits and employment issues, electronic prescriptions, registration at the place of residence, and others [14]. In Sweden, the Government eLink project was implemented back in 1997, which is designed to ensure reliable and secure information exchange between government agencies. Next year, the state administration was made more focused on citizens, more rights and opportunities were granted in state administration (document "Central Government Administration in the Citizens Service") [13].

European countries believe that the provision of services through electronic means of communication should complement and not replace other communication channels. Conventional ways of obtaining services (by telephone, mail, or by personal contact) will continue to exist, constantly improving so that all citizens have better access to information and services from their governments. Citizens can choose their channel of communication with their government and pan-European structures [17]. Improving the system of providing electronic administrative services for the Member States of the European Union is politically important, since this is how the authorities constantly communicate with citizens on a daily basis. An important component of electronic administrative services in the countries of the European Union is cross-border administrative services stipulated by the Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC[1], the Decision (EU) 2015/2240 of the European Parliament and of the Council of 25 November 2015 establishing a programme on interoperability solutions and common frameworks for European public administrations, businesses and citizens (ISA2 programme) as a means for modernising the public sector[2], etc. [27].

In compliance with the requirements of these regulations, the European Union has introduced the

1. Regulation (EU) No. 910/2014 of the European Parliament and of the Council. (2014, July). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0910.

2. Decision (EU) 2015/2240 of the European Parliament and of the Council. (2015, November). Retrieved from https://ec.europa.eu/isa2/sites/isa/files/celex_en.pdf.

STORK programme, which "taking into account the ID identification technology is available in each country and provides systematisation of data according to generally accepted technical and legal schemes, which ensures understanding between users with each other". In addition, for the purpose of providing cross-border electronic services in the EU, there is an electronic service "SPOCS (Simple Procedures Online for Cross-Border Services)", an electronic portal "e-CODEX (e-Justice Communication via Online Data Exchange)", created to ensure electronic interaction in the field of justice through online data exchange, as well as the "epSOS" programme, which provides access to cross-border services in the field of healthcare, and the electronic service "PEPPOL (pan-European Public Procurement online)", introduced for the purpose of online access to public procurement.

The current state of providing cross-border services by administrative bodies in the European Union countries is described by combining individual electronic services for providing these services into a unified web portal, the functions of which would ensure the provision of a wide scope of public services in electronic form throughout the European Union. In particular, the portal "e-SENS (Electronic Simple European Networked Services)" is currently under development, which will combine the functions of the above-mentioned electronic services and "is established to ensure the provision of cross-border public services in electronic form using common and reused technical components". Analysing the international experience in the implementation of electronic public services, it is necessary to pay attention to the development by national governments of a large-scale strategic approach, which results in a gradual transition to accelerated development and simultaneous use of conventional and electronic channels for providing administrative services. Notably, the provision of administrative services in electronic form in the countries of the European Union usually takes place through unified online services, which collect a considerable number of popular electronic services for both citizens and businesses. Provision of electronic services at the national level through a unified web portal helps to increase the convenience of locating the necessary service and unifying the requirements for obtaining such services, regardless of the state authority that renders these services. However, at the local level, local self-government bodies create opportunities to provide additional administrative services that fall within their competence and are carried out taking into account local characteristics and needs.

CONCLUSIONS

The authors found that one of the best ways to encourage the provision of administrative services in electronic form is to standardise their provision – the development of clear organisational and technical and technological rules and requirements. In addition, it is safe to say that the provision of services through electronic means of communication should complement and not replace other communication channels. Conventional ways of obtaining services (by telephone, mail, or by personal contact) will continue to exist, constantly improving so that all citizens have better access to information and services from their governments. Citizens can choose any channel of communication with their government and pan-European structures. Thus, the implementation of internet technologies in the sphere of public power, on the one hand, will increase its efficiency, and on the other hand, it will make the work of public authorities more transparent. Working in the e-Government mode fundamentally changes the atmosphere of interaction between officials and the population. Every ci¬tizen gets the opportunity to track events in the activities of state authorities, local self-government bodies, know about their work plans, directly interact with them without queues and unnecessary bureaucracy, reduce their corruption component, which is effectively achieved by introducing electronic services. And the first step in this direction should be the development of a market for administrative and informational electronic services. It should become the engine that will enable the development of a new paradigm of public administration in the process of developing e-governance, which aims to improve the well-being of the population, increase the competitiveness of our enterprises and the state in general, and ensure new priorities for the development of Ukraine.

Thus, the provision of administrative services using information and communication technologies cannot be reduced to merely creating an opportunity to familiarise with the list of documents on the website of the authority or the Centre for administrative services, which is a common practice in public administration bodies. The implementation of certain actions of public administration bodies in electronic form also cannot be considered as the introduction of electronic administrative services, in particular, this refers to a preliminary online appointment for receiving public services, and the possibility of electronic receipt of information about administrative services. Furthermore, a well-built system of electronic administrative services will have a positive impact on the development of the social state with influential civil society institutions, especially on those issues where methods and forms of interaction of public administration bodies with citizens and business entities are of great importance.

The value of the subject matter is shown in the fact that one of the most important issues of modern society is the development and improvement of the level of participation of citizens through information and communication technologies in state affairs. After all, electronic administrative services, as a modernised public administration process and the degree of implementation of its tasks, determine the need to step up research on the legal settlement of this issue.

REFERENCES

[1] Polytanskyi, V.S. (2018). The doctrine of the concept of electronic government. *Legea si Viata*, 1/2, 98-101.
[2] Mirzoian, A.A. (2005). Service as a civil law category. *International Law and National Law*, 1, 127-138.

[3] Kozachenko, N. (2013). Normative-legal regulation of state servants activity in the provision of administrative services in Ukraine. *State Governance and Local Self-Government*, 1, 194-202.
[4] Dzoban, O.P. (2013). *Philosophy of information law: Worldview and general theoretical principles*. Kharkiv: Maidan.
[5] Babaiev, V.M. (2014). *E-government.* Kharkiv: O.M. Beketov National University of Urban Economy in Kharkiv.
[6] Kaluti, M., & Rajani, K.C. (2021). E-governance for public administration: lecture notes in electrical engineering. In *3rd International Conference on Communications and Cyber Physical Engineering* (pp. 1059-1065). Vol. 698. Singapore: Science and Business Media Deutschland GmbH.
[7] Klich, A. (2021). Electronic communication with public administration in the time of COVID-19 – Poland's experience. *International Journal of Environmental Research and Public Health*, 18(2), Article number 685.
[8] Marzooqi, S.A., Nuaimi, E.A., & Qirim, N.A. (2017). E-governance (G2C) in the public sector: Citizens acceptance to E-government systems – Dubai's case. In *Second International Conference on Internet of things, Data and Cloud Computing* (pp. 1-11). New York: Association for Computing Machinery.
[9] Park, H.M. (2015). Should E-government be transformational and participatory? In *An essay on E-government in the utilitarian mode of information technology use: 48th Annual Hawaii International Conference on System Sciences* (pp. 2476-2485). Grand Hyatt Kauai: IEEE Computer Society.
[10] Rocha, J. (2020). Spanish and Portuguese eIDAS node evolution for electronic identification of European citizens. In *Proceedings of the 10th Euro-American Conference on Telematics and Information Systems* (pp. 1-5). Portugal: ACM.
[11] Al-Refaie, A., Ramadna, A., & Bata, N. (2017). Barriers to e-government adoption in Jordanian organizations from users' and employees' perspectives. *International Journal of Electronic Government Research*, 13(1), 33-51.
[12] Špaček, D., Csótó, M., & Urs, N. (2020). Questioning the real citizen-centricity of e-government development: Digitalization of G2C services in selected CEE countries. *Journal of Public Administration and Policy,* 13(1), 213-243.
[13] Andrieieva, O.M. (2014). E-government of the Scandinavian countries: The formation and development. *Problems of International Relations,* 9, 154-168.
[14] Arkhypova, Ye.O. (2015). The experience of implementing e-government in Estonia and its implementation in Ukraine. *A Young Scientist,* 11, 148-152.
[15] Horbulin, V.P. (2014). *E-government*. Kyiv: NADU.
[16] Demkova, M.S., & Fihel, M.V. (2004). *Access to public information and e-government*. Kyiv: Fakt.
[17] Dziuba, S.V., Zhyliaiev, I.B., Polumiienko, S.K., Ruban, I.A., & Semenchenko, A.I. (2012). *E-government*. Kyiv: OSCE Project Coordinator.
[18] Ievtushenko, O.N. (2009). The role of state power and local self-government in building a service state for the provision of quality public services. *Political Science*, 122(109), 32-37.
[19] Klymenko, I.V., & Lynov, K.O. (2006). *E-government technologies.* Kyiv: Center for Civil Service Institutional Development.
[20] Kozhenko, Ya.V. (2012). Concepts of "strong" and "service" state in the context of modernization of public administration in Russia: Common and distinctive. *Fundamental Research,* 3(3), 744-748.
[21] Kuznietsov, V. (2019). Experience in providing electronic administrative services in EU countries. In *The Lisbon Treaty is 10 years after its entry into force. What has changed in the functioning of the EU?: Proceedings of the Scientific and Practical Conference* (pp. 152-154). Mykolaiv: Petro Mohyla Black Sea National University.
[22] Semenchenka, A.I. (2017). *E-government and e-democracy*. Kyiv: FOP Moskalenko O.M.
[23] Zahorskyi, V.S., & Teleshun, S.O. (Eds.). (2011). *Encyclopedia of Public Administration: Vol. 8.* Lviv: LRI NAPA.
[24] Pedrosa, G.V, Kosloski, R.A.D., de Menezes, V.G., Iwama, G.Y., da Silva, W.C., & da C. Figueiredo, R.M.A. (2020). A systematic review of indicators for evaluating the effectiveness of digital public services. *Information*, 11(10), 472-475.
[25] E-SENS: Easy digital public services within Europe. (2021, February). Retrieved from https://www.esens.eu/.
[26] Margariti, V., Anagnostopoulos, D., Papastilianou, A., Stamati, T., & Angeli, S. (2020). Assessment of organizational interoperability in e-Government: A new model and tool for assessing organizational interoperability maturity of a public service in practice. In *Proceedings of the 13th international conference on theory and practice of electronic governance* (pp. 298-308). New York: Association for Computing Machinery.
[27 Misuraca, C. (2020). Evaluating the impact of artificial intelligence technologies in public services. In *Proceedings of the 13th International Conference on Theory and Practice of Electronic Governance* (pp. 8-16). New York: Association for Computing Machinery.

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ЮРИДИЧНІ ТА СОЦІАЛЬНО-ЕКОНОМІЧНІ АСПЕКТИ РЕФОРМУВАННЯ СИСТЕМИ ВИЩОЇ ОСВІТИ УКРАЇНИ

Анотація. *Ціль статті полягає в критичному огляді ефективності процесів реформування системи вищої освіти України у світлі інтеграції до європейського освітнього простору. Визначальним теоретичним концептом розвитку вищої освіти в Україні є її провідна роль у забезпеченні сталого соціально-економічного розвитку держави шляхом реалізації невід'ємного права громадян на освіту, отримання якісних освітніх послуг, усебічного інтелектуального та духовного розвитку. Основними методами дослідження є метод частотного аналізу та методи математичної статистики, за допомогою яких здійснювалась обробка вихідних даних анкетування державних службовців. Визначено, що в умовах соціально-економічної, суспільно-політичної, адміністративно-управлінської кризи, підвищення конкурентних вимог до системи вищої освіти України провідною метою її модернізації є формування нового змісту та стандартів якості освітніх послуг, які забезпечать максимальну інтеграцію України у світовий та європейський освітній простір. У контексті проведеного соціологічного опитування державних службовців окреслено коло загроз, структуру їх взаємозв'язків та джерел виникнення, які є першочерговими цільовими пріоритетами державного управління, метою якого є забезпечення сталого розвитку системи вищої освіти України. Новизна дослідження зумовлена проведенням соціологічного опитування державних службовців з метою визначення експертної думки щодо ключових питань. Практичне значення визначається необхідністю окреслення пріоритетних напрямів щодо протидії наявним і більш потенційно небезпечним загрозам сталому розвитку вищої освіти в Україні*

Ключові слова: *освітня політика, розвиток вищої освіти, система вищої освіти, сталий розвиток, державне управління*

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LEGAL AND SOCIO-ECONOMIC ASPECTS OF REFORMING UKRAINE'S HIGHER EDUCATION SYSTEM

Abstract. *The aim of the article is to critically review the effectiveness of the processes of reforming Ukraine's higher education system in the light of integration into the European educational space. Also, the goal is to define the boundaries of the legislative control of the education system at the state level. The defining theoretical concept for the development of higher education in Ukraine is its leading role in ensuring the sustainable socio-economic development of the country through the implementation and legal protection of the inalienable right of citizens to education, obtaining quality educational services, comprehensive intellectual and spiritual development. The main research methods are the frequency analysis method and the mathematical statistics methods, which were used to process the data of the questionnaire of public officials. It has been determined that in the conditions of socio-economic, socio-political, legislative, administrative and managerial crisis, increasing competitive requirements for the higher education system of Ukraine, the leading purpose of its modernisation is the formation of new content and quality standards of educational services, which will ensure the maximum integration of Ukraine in the world and European educational space. In the context of a sociological survey of civil servants, the circle of threats, the structure of their relationships and sources of origin are outlined, which are the first priorities of the state administration, aimed at ensuring the sustainable development of the higher education system of Ukraine. The novelty of the study is due to a sociological survey of public officials in order to determine the expert opinion on key issues. It is important to find out what legal responsibility people will bear for opposing the laws of Ukraine on education. The authors also collected an expert opinion on key issues that will improve Ukrainian legislation in the field of higher education. The practical importance is determined by the necessity to outline priority areas to counter the existing and more potentially dangerous threats to the sustainable development of higher education in Ukraine*

Keywords: *education policy, higher education development, higher education system, sustainable development, public administration*

INTRODUCTION

Since Ukraine's proclamation as a sovereign and independent state, the processes of modernization of the higher education system have been going on. Ukraine's accession to the Bologna Process in 2006 led to a systematic review of the legal framework for regulating the relations of participants in the educational process, revision of state standards of higher education content, establishing new rules and procedures for access to higher education in Ukraine, improving the quality of educational services. As a result, the uncoordinated state policy of reforming Ukraine's higher education that consisted of ignoring its adaptive capacities to the new requirements and standards of the European education system, which were caused by insufficient financial resources, fundamentally different organisational and legal norms of its construction, lack of clear and transparent rules of functioning educational institutions of different forms of ownership, led to the deepening of the systemic crisis in higher education.

According to independent statistics [1], the devastating processes of destruction of its scientific and technical potential, the decline of science and a significant influx of scientists and teaching staff abroad are deepening in Ukraine. According to the Human Development Index, according to the World Economic Forum in 2016, Ukraine ranked 26th among 130 countries in the world, and in the global competitiveness index in 2016-2017, Ukraine ranked

85th among 138 countries. Ukraine's European integration processes have led to new challenges and threats to higher education, which are exacerbated by competition from higher education institutions (hereinafter referred to as HEIs) from foreign countries. In which the higher education system of Ukraine demonstrates the inability to create a decent competition in the international market of educational services, which is caused by high tuition fees in a number of Ukrainian HEIs, corruption, low quality of education, as well as in the subsequent emigration of specialists and students due to their inability to find employment with decent pay conditions. According to independent experts, the number of Ukrainians in foreign universities in 2014-2015 amounted to 59 thousand, and in the 2015-2016 academic year – 68 thousand citizens of Ukraine (an increase of 9,000), among which more than 60% of future students have chosen Polish universities. In the 2015-2016 academic year 30041 Ukrainian students studied in Poland [2].

The permanent problem for Ukrainian society and higher education is the influx of scientists abroad. Ukraine ranks 54th out of 55 countries that participated in the survey in terms of scientists' outflows. For Ukraine, such an outflow of scientists annually costs 40-90 million UAH for the country's economy. As a rule, scientists mainly travel to EU countries and the USA. During the years of independence, 45,000 people moved from Ukraine to the United States [3]. According to the state statistics, only during 2010-2016 there is a catastrophic reduction in the number of researchers in educational institutions, among which there were 11974 doctors of science, and as of 2016, only 7091 (a decrease of 40.7%), PhDs (Candidates of Sciences) in 2010 were 46,685 people, and in 2016 – 20208 people (a decrease of 56.7%), and for all categories of staff there was a reduction of employees by 46.3%. It is worth noting the systematic reduction in the number of higher education institutions in Ukraine, which in the beginning of 1991 were 910, and in 2016 – 657 units [4; 5].

The results of many years of scientific research undoubtedly prove [6-10] the leading importance of the educational policy of the country in the processes of creating new knowledge, effective introduction of new technologies and innovations in the field of economic activity in order to ensure sustainable economic development of society. The recently adopted new version of the Law of Ukraine "On Higher Education"[1] introduces significant changes to the system of organisational and legal regulation of the activity of the higher education system of Ukraine, which substantially approximates the standards and norms of functioning of the European higher education system. The main innovations are the adaptation to the European norms of the system of educational and qualification levels, the procedure for issuing diplomas of higher education, including jointly with foreign HEIs, expanding the autonomy of higher education institutions, the establishment of a national agency for quality of higher education, procedures for accreditation of educational and scientific programs, admission rules and regulations to study. As defined in Art. 3 P. 3 of this Law[2], formation and implementation of the state policy in the field of higher education is ensured by maintaining and developing the higher education system and improving its quality, development of autonomy of institutions, ensuring the development of scientific, scientific and technical and other activities of higher education institutions.

Conducting this study on the challenges and threats to the sustainable development of Ukraine's higher education system, given its critical state and reform policies to modernise it pursued by the country's government, will allow to outline directions for finding scientifically sound answers to a number of key questions. The research the authors have organised and conducted will allow to outline priority directions to counter the existing and more potentially dangerous threats to the sustainable development of higher education in Ukraine.

1. METHODOLOGY

Respondents are public officials between the ages of 20 and 67 who are administratively involved in the humanitarian field of education and culture. Given the gender aspect, the distribution of respondents is as follows: 53 male and 207 female (Table 1).

***Table 1**. Demographic indicators of the studied sample population*

The name of oblast	Region of Ukraine	Age			Sex, number of respondents		
		min	max	Average	M	F	Num
Volyn	West	23	67	39.8	6	25	31
Ternopil	West	23	57	40.8	4	27	31
Ivano-Frankivsk	West	21	58	38.9	4	30	34
Khmelnytskyi	West	25	60	41.6	8	20	28
Kyiv	Centre	24	67	46.4	7	18	25
Zhytomyr	Centre	20	56	33.5	4	26	30
Poltava	Centre	29	54	42.8	6	21	27
Odesa	South	22	56	38.3	5	25	30
Kharkiv	East	24	67	46.7	9	15	24
In total					53	207	260

1. Law of Ukraine No. 1556-VII "On Higher Education". (2014, July). Retrieved from http://zakon5.rada.gov.ua/laws/show/1556-18.
2. Ibidem, 2014.

The questionnaires were formulated in a closed type and provided yes and no answer options, which made it possible to clarify subjective considerations of civil servants regarding the presence or absence of threats to the sustainable development of higher education and to determine based on their expert opinion the priority of existing threatsby regional and content distribution. Each question was characterised by a specific type of threat or source of threats, namely: quality of educational services; use of advanced training techniques; effectiveness of national patriotic education; employment opportunities for graduates; professional competence of teachers; the spread of corruption in higher education institutions; reduction of the number of higher education institutions; depreciation of diplomas and status of higher education; interaction with the public; emigration of scientists, HEI teachers abroad; desire of young people to go abroad for study and employment.

The initial data of the public officials` questionnaire was processed by applying the methods of mathematical statistics: determination of the sample size, establishment of the required level of accuracy of the study with acceptable error, determination of the confidence interval, digital codification of data, frequency analysis, determination of the percentage distribution of responses by types of threats and by oblasts of Ukraine, conducting a rating on the types of threats identifying the most important for all oblasts of Ukraine by applying the index method, nonparametric correlation analysis by determining the coefficient of Kendall with the purpose of establishing the fact of presence or absence of correlation between the investigated types of threats, nonparametric variance analysis of Friedman and calculating the coefficient of Kendall's concordance with the purpose of establishing the harmonised experts` opinion on the questions under study, presence or absence of a significant difference in the judgments of public officials regarding the existing threats to sustainable development in education by type and oblast by calculating Q homogeneity statistics of two binomial samples by the formula 1 where: p is the ratio of n (trait value) to N (total sample):

$$Q = \frac{P1 - P2}{\sqrt{\frac{P1(1-P1)}{N1} + \sqrt{\frac{P2(1-P2)}{N2}}}} \quad (1)$$

according to the requirements of the scientific literature [11; 12]. The above tasks were accomplished using Statsoft Statistica 10 [13] computer mathematical and statistical complex, Microsoft Excel 2016.

2. RESULTS AND DISCUSSION

An analysis of the distribution of public officials` responses to the presence or absence of threats to the sustainable development of higher education in their areas showed that the most significant at the level of 0.1 is the majority of expert assessments of the existence of such threats in Ternopil (Q = 6.792), Ivano-Frankivsk (Q = 4.887), Poltava (Q = 3.369) oblasts. Public officials in the rest of the study areas expressed diametrically opposed views on this issue, indicating that there is no consensus on the assessment of the presence or absence of crisis phenomena in the higher education development processes of the respective oblasts. In total, out of 260 public officials interviewed, 151 are convinced that the higher education system is characterised by the presence of crisis phenomena, which destructively affect the functioning of higher education in Ukraine (Q = 5.122) (Table 2).

Table 2. *Distribution of respondents' answers regarding the presence or absence of security threats to the humanitarian sphere in higher education in their area*

The name of oblast	Confidence interval	Number of responses, percentage (%), relative frequency							Q criterion (a=0.1) K=1.64
		Yes	No	Num	% yes	% no	p (yes)	p (no)	
Volyn	±14.6	16	15	31	51.6	48.4	0.516	0.484	0.330<1.64
Ternopil	±6.5	24	7	31	77.4	22.6	0.774	0.226	6.792>1.64
Ivano-Frankivsk	±8.4	24	10	34	70.6	29.4	0.706	0.294	4.887>1.64
Khmelnytskyi	±14.7	15	13	28	53.6	46.4	0.536	0.464	0.693<1.64
Kyiv	±18.8	11	14	25	44.0	56.0	0.440	0.560	-1.100<1.64
Zhytomyr	±14.2	16	14	30	53.3	46.7	0.533	0.467	0.671<1.64
Poltava	±10.7	18	9	27	66.7	33.3	0.667	0.333	3.369>1.64
Odesa	0.0	15	15	30	50.0	50.0	0.500	0.500	0.000<1.64
Kharkiv	0.0	12	12	24	50.0	50.0	0.500	0.500	0.000<1.64
In total	±4.3	151	109	260	58.1	41.9	0.581	0.419	5.122>1.64

Note: ** – Questionnaire point: Do you think that there are security threats to the humanities sector in higher education in your area?*

Frequency analysis and percent distribution of baseline data allowed to identify which, according to experts, threats and sources of their origin are priorities in terms of the destructive impact on higher education in Ukraine, and which, given the significant majority of affirmative answers, were organised by rating [14-16]. Here are the first three positions: 1 – impossibility of employment of HEI graduates; 2 – desire of young people to go abroad to study with further employment; 3 – emigration of scientists and teaching staff abroad (Table 3).

***Table 3**. Distribution of respondents' responses on identifying priority types of threats and their sources of security for the humanitarian sphere in higher education (consolidated by Ukraine's oblasts)*

Types of threats *	Number of responses, percentage (%), relative frequency							Q criterion (a=0.1) K=1.64	Confidence interval	rank (pount-yes)
	yes	no	num	Yes, %	No, %	p (yes)	p (no)			
1	177	83	260	68.1	31.9	0.681	0.319	12.154>1.64	±3.8	5
2	161	99	260	61.9	38.1	0.619	0.381	7.687>1.64	±4.6	9
3	120	140	260	46.2	53.8	0.462	0.538	|-2.413|>1.64	±6.5	---
4	210	50	260	80.8	19.2	0.808	0.192	24.577>1.64	±2.3	1
5	176	84	260	67.7	32.3	0.677	0.323	11.857>1.64	±3.5	6
6	172	88	260	66.2	33.8	0.662	0.338	10.695>1.64	±4.1	7
7	152	108	260	58.5	41.5	0.585	0.415	5.373>1.64	±5.1	10
8	181	79	260	69.6	30.4	0.696	0.304	13.373>1.64	±3.7	4
9	164	96	260	63.1	36.9	0.631	0.369	8.485>1.64	±4.5	8
10	186	74	260	71.5	28.5	0.715	0.285	14.974>1.64	±3.5	3
11	208	52	260	80.0	20.0	0.800	0.200	23.601>1.64	±2.4	2
In total	**1907**	**953**	**2860**	----------						

***Note**: * – Hereinafter types of threats: 1 – quality of educational services; 2 – teaching methods; 3 – national-patriotic education; 4 – employment of HEI graduates; 5 – professional competence of teachers; 6 – corruption in HEIs; 7 – reduction of the HEIs number; 8 – depreciation of diplomas and status of higher education; 9 – interaction with the public; 10 – emigration of scientists; 11 – the desire of young people to go abroad to study*

Another important issue in this study is understanding the structure of the relationship between existing threats based on the evaluative judgments of public officials, which may characterise a specific causation between them, and accordingly one of which can be classified as a source of the other (Table 4).

***Table 4**. Significance of Kendall correlation coefficients between the investigated indicators of security threats to the humanitarian sphere in higher education of Ukraine (according to the survey of public officials, n = 260, v = "yes")*

Types of threats	1	2	3	4	5	6	7	8	9	10	11
1		-0.239	-0.289	0.418	-0.100	**0.516***	0.239	-0.149	-0.289	-0.239	-0.100
2	-0.239		0.069	0.214	0.418	-0.039	-0.214	0.134	-0.311	-0.179	0.418
3	-0.289	0.069		0.069	0.346	0.261	0.311	**0.516***	0.267	0.449	0.346
4	0.418	0.214	0.069		0.418	**0.810***	0.179	0.134	0.069	0.214	0.418
5	-0.100	0.418	0.346	0.418		**0.516***	0.239	0.671*	0.346	0.418	**1.000***
6	**0.516***	-0.039	0.261	**0.810***	**0.516***		**0.463***	0.241	0.261	0.386	**0.516***
7	0.239	-0.214	0.311	0.179	0.239	**0.463***		0.356	0.311	**0.571***	0.239
8	-0.149	0.134	**0.516***	0.134	**0.671***	0.241	0.356		**0.516***	**0.624***	**0.671***
9	-0.289	-0.311	0.267	0.069	0.346	0.261	0.311	**0.516***		0.449	0.346
10	-0.239	-0.179	0.449	0.214	0.418	0.386	**0.571***	**0.624***	0.449		0.418
11	-0.100	0.418	0.346	0.418	**1.000***	**0.516***	0.239	**0.671***	0.346	0.418	

***Note**: * – Kendall's correlation coefficient is significant at p <0.05*

In authors' opinion, poor quality of higher education is a leading, complex threat to the sustainable development of higher education in Ukraine [17-19]. The quality of higher education depends on many factors, but, as the results of the correlation analysis show, its correlation with the state of corruption in the HEI of Ukraine is significant (r = 0.516 p <0.05). As it has been defined above, the leading threat to the sustainable development of higher education in Ukraine is the systemic problems with graduates' employment, and which, in the opinion of experts, are closely linked to corruption in the HEIs, which in turn significantly affects the quality of higher education (r = 0.818 p <0.05). Another major threat is the desire of young people to pursue higher education in foreign educational institutions with further employment in these countries, which is functionally correlated with the professional competence of teachers of HEIs (r = 1.000 p <0.05), the depreciation of diplomas and the status of higher education. = 0.671 p <0.05), a state of corruption in the HEIs (r = 0.516 p <0.05).

Third in the rating of threats were processes related to the emigration of scientists abroad, which significantly correlated with the processes of depreciation of diplomas and status of higher education (r = 0.624 p <0.05) and the decrease in the number of higher education institutions (r = 0.571 p < 0.05). It is important to understand the reasons for the devaluation of diplomas and the status of higher education in Ukraine, and within the questions posed, they may, on the basis of established dependencies, be the subjective factors that characterise the quality of the educational process in the HEIs of Ukraine: national-patriotic upbringing of youth (r = 0.516 p <0.05); professional competence of teachers (r = 0.671 p <0.05); interaction between the state and the public (r = 0.516 p <0.05); emigration of competitive scientists abroad (r = 0.624 p <0.05).

It should also be noted that the level of corruption in the HEI is significantly related and, in authors` opinion, influences the quality of education (r = 0.516 p <0.05), which determines: the ability of graduates to continue to successfully work (r = 0.810 p <0.05); professional career and qualifications of teachers (r=0.516 p <0.05); development of a network of higher education institutions (decrease, increase of their number) (r = 0.463 p <0.05); the level of desire of young people to get higher education at home (r = 0.516 p <0.05). In addition, Friedman's analysis of variance and Kendall's coefficient of concordance of 0.654 (Table 5) gave ground for asserting a sufficient level of agreement of experts' opinions regarding the assessment of the presence or absence of certain types of threats to the sustainable development of higher education in Ukraine.

***Table 5**. Results of Friedman's analysis of variance and Kendall's concordance on the results of public officials' questionnaires*

n/n	$\bar{X}_{i(rank)}$	$\sum_{i=1}^{n} X_{i(rank)}$	$\bar{X}_i$	σ_X
Volyn	5.363636	59.00000	20.18182	4.771125
Ternopil	8.090909	89.00000	23.72727	3.797128
Ivano-Frankivsk	8.045455	88.50000	22.63636	3.981777
Khmelnytskyi	4.818182	53.00000	19.81818	3.655631
Kyiv	2.045455	22.50000	14.72727	1.793929
Zhytomyr	5.272727	58.00000	19.90909	3.448320
Poltava	5.681818	62.50000	20.36364	3.354779
Odesa	3.363636	37.00000	17.09091	3.448320
Kharkiv	2.318182	25.50000	14.90909	2.022600
Friedman analysis of variance X^2 (N = 11, df = 8) = 57.58502, p <0.00000				
Concordance coefficient = .65438. Average rank r = .61981				

Rating of oblasts based on the significant majority of affirmative responses of public officials to the combined presence of threats to the sustainable development of higher education in their oblasts makes it possible to state that in all the studied areas the threats and crisis phenomena in the higher education system are relevant (Table 6).

***Table 6**. Rating assessment of oblasts of Ukraine by the aggregate presence of threats and sources of their emergence in the humanitarian sphere in higher education of Ukraine*

The name of oblast	**Number of responses, percentage (%), relative frequency**							**Q criterion (a=0.1) K=1.64**	**Confidence interval**	**rank (pount-yes)**
	Yes	**No**	**Num**	**Yes, %**	**No, %**	**p (yes)**	**p (no)**			
Volyn	222	119	341	65.1	34.9	0.651	0.349	11.408>1.64	±3.1	6
Ternopil	261	80	341	76.5	23.5	0.765	0.235	22.612>1.64	±2.1	1
Ivano-Frankivsk	249	125	374	66.6	33.4	0.666	0.334	13.269>1.64	±2.8	4
Khmelnytskyi	218	90	308	70.8	29.2	0.708	0.292	15.632>1.64	±2.7	3
Kyiv	162	113	275	58.9	41.1	0.589	0.411	5.833>1.64	±4.0	8
Zhytomyr	219	111	330	66.4	33.6	0.664	0.336	12.264>1.64	±3.1	5
Poltava	224	73	297	75.4	24.6	0.754	0.246	19.854>1.64	±2.4	2
Odesa	188	142	330	57.0	43.0	0.570	0.430	4.979>1.64	±3.9	9
Kharkiv	164	100	264	62.1	37.9	0.621	0.379	7.885>1.64	±3.9	7
In total	**1907**	**953**	**2860**	----------						

According to civil servants, the most pronounced crisis processes are observed in Ternopil (Q=22.612), Poltava (Q=19.854), Khmelnitskyi (Q=15.632) oblasts (Fig. 1).

Assessing the studied areas from the point of view of a validly confirmed number of threats, it is advisable to state that the level of danger is high and critical in eight oblasts of Ukraine out of nine investigated (Tables 7; 8), because, according to experts, in their oblasts, there are 7 to 10 threats to the sustainable development of higher education. It should be noted that the ranking of threats in each oblast by significance indicates their different priority in terms of destructive influence on the processes of sustainable development of higher education, that is, their decomposition structure has a pronounced regional factor, but at the same time the authors emphasise that the three leading threats identified by them remain for all areas under study (Tables 7, 8).

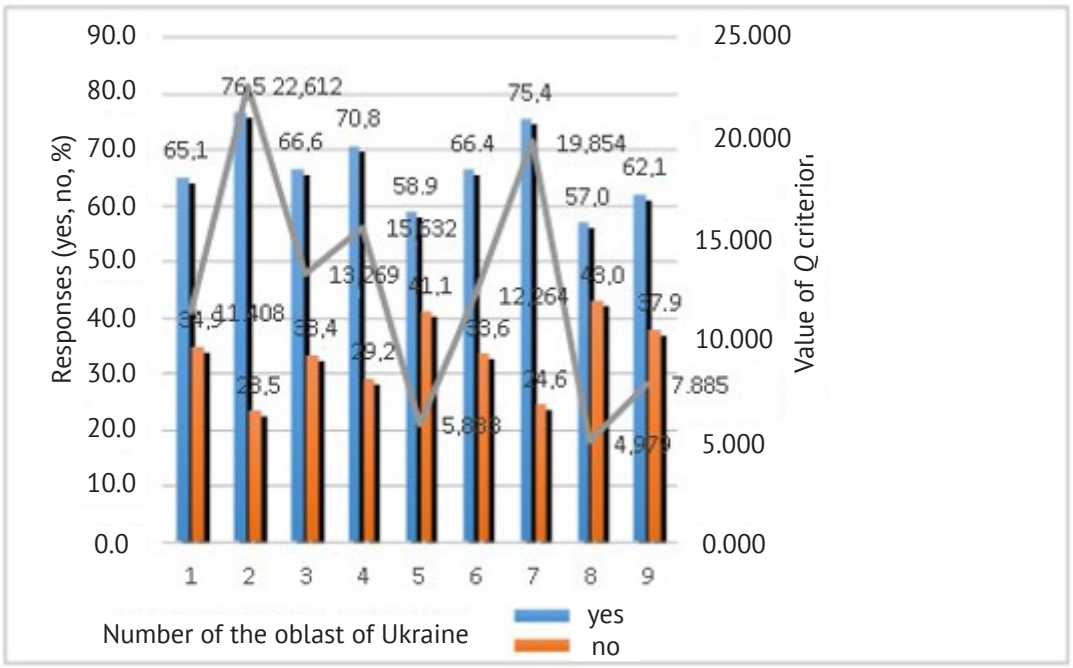

***Figure 1**. Level of threats to the humanitarian sphere in the field of higher education of Ukraine in the studied areas: 1 – Volyn obl.; 2 – Ternopil obl.; 3 – Ivano-Frankivsk obl.; 4 – Khmelnitskyi obl.; 5 – Kyiv obl.; 6 – Zhytomyr obl.; 7 – Poltava obl.; 8 – Odesa obl.; 9 – Kharkiv obl.*

***Table 7**. Distribution of existing threats and sources of their occurrence in the humanities in higher education in the studied regions of Ukraine*

The name of oblast	The region of Ukraine	Presence of threats (yes.no). Qcriterion (a=0.1). K = 1.64							
		1		2		3		4	
		Q (yes vs no)	Yes. no	Q (yes vs no)	Yes. no	Q (yes vs no)	Yes. no	Q (yes vs no)	Yes. no
Volyn	West	2.373	yes	3.111	yes	-2.373	no	11.623	yes
Ternopil	West	9.619	yes	2.373	yes	0.994	---	11.623	yes
Ivano-Frankivsk	West	4.072	yes	3.317	yes	-1.273	---	9.290	yes
Khmelnytskyi	West	3.718	yes	2.126	yes	0.000	---	8.282	yes
Kyiv	Centre	1.859	yes	1.100	---	0.364	---	2.661	yes
Zhytomyr	Centre	3.566	yes	4.412	yes	-2.052	no	7.657	yes
Poltava	Centre	9.634	yes	3.369	yes	-1.060	---	12.126	yes
Odesa	South	1.351	---	0.671	---	-2.052	no	9.174	yes
Kharkiv	East	2.302	yes	1.505	---	0.744	---	3.160	yes

The name of oblast	The region of Ukraine	5		6		7		8	
		Q (yes vs no)	Yes. no	Q (yes vs no)	Yes. no	Q (yes vs no)	Yes. no	Q (yes vs no)	Yes. no
Volyn	West	1.672	yes	4.756	yes	-0.994	---	3.899	yes
Ternopil	West	11.623	yes	9.619	yes	2.373	yes	11.623	yes
Ivano-Frankivsk	West	4.072	yes	4.072	yes	0.000	---	4.887	yes
Khmelnytskyi	West	8.282	yes	5.648	yes	0.693	---	4.625	yes
Kyiv	Centre	0.364	---	-1.100	---	2.661	yes	2.661	yes
Zhytomyr	Centre	1.351	---	4.412	yes	2.786	yes	2.786	yes
Poltava	Centre	6.429	yes	9.634	yes	5.265	yes	6.429	yes
Odesa	South	4.412	yes	-0.671	---	0.671	---	1.351	---
Kharkiv	East	0.744	---	-0.744	---	3.160	yes	3.160	yes

The name of oblast	The region of Ukrainr	9		10		11		---	
		Q (yes vs no)	Yes. no	Q (yes vs no)	Yes. no	Q (yes vs no)	Yes. no	---	---
Volyn	West	1.672	yes	6.792	yes	11.623	yes	---	---
Ternopil	West	5.708	yes	5.708	yes	11.623	yes	---	---
Ivano-Frankivsk	West	2.606	yes	5.782	yes	9.290	yes	---	---
Khmelnytskyi	West	2.893	yes	6.839	yes	16.794	yes	---	---
Kyiv	Centre	1.859	yes	2.661	yes	3.529	yes	---	---
Zhytomyr	Centre	2.786	yes	6.412	yes	7.657	yes	---	---
Poltava	Centre	4.262	yes	5.265	yes	9.634	yes	---	---
Odesa	South	0.671	---	0.671	---	2.052	yes	---	---
Kharkiv	East	2.302	yes	4.110	yes	5.197	yes	---	---

Table 8. *Rating grouping of existing topical threats to humanitarian security in higher education in the studied oblasts of Ukraine*

The name of oblast	Type of threat (ranking by priority)	Total number	The level of danger
Volyn	1. Young people leavethe country to study abroad; 2. Employment of graduates of HEIs; 3. The emigration of scientists; 4. Corruption in HEIs; 5. Degradation of diplomas and status of higher education; 6. Teaching methods; 7. Quality of educational services; 8. Public interaction; 9. Professional competence of teachers	9	High
Ternopil	1. Young people leave the country to study abroad; 2. Degradation of diplomas and status of higher education; 3. Employment of graduates of ZVO; 4. Professional competence of teachers; 5. Quality of educational services; 6. Corruption in ZVO; 7. Interaction with the public; 8. The emigration of scientists; 9. Reduction of the amount of ZVO; 10. Teaching methods	10	Critical
Ivano-Frankivsk	1. Young people leave the country to study abroad; 2. Employment of graduates of HEIs; 3. The emigration of scientists; 4. Degradation of diplomas and status of higher education; 5. Corruption in HEIs; 6. Professional competence of teachers; 7. Interaction with the public; 8. Quality of educational services; 9. Teaching methods	9	High
Khmelnytskyi	1. Young people leave the country to study abroad; 2. Employment of graduates; 3. Professional competence of teachers; 4. The emigration of scientists; 5. Corruption in HEIs; 6. Degradation of diplomas and status of higher education; 7. Interaction with the public; 8. Quality of educational services; 9. Teaching methods	9	High

Kyiv	1. Young people leave the country to study abroad; 2. The emigration of scientists; 3. Degradation of diplomas and status of higher education; 4. Reduction of the number of HEIs; 5. Graduate employment; 6. Quality of educational services; 7. Interaction with the public	7	High
Zhytomyr	1. Young people leave the country to study abroad; 2. Employment of graduates; 3. The emigration of scientists; 4. Corruption in HEIs; 5. Teaching methods; 6. Quality of educational services; 7. Reduction of the number of HEIs; 8. Degradation of diplomas and status of higher education; 9. Public interaction	9	High
Poltava	1. Employment of graduates; 2. Quality of educational services; 3. Departures of young people abroad; 4. Corruption in HEIs; 5. Professional competence of teachers; 6. Degradation of diplomas and status of higher education; 7. The emigration of scientists 8. Reduction of the number of HEIs; 9. Public interaction; 10. Teaching methods	10	Critical
Odesa	1. Employment of graduates; 2. Professional competence of teachers; 3. Departure of young people to study abroad	3	Moderate
Kharkiv	1. Young people leave the country to study abroad; 2. The emigration of scientists; 3. Reduction of the number of HEIs; 4. Degradation of diplomas and status of higher education; 5. Graduate employment; 6. Quality of educational services; 7. Interaction with the public	7	High

The conducted research convincingly proves that the higher education system of Ukraine is in crisis, and its sustainable development is complicated by the existing threats and factors that are the source of their emergence [20]. The statistics presented by the authors on the quantitative features of the destructive processes occurring in the higher education system are in full agreement with the opinion of the surveyed public officials, which gives reason to conclude that the state administration have adequately assessed the state of affairs in the field of higher education. The content of the reform efforts of the country's government to modernise the higher education system by European and world standards makes it possible to state that the creation of new governance structures on the quality of education, the extension of powers and autonomy of higher education institutions, the regulation of the content and standards of higher education, etc. do not fully comply with the requirements and standards of threats to the sustainable development of higher education in Ukraine.

It should be noted that, as part of the overall strategy for the sustainable development of the higher education system of Ukraine, these measures are necessary and require regulation. However, the implementation of these measures will not produce the expected results without significant improvement in the material, technical, financial, information, etc. provision of scientific process, creation of decent conditions for remuneration of the teaching staff, social protection of students, the implementation by the state of planned, systematic activities to guarantee the implementation of the right to employment for graduates of HEIs. The Government does not conduct such measures, the strategy of long-term development of higher education and science in view of its integration into the concept of sustainable economic development of Ukraine is a priori absent, and the provisions and tasks of higher education development, defined in a number of state documents, are declarative and formal and in authors' opinion, in the current state of affairs of the country will not be implemented for a long time.

In addition, there is a fact that there is no state strategic planning and forecasting of indicators for which it is expedient to evaluate the effectiveness of the processes of sustainable development of higher education in Ukraine, its quality, and only an attempt to translate this problem into the primary link of the higher education system – an educational institution – is observed. Another major factor in the emergence of crises in the higher education system is corruption, which, under the socio-economic conditions of today, is, first of all, extremely low salaries for teaching staff, which does not concern the heads and administration of the HEI, government policy pursued by the government, the state of the citizens' legal consciousness, is insurmountable. At present, every institution of higher education has formally proclaimed the fight against corruption in the educational and scientific process, falsification and academic plagiarism in scientific research, which is enshrined in the orders and orders of managers, but in fact these shameful phenomena are widespread.

There is also insufficient interaction between the state and non-governmental organisations to work with student youth, parents on identifying and reporting to law enforcement agencies about corruption in higher education institutions in Ukraine. Thus, it should be acknowledged that the economic crisis, the unprofessionalism of the country`sgovernment, the political involvement of certain socially active segments of the population, the total control over the country by oligarchic-criminal groups will not allow a priori to change the situation in the field of higher education in the near future.

CONCLUSIONS

The conducted research makes it possible to state with confidence that the government policy of modernisation of the higher education system of Ukraine does not fully meet the urgent needs of society and the state and is not able to fully ensure effective counteraction to the existing threats to the sustainable development of higher education. In this context, it is necessary to identify the main directions of state policy, which require a first-rate scientific and theoretical substantiation and further regulatory support. Current state policy and relevant strategic programs for the development of higher education in Ukraine should

be aligned with socio-economic realities, be based on deep scientific research, have clearly defined benchmarks and predictive indicators for evaluating the effectiveness of implementing measures for the development of higher education.

The strategy of higher education development must be based primarily on the principle of "education for human", the rule of observance and protection of the rights of the teaching staff for decent pay and social guarantees, taking into account the intellectual, spiritual requests of society and the fullest possible satisfaction of the needs of citizens and the state. Establishment of interaction with employers, research of the labour market, formation of guarantees by the state for graduates of HEIs with respect to their further employment, establishment of economically justified norms of the state order for training of specialists in the relevant specialities. The development of a new current strategy requires immediate revision – a comprehensive program for combating corruption in higher education institutions of Ukraine. First of all, it concerns measures to detect corruption among senior management of HEIs, persons holding administrative, executive positions in public administration bodies. It is necessary to conceptually rethink the basics of quality assurance of the educational and scientific process, which should reflect the procedural certainty of the procedures for assessing the quality of educational activity of young people in accordance with the content and standards of the respective specialities, the quality of staffing, creating conditions for students to conduct independent research activities, combating academic plagiarism and borrowing, compliance of higher education standards with educational qualification levels of labour market requirements.

REFERENCES

[1] Police of Ukraine ranked in 2016-2017 Global Competitiveness Index. (2017). Retrieved from edclub.com.ua/analityka/pozyciya-ukrayiny-v-reytyngu-krayin-svitu-za-indeksom-globalnoyi-konkurentospromozhnosti-2.

[2] Slobodjan, O., & Stadnyj, Je. (2017). *Ukrainian students abroad: How much and why?* Kyiv: CEDOS Analytical Center.

[3] Chuprij, L.P. (2013). Conceptual principles of the national security policy of the Ukrainian state in the humanitarian sphere. *Political Management*, 1/2, 35-41.

[4] Number of employees in volved in the implementation of research and development by category. (2020). Retrieved from http://www.ukrstat.gov.ua/operativ/operativ2017/ni/kpno_kp/kpno_kp_u.htm.

[5] During the years of independence, the number of universities in Ukraine will be reduced by one third. (2017). Retrieved from https://www.unn.com.ua/uk/news/1654377-kilkist-vnz-v-ukrayini-za-roki-nezalezhnosti-skorotilas-na-tretinu.

[6] Barro, R. (1991). Economic growth in a cross section of countries. *The Quarterly Journal of Economics*, 106(2), 363-394.

[7] Benhabib, J., & Spiegel, M.M. (1994). The role of human capital in economic development: evidence from aggregate cross-country data. *Journal of Monetary Economics*, XXVIII, 143-173.

[8] Barro, R., & Sala-i-Martin, X. (1998). *Economic growth*. Cambridge: MIT Press.

[9] Rebelo, S. (1991). Long-run policy analysis and long-run growth. *Journal of Political Economy*, 99(3), 500-521.

[10] Schultz, T.W. (1960). Capital formation by education. *Journal of Political Economy*, 68(6), 571-583.

[11] Orlov, A.I. (2002). *Ekonometrika*. Moscow: Jekzamen.

[12] Kobzar, A.I. (2006). *Applied mathematical statistics. For engineers and research workers*. Moscow: Fizmatlit.

[13] Halafjan, A.A. (2007). *STATISTICA 6. Statistical analysis of data*. Moscow: Bynom-Press.

[14] Zinchenko, A.S. (2020). Project-focused personnel management approach of higher educational institutions. *Asia Life Sciences*, 22(2), 243-256.

[15] Kucheryavaya, E.V., Witkowska, M., Kalinovskaya, V., Seleznev, P., Zubanova, S., & Fedyakin, A. (2020). The multiculturalism policy in Europe. *Online Journal Modelling the New Europe*, 32, 58-71.

[16] Galiullina, G.F., Mansurova, T.G., & Gallyamova, E.F. (2019). Qualitative assessment of the potential of innovative development of territories. *Journal of Environmental Treatment Techniques*, 7(Special Issue), 1195-1199.

[17] Kulanov, A., Tamenova, S., Amenova, K., Karshalova, A., & Tussupova, L. (2020). Investment climate and its influence on the development of entrepreneurship: Practice of the Republic of Kazakhstan. *Entrepreneurship and Sustainability Issues*, 8(2), 421-437.

[18] Chekan, O.I., Barna, Kh.V., & Lyubchenko, I.I. (2018). Types and methods of using innovative technologies in terms of modernization of educational process of higher educational establishment. *Bulletin of Mukachevo State University. Series "Pedagogy and Psychology"*, 2(8), 126-128.

[19] Molnar, T.I., & Mykulanynets, A.V. (2018). Competence approach as a direction of improvement of higher pedagogical education. *Bulletin of Mukachevo State University. Series "Pedagogy and Psychology"*, 2(8), 33-36.

[20] Zelinska, S.O. (2018). Abilities of the use of technologies of augmented reality in informational and educational environment of higher educational establishment. *Bulletin of Mukachevo State University. Series "Pedagogy and Psychology"*, 1(7), 97-100.

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ОКРЕМІ АСПЕКТИ СИСТЕМИ ДЕРЖАВНОГО УПРАВЛІННЯ ЗАКЛАДАМИ ВИЩОЇ ОСВІТИ: СВІТОВІ ПРАКТИКИ ТА УКРАЇНСЬКИЙ ВИМІР

Анотація. *Стаття присвячена питанням визначення шляхів удосконалення системи державного управління закладами освіти з метою забезпечення їх конкурентоздатності. У статті проаналізовано основні тенденції нормативно-правового забезпечення діяльності закладів вищої освіти, в результаті чого визначено базові нововведення закону України «про вищу освіту» від 2014 року, що став основою формування систем академічної мобільності, доброчесності та автономії. Було визначено основні проблеми розвитку системи вищої освіти в Україні, що полягають у недосконалих механізмах управління, неефективній системі фінансування та неповній реалізації процесів академічної автономії, визначених законодавчо. Проаналізовано основні підходи до реформування системи вищої освіти в Україні, в результаті чого було визначено роль системи державного управління в регулюванні та координації закладів вищої освіти. Дана система на сьогодні не є гнучкою, тому не може бути ефективною. Створення підходів щодо рейтингування закладів вищої освіти визначає формат перерозподілу коштів у системі державного фінансування освіти. Дана система дозволить мотивувати заклади освіти до підвищення рівня якості освітнього процесу, науково-дослідницької діяльності, академічної мобільності, партнерських зав'язків, рівня матеріально-технічного забезпечення освітнього процесу, рівня працевлаштування випускників за спеціальністю тощо. Дані показники забезпечують мотивацію до підвищення ефективності роботи закладів вищої освіти, проте не вирішують повністю проблему нестачі фінансування, зокрема на інноваційну діяльність. Низька оплата праці професорсько-викладацького складу також негативно позначається на освітньому процесі. Отже, у статті надано рекомендації щодо можливості підвищення ефективності системи державного управління закладами вищої освіти, які полягають у створенні можливостей для залучення фінансових ресурсів партнерів закладів вищої освіти, співпраці освіти та бізнесу, спрощення системи освоєння грантів та фінансової співпраці із іноземними закладами освіти*

Ключові слова: *державне управління, механізми державного управління, заклади вищої освіти, світовий досвід розвитку освіти*

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CERTAIN ASPECTS OF THE SYSTEM OF PUBLIC ADMINISTRATION OF UNIVERSITIES: WORLD PRACTICES AND THE UKRAINIAN DIMENSION

Abstract. *The article deals with determining ways to improve the system of public administration of educational institutions in order to ensure competitiveness. Were analysed the main trends in the regulatory support for the activities of higher education institutions in the article, as a result of which the basic innovations of the Law of Ukraine "On Higher Education", which became the basis for the formation of systems of academic mobility, virtue and autonomy, were defined. The main problems of development of higher education system in Ukraine were identified, consisting of imperfect management mechanisms, inefficient system of financing and incomplete implementation of processes of academic autonomy defined by law. The main approaches to reforming the higher education system in Ukraine were analysed, as a result of which the role of the public administration system in the regulation and coordination of higher education institutions were determined. Today this system is not flexible and therefore cannot be effective. The creation of approaches to the rating of higher education institutions determines the format of redistribution of funds in the system of state financing of education. This system will motivate educational institutions to improve the quality of the educational process, research activities, academic mobility, partnerships, the level of material and technical resources of the educational process, the level of employment of graduates in the specialty and the like. These indicators provide motivation to improve the performance of higher education institutions, but do not fully solve the problem of lack of funding, in particular for innovation. Low pay for faculty members also affects the educational process negatively. Thus, the article gives recommendations on the possibility of increasing the effectiveness of the system of state management of universities, which consists in creating opportunities to attract financial resources of partners of higher educational institutions, cooperation of education and business, simplification of the system of development of grants and financial cooperation with foreign educational institutions*

Keywords: *public administration, public administration mechanisms, higher education institutions, world experience, development of education*

INTRODUCTION

The Ukrainian system of higher education is in the conditions of reform and transformation, which is connected with the transition to the European educational space [1-4]. Innovative approaches to the construction of a quality system of higher education determine the priority of the state on the regulation of educational processes, as this field has high social importance [5; 6]. So, the reform of higher education is a priority of state development, because it is education that forms the future development of social and economic processes in the state. The key tasks facing the education system are the transformation of approaches to the presentation of educational material, the renewal of the physical resources in accordance with the needs of the modern market, and the improvement of the competitiveness of higher education institutions by improving the quality and standards of education, the reorientation of the system of students` training to the requirements of the modern labour market [7-9]. These tasks are the basis for the formation of the educational policy of the state in order to ensure its innovative development and competitiveness in the system of intellectual potential at the global level. So, the issue of public administration of universities has great practical relevance and requires research taking into account the development of modern economy and innovation [10].

The relevance of the topic of the study draws the attention of the authors to it. In particular, certain aspects of the system of public administration were defined in the scientific works of O.Yu. Obolensky [11], V.M. Martynenko [12] tried to systematize approaches to public administration in his work. N.M. Kolisnichenko [13] considered issues of public administration in the system of higher education in his thesis research. Certain aspects of management in education are defined in the work of I.V. Moroz [14], O.M. Shelomovska [15] formed the concept of synergistic effect from the implementation of rational mechanisms of public administration in education. However, in the context of transformational processes and reform of the higher education system, it is useful to establish new priorities for the development of the field and the mechanisms of public administration in it. The constant development of science and technology, the increasing requirements for graduates of higher education institutions, the growing competition in labour markets at the global level influence the increasing relevance of this topic and the need to continue research on public administration in the field of higher education [16-18].

According to the relevance of the research, the purpose of the article is to find ways to increase the effectiveness of public administration of universities in order to ensure quality education and competitiveness of education of Ukraine in the world economic markets. For the purpose of research, the following tasks are realized:

– to analyse the main trends in the regulatory support for the activities of higher education institutions;

– to identify the main problems of the development of the higher education system in Ukraine;

– to analyse the main approaches to reforming the higher education system in Ukraine;

– to define the role of public administration in the regulation and coordination of higher education institutions;

– to give recommendations on the possibility of increasing the efficiency of the system of public administration of higher education institutions.

1. MATERIALS AND METHODS

Under conditions of rapid development of economic systems, science and technology, modern educational field works in conditions of additional challenges and requirements to its effectiveness. Ensuring the competitiveness of higher education institutions is no longer only as knowledge and skills provided to students, an important factor is the mobility of the educational institution, its ability to integrate into the world educational and scientific space, adaptability, the possibility of transformation in accordance with the latest trends, modern forms and methods of building the educational process and many other factors [19; 20]. The European integration of Ukraine, on the one hand, has opened up additional opportunities for domestic educational institutions to establish scientific and educational ties with European and world partners, the opportunity to acquire experience and apply the best educational practices of the world, but, on the other hand, the opening of educational boundaries has increased competition and forced higher education institutions to operate at high standards, However, funding for these institutions is significantly lower from European institutions, which affects considerably the competitiveness of both individual institutions of higher education and the field as a whole. In these circumstances, it is important to find effective mechanisms for the management of higher education at the state level in order to create conditions for competitive development [21; 22].

The new provisions of Law of Ukraine No. 1556-VII "On Higher Education"[1] have become special conditions for financing educational institutions, stimulation of quality improvement, control of quality of education by impartial institutions, conditions of rating for students and higher educational institutions themselves in obtaining state funding, creation of funds for scientific research and development, provision on academic mobility, integrity and autonomy of educational institutions, democratization of management processes. The basic concepts introduced into the higher education system were academic autonomy, virtue and mobility. We will analyze these concepts, and those changes and improvements that have been determined with their use – Table 1.

1. Law of Ukraine No. 1556-VII "On Higher Education". (2014, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1556-18#Text.

***Table 1**. Basic provisions of the legislative support of the higher education system under the Law of Ukraine "On Higher Education"*

Concept	Definition	Field of application	Advantages
Academic virtue	A set of ethical principles and rules to be followed by participants in the educational process during training, teaching and carrying out scientific (creative) activities in order to ensure confidence in the results of training and/or scientific (creative) achievements	Uniqueness of research work and educational achievements of students	Ensuring the quality of the educational process, monitoring the identity of persons who are studying, protecting intellectual property rights in science and education
Academic mobility	Opportunity of participants in the educational process to study, teach, train or carry out scientific activities in another institution of higher education (scientific institution) in the territory of Ukraine or abroad	Establishment of ties and sharing of experience with the world's scientific and educational communities	Opportunity to gain leading world experience, participate in the latest trends and processes of education and scientific research
Academic freedom (autonomy)	Autonomy and independence of participants of educational process in the conduct of the pedagogical, scientific and pedagogical, scientific and/or innovative activity which is carried out on the principles of freedom of expression and creation, dissemination of knowledge and information, carrying out scientific research and use of their results, and realized taking into account the restrictions set by the law	Opportunity for higher education institutions to be independent in their own activities, strategic decision-making and management decisions collectively	Transparency and democratization of educational processes, transfer of more powers "to the ground"

Therefore, the adoption of the Law of Ukraine "On Higher Education"[1] contributed to the development of the processes of ensuring the quality control of the educational process, the performance of education, opened wide opportunities for cooperation at the global level, created new opportunities for the development of higher education institutions [13].

2. RESULTS AND DISCUSSION

However, along with positive points, these concepts have discovered and exacerbated problematic aspects of the development of the domestic higher education system, among which it is useful to identify the following:

– low competitiveness of Ukrainian higher education institutions in the international arena;

– low level of financial support for institutions of higher education, both at the expense of the state budget and due to the formation of own revenues, for example, from the conduct of contract form of training, economic contractual relations, grant projects, etc.;

– the desuetude of physical resources of higher education institutions, which affects the possibilities of quality education of students taking into account modern technological processes and the performance of economic contractual works and innovative research;

– low level of remuneration of faculty members, lack of systems of motivation of faculty members, equalization of wages without taking into account real achievements and volume of work;

– high extent of bureaucratization of educational process: the duplicating reports, statistical information which cannot be authentic owing to a number of factors and is not presented in full etc.;

– legislative and regulatory barriers to the development of higher education institutions, unreasoned tender systems, prohibitions on certain types of procurement relating to innovative development, etc.

In relation to the identification of these problems, as such, which impede the development of the field and reduce its competitiveness, it is necessary to consider the steps of transformation that the state is undertaking to improve the situation. In order to increase competition between higher education institutions and European colleagues, the following regulatory measures have been applied and are being developed and implemented at the state level:

– activation of academic mobility processes, development of new regulatory documents supporting the development of academic mobility projects in Ukraine and abroad, liberalization of departure processes, processing papers and reports on the results of academic mobility programs and projects;

1. Law of Ukraine No. 1556-VII "On Higher Education". (2014, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1556-18#Text.

– development of catalogs of financing of higher education institutions depending on the achievements of the institution of higher education, which are measured by indicators of academic mobility, research work, ratings of the educational institution in scientometric databases related to publications of researchers and their citation, indicators of employment of graduates by specialty and other assessment criteria;

– creation of new accreditation and licensing systems, which are connected with the need to ensure transparency and impartiality of these processes, the creation of a system of expert assessment and comprehensive assessment of the results of the activities of the institution of higher education in certain training programs or specialty.

So, today the system of public administration works in the direction of developing approaches to differentiation of opportunities to receive budget financing by universities. Since budgetary money is insufficient to fully finance the obligations of the Ministry of Education to universities of the state form of ownership (which are the majority in Ukraine), mechanisms for its more effective distribution are being developed under conditions of limited funding by state institutions [23; 24]. This situation leads to support for higher education institutions with high ratings and reduces the competitive advantages of those educational institutions that are inefficient. Of course, this situation will lead to the closure of less competitive higher education institutions, but fundamentally the problems of renewal and modernization of the domestic higher education system will not solve.

The author proposes to consider the possibility of creating financial autonomy for higher education institutions, which will allow them to compete in the market for the provision of educational services, freely dispose of their financial resources, directing them to development and improvement. The financial autonomy system may include the following elements:

– expansion of the powers of higher education institutions to use financial resources of their own income;

– increasing opportunities for higher education institutions to cooperate with foreign partners in joint projects and programmes;

– creation of conditions for attracting business investments in the development of science and education, formation of partnerships for the development of innovative projects, financing of research and training of future specialists;

– creation of conditions of real financial autonomy on the basis of public control of supervisory boards of educational institutions, formation of foundations of open competition in the market of educational services provision.

CONCLUSIONS

So, the result of the research was an analysis of the current situation to ensure the state management of universities. The world's leading experience shows that state regulation of the education system should be based not on administrative and managerial mechanisms, but on the creation of conditions of real competition. In particular, an important aspect of the development of the education system and its integration into the world educational space was the adoption of the Law of Ukraine "On Higher Education", which defined the foundations of academic mobility, academic virtue, autonomy. The development of academic mobility has increased the capacity of higher education institutions to partner with institutions around the world. However, this trend has contributed not only to the exchange of experience and the creation of additional opportunities, but also to the low competitive capacity of domestic higher education institutions.

Issues of academic virtue contributed to improving the effectiveness of quality control systems of the educational process, the performance of knowledge and skills gained by students during the course of education. Academic freedom was viewed in terms of increasing the ability of educational institutions to self-realize. However, in analysing existing approaches to reforming and transforming the education system, an insufficient level of academic freedom (autonomy) was identified, which inhibits the solution of the main issue of ensuring the competitiveness of educational institutions - increasing the efficiency and financing of educational institutions. Proposals have been developed to ensure the effectiveness of these processes.

REFERENCES

[1] Horban, O., Kuprii, T., Martych, R., & Panasiuk, L. (2020). Implications of total quality management in Ukrainian higher education institutions: International experience. *Naukovyi Visnyk Natsionalnoho Hirnychoho Universytetu*, 2, 126-130.

[2] Ignatova, Y.V., Ustinova, O.V., Pirverdieva, E.A.-K., Shakirova, E.V., & Zubareva, J.V. (2017). Problems of integration of national system of higher education in the world educational space. *Espacios*, 38(40), Article number 18.

[3] Andreiev, S., Kogutiuk, V., Dymenko, R., & Fediunin, S. (2019). Problems of development of interdisciplinary field of knowledge "public administration and management" in Ukraine. *International Journal of Innovative Technology and Exploring Engineering*, 8(7), 2642-2651.

[4] Rogach, O.V., Frolova, E.V., Medvedeva, N.V., Ryabova, T.M., & Kozyrev, M.S. (2017). State and public management of education: Myth or reality. *Espacios*, 38(25), Article number 15.

[5] Haase, T.W., Haddad, T., & El-Badri, N. (2018). Public administration higher education in Lebanon: An investigation into the substance of advertised courses. *Journal of Public Affairs Education*, 24(1), 43-65.

[6] Iatsyshyn, A.V., Kovach, V.O., Romanenko, Y.O., & Iatsyshyn, A.V. (2019). Cloud services application ways for preparation of future PhD. *Paper presented at the CEUR Workshop Proceedings*, 2433, 197-216.

[7] Dobina, T., Haidukevych, K., Panchenko, S., Petrova, I., & Sabadash, J. (2019). Effectiveness analysis of entrepreneurship model of development qualities of future managers. *Journal of Entrepreneurship Education*, 22(3), 14-301.
[8] Purón-Cid, G. (2017). Information technology strategy and management curricula in public administration education in Latin America. *Journal of Public Affairs Education*, 23(3), 903-924.
[9] Alazmi, M.S., & Alazmi, A.A. (2020). The role of administration and faculty in developing character education within public and private universities in Kuwait. *International Journal of Educational Management,* 34(4), 664-676.
[10] Khadzhyradieva, S., Hrechko, T., & Savkov, A. (2019). Behavioral insights in public policy: Ukrainian case. *Public Policy and Administration,* 18(1), 85-99.
[11] Obolensky, O.Yu. (2005). *Public administration and public service*. Kyiv: KNEU Publishing House.
[12] Martynenko, V.M. (2003). Public administration in the system paradigm system. *Actual Problems of Public Administration: A Collection of Scientific Papers*, 2(16), 54-57.
[13] Kolisnichenko, N.M. (2003). *Relationship between state regulation and mechanisms of self-organization in the management of higher education*. Kyiv: Ukrainian Academy of Public Administration under the President of Ukraine.
[14] Moroz, I.V. (2006). *Management and marketing of education*. Kyiv: Osvita Ukrayiny.
[15] Shelomovska, O.M. (2009). Synergetic principles of public administration of higher education. In *Public Administration and local self-government: Abstracts of the IX international scientific congress.* Kharkiv: Magistr.
[16] Shkyrta, I.M., & Lazar, V.F. (2019). Information technologies and means of their implementation in higher education institutions. *Bulletin of Mukachevo State University. Series "Pedagogy and Psychology"*, 2(10), 45-48.
[17] Fedoruts, M.V. (2019). Social and pedagogical support of formation of social competence of high school children. *Bulletin of Mukachevo State University. Series "Pedagogy and Psychology"*, 1(9), 171-175.
[18] Kostruba, A.V. (2020). Right deprivation in the legal regulation mechanism of civil property relations: Comparative analysis of international legislation. *Asia Life Sciences*, 22(2), 143-156.
[19] Stepanets, M.Yu. (2019). Structural features of the higher education system in Canada. *Bulletin of Mukachevo State University. Series "Pedagogy and Psychology"*, 1(9), 213-217.
[20] Dema, D., Dorohova, L., & Kurovska, N. (2018). Strengthening the social responsibility of the state in the process of implementing the regional financial policy. *Scientific Horizons*, 11(72), 32-38.
[21] Zakharina, O., Khodakivskii, E., & Iakobchuk, V. (2020). Explication of the concept of "public-private partnership" in public administration theory. *Scientific Horizons*, 3(88), 26-33.
[22] Tovkanets, H.V. (2020). Research activity in the development of creative potential of the modern specialist in the conditions of socialization. *Scientific Bulletin of Mukachevo State University. Series "Economy"*, 1(13), 118-122.
[23] Kostruba, A.V., & Vasylyeva, V.A. (2020). International regulation of termination of rights in the field of civil and intersubjective state relations. *Astra Salvensis*, 1, 131-153.
[24] Slobodianyk, Yu.B., & Halas, O.M. (2020). Problems and prospects for the development of the internal state audit in Ukraine. *Scientific Bulletin of Mukachevo State University. Series "Economy",* 1(13), 212-221.

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ОНОВЛЕННЯ ЦИВІЛЬНОГО КОДЕКСУ УКРАЇНИ ЯК ЗАПОРУКА ЕФЕКТИВНОЇ ВЗАЄМОДІЇ ДЕРЖАВИ ТА СУСПІЛЬСТВА

Анотація. *У статті здійснено аналіз чинних положень ЦК України та судової практики, вивчено міжнародні акти цивільного законодавства. Ураховуючи потребу в оновленні цивільного законодавства до законодавства країн Європейського Союзу, а також поступового наближення до рекомендацій Європейського Союзу в майновій сфері зроблено висновок про те, що статтю 1 ЦК України слід модернізувати шляхом перенесення словосполучення «цивільні відносини» у кінець цього речення, оскільки цивільними є такі відносини, що відповідають усім критеріям, визначеним у частині першій цієї статті, тобто засновані на юридичній рівності, вільному волевиявленні та майновій самостійності їх учасників. На підставі аналізу положень ЦК України пропонується таку ознаку як «майнова самостійність», що має бути притаманна усім цивільним відносинам, – замінити на більш влучне словосполучення – «майнова відокремленість». Вважається, що ЦК України має бути розрахований як на відносини, у яких їх учасники ставлять за мету отримання прибутку, так і на відносини, учасники яких такої мети не мають. В роботі доведена необхідність відновлення статусу ЦК України як стрижневого акта для усіх суспільних відносин з приватноправовим змістом. З метою втілення ідеї про ЦК України, як стрижневий для приватного права акт, звернено увагу на необхідності переглянути механізм забезпечення статусу ЦК України як основного акта цивільного законодавства України. Адже, механізм, закладений в частині 2 статті 4 ЦК України, виявився недієвим: у текст ЦК України вносилися зміни будь-якими законами без врахування специфіки механізму цивільно-правового регулювання таких відносин. Вважається, що на етапі оновлення цивільного законодавства слід повернутися до закріплення в ЦК України переліку організаційно-правових форм, у яких можуть створюватися юридичні особи і у такий спосіб уніфікувати українське законодавство з європейськими підходами до регулювання інституту юридичної особи, а також низки договорів, які у 2003 році були примусово виключені з ЦК України з метою формування та наповнення тексту ГК України*

Ключові слова: *оновлення цивільного законодавства, взаємодія держави і суспільства, приватне право, захист прав, баланс інтересів*

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UPDATING THE CIVIL CODE OF UKRAINE AS A GUARANTEE OF EFFECTIVE INTERACTION BETWEEN THE STATE AND SOCIETY

Abstract. *The study analyses the current provisions of the Civil Code of Ukraine and judicial practice, examines international acts of civil legislation. Considering the need to update civil legislation to the legislation of the European Union countries, as well as gradually approaching the recommendations of the European Union in the property sphere, it is concluded that Article 1 of the Civil Code of Ukraine should be modernised by moving the phrase "civil relations" to the end of this sentence, since civil relations are such relations that meet all the criteria defined in Part 1 of this article, that is, relations based on legal equality, free expression of will and property independence of their participants. Based on the analysis of the provisions of the Civil Code of Ukraine, it is proposed to replace such a feature as "property autonomy", which should be inherent in all civil relations, with a more accurate phrase – "property insulation". It is considered that the Civil Code of Ukraine should be designed both for relations in which their participants set the goal of making a profit, and for relations in which participants do not pursue such a goal. The study proves the need to restore the status of the Civil Code of Ukraine as a core act for all public relations with private law content. To implement the idea of the Civil Code of Ukraine as a core act for private law, attention is drawn to the need to review the mechanism for ensuring the status of the Civil Code of Ukraine as the main act of civil legislation of Ukraine. After all, the mechanism laid down in Part 2 Article 4 of the Civil Code of Ukraine turned out to be ineffective: the text of the Civil Code of Ukraine was amended by any laws without taking into account the specific features of the mechanism of civil law regulation of such relations. It is considered that at the stage of updating the civil legislation, it is necessary to return to consolidating the list of legal forms for creation of legal entities in the Civil Code of Ukraine and thus harmonise Ukrainian legislation with European approaches to regulating the institution of a legal entity, as well as a number of contracts that were forcibly excluded from the Civil Code of Ukraine in 2003 to develop and fill in the text of the Civil Code of Ukraine*

Keywords: *updating of civil legislation, interaction between the state and society, private law, protection of rights, balance of interests*

INTRODUCTION

The social purpose and social value of law lies in the fact that it is designed to govern relations in society between individuals and certain social groups. Evidently, the role and significance of the adoption and implementation of the Civil Code of Ukraine[1] in 2003 should not be underestimated. This Code replaced the outdated Civil Code of the Ukrainian SSR of 1963[2], designed to be applied to social relations that existed under radically different socio-economic conditions, a different political formation. The Civil Code of Ukraine was originally designed to regulate economic relations in the conditions of economic relations built on a free market as opposed to a planned economy.

The Civil Code of Ukraine, in contrast to the Civil Code of the Ukrainian SSR, became the code of private law, which focused its regulatory influence on a human, a private person, with his or her interests, aspirations, desires. In a functioning civil society, the Civil Code of Ukraine has taken a leading place as the most important legal act that ensures and guarantees the full existence of a private person in the Ukrainian state. For undemocratic political regimes, criminal legislation always remains the core, which defines the limits of permissible freedom (unfreedom), the existence and free use of human rights and freedoms; for such a state, there are no insurmountable boundaries in the sphere of a person's private existence, just as there is nothing private in the life of an individual for which any aspirations are not recognised outside the interests of the state and such a totalitarian society.

As history demonstrates, only in an open society dominated by liberal values can human thought develop freely, with conditions appropriate for fruitful creativity and the birth of innovation. It was open societies that demonstrated their advantages over closed non-free societies, which in the long run have always lost out to

1. Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text.
2. Civil Code of the Ukrainian SSR. (1963, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1540-06#Text.

democratic political regimes. Accordingly, the main task of the Civil Code is to create conditions for the development of a private person, his or her creativity, and the flourishing of their abilities and talents.

The Civil Code of Ukraine, adopted on January 16, 2003 (hereinafter referred to as "the CC of Ukraine"), has become a decisive step that determined the line of development of the entire legal system of Ukraine towards civilised development [1]. The CC of Ukraine has radically changed the paradigm of legal regulation of civil relations. If, prior to its entry into force, the main (if not the only) model of legal regulation of such relations was their external regulation by the state with the admission of only dosed so-called "autonomous" regulation carried out by participants in such relations, then with the entry into force of the CC of Ukraine, the emphasis was placed differently. The interpretation of the Part 2 Article 6 of the CC of Ukraine suggests that the rules of this Code contain precisely dispositive provisions, if the opposite does not follow from the content of the act of civil legislation, as well as if the imperative nature of a certain provision follows from its content or from the essence of relations between the parties [2]. Attracting contractual means to regulate civil relations opened up wide opportunities for improving civil law and general boost in the efficiency of the mechanism of legal regulation of civil relations, increased the role of the contract in civil law in the status of a regulator of civil relations, expanded the freedom of contract, included initiative as a driving force for the development of an open society [3].

17 years of functioning and application of the first and main act of codification of Ukrainian civil legislation clearly demonstrated the progressiveness of the CC of Ukraine; on the other hand, the experience of its application allowed identifying certain shortcomings, weaknesses, and gaps in the introduced mechanism of legal regulation of these relations. The global financial crisis that has engulfed Ukraine, the permanent economic crisis in the state, excessive regulation of certain public relations, numerous examples of maintaining in the legislation the possibility of unjustified state interference in private relations set the Ukrainian legislator an urgent task of preparing and conducting another systematic change in civil legislation, the state of which indicates that currently it fails to meet the modern realities and needs [4]. Ukraine also needs to join the processes of unification of private law that have been going on across the European continent for more than 20 years and have already ended with the creation of numerous new model laws in the field of private law that meet the requirements for the development of modern economies.

In Ukrainian legal science, such a process of updating the Civil Code of Ukraine has already received an apt name – recodification of civil legislation, which makes provision for its modernisation, harmonisation with European achievements in the science of private law, so that its condition meets the requirements and needs of today. The updated code should become an engine for the development of Ukraine. It is worth considering that for almost two decades since its adoption, numerous amendments and modifications have been made to the Code, which quite often did not take into account either the content or spirit of this act, or the principles of its construction, which was repeatedly proved both in purely scientific and in research to practice studies [5].

It is precisely the lawmakers' awareness of the need for a comprehensive doctrinal approach to amending the Civil Code of Ukraine that should be welcomed instead of making "patchwork" changes, since a long-awaited discussion has commenced at the official level, resulting in the creation of a draft concept for updating the Civil Code of Ukraine at the first stage [6].

The purpose of this study is to analyse individual changes in civil legislation in the development of the provisions proposed by the authors of this draft Concept.

1. MATERIALS AND METHODS

The methodology of the study is determined by its purpose, which is to analyse the structural parts, namely sections, articles, paragraphs, clauses of the Civil Code of Ukraine for the subject of legal regulation of civil relations, their emergence, change, and termination, ordering, in accordance with the ideal model that the subject of legal regulation consolidates in the contract or in acts of civil legislation. The statutory legal basis for this study included codified regulations governing public relations, namely the CC of Ukraine; the Law of Ukraine "On Mortgage"; the Law of Ukraine "On the Procedure for Compensation of Damage Caused to a Citizen by Illegal Actions of Bodies Engaged in Intelligence Activities, Pre-Trial Investigation Bodies, Prosecutor's Office and Court", etc.

Comparative legal, philosophical, dialectical, general scientific, special scientific, and Aristotelian research methods were used in this study. The Aristotelian method, namely analysis, synthesis, abstraction, generalisation, analogy, induction and deduction, was used to study certain provisions of the CC of Ukraine, as well as provisions of international acts of civil legislation. The leading tool of the Aristotelian method is the analysis of the current civil legislation, which was used to predict the effectiveness of interaction between the state and civil society. In particular, this refers to the fact that the extension of the rules on liability for non-performance of a monetary obligation to any type of delay of the debtor was a reaction of society, the economy and the legal community to the crisis of total non-payments on obligations and the lack of an effective mechanism for executing court decisions. It is noted that the rule of Article 625 of the CC of Ukraine is currently applied as a provision on the astreinte. Similarly, abuse of the right to claim and other procedural rights was investigated.

The dialectical method was used for the purpose of analytical research of doctrinal approaches to the definition of the term "civil relations", as well as to cover the main properties of the above term. With the help of abstraction, the updating of civil legislation as a prerequisite for ensuring effective interaction between the state and civil society was investigated in terms of applicability and legitimisation in a particular regulation. The method of abstraction made it possible to formulate the conclusions of this scientific research, and the method of deduction and

induction – to carry out an appropriate search for initial ideas (proposals for statutory changes and corresponding doctrinal provisions). Induction and deduction were used to find the necessary material for generalising and abstracting the statutory approach to updating (recodifying) the civil legislation.

The legal technical and dogmatic methods were used to study and interpret the provisions of the current CC of Ukraine, as well as to implement its systematisation upon updating its provisions. The comparative law method was used to compare the principles, definitions and standard rules of European private law (DCFR) and the CC of Ukraine. The historical method facilitated the study of the term "civil relations" in retrospect and establish the purpose of civil legislation. Axiological and institutional approaches made it possible to consider such basic categories of civil law as property independence, good faith, abuse of law, etc. in combination and unity, which serve as the basis for building civil legal relations. The use of Aristotelian, system-structural methods allowed concluding that Ukraine should strive to overcome the total legal nihilism that has reigned in all spheres of social existence in Ukraine. The method of system analysis provided a generalisation of accumulated theoretical knowledge on updating civil legislation. To generalise and develop a holistic understanding of updating the civil legislation of Ukraine, the study used a systematic approach, interpretation and construction of a theoretical model of the provisions of the Civil Code of Ukraine. A systematic approach made it possible to outline the problematic aspects of law enforcement and offer the author's vision regarding their solution.

All scientific research methods were used in interrelation and interdependence, which contributed to ensuring the comprehensiveness, objectivity, and completeness of the study. The chosen aspect made it possible to lay the foundation for further lines of scientific development of theoretical ideas on updating (recodification) the civil legislation of Ukraine.

2. RESULTS AND DISCUSSION

Admittedly, since the declaration of its independence, Ukraine has been creating the legislation of an independent country, which has chosen the irreversible path of building a democratic state governed by the rule of law; there is not only a search for effective mechanisms for the legal regulation of certain social relations, but also a search for the ideal model according to which the legislator wants to regulate these relations. General comments on the process of updating the Civil Code of Ukraine. The study identified the general shortcomings of the current state of civil legislation.

2.1. Analysis of general shortcomings and lines for improving the civil legislation of Ukraine

Insufficiently detailed legal regulation of certain public relations may not always indicate a shortcoming of a legislative act. If the mechanism of legal regulation of these relations works effectively, then there is no need for their more detailed regulation. If the content of a legal provision is understood unambiguously by bona fide participants in civil relations, there is also no need to supplement its content. However, if the provision allows for an ambiguous interpretation (with a conscientious attitude towards determining its actual content), to abuse of the rights and opportunities that it provides, which has found manifestation in ambiguous or inconsistent judicial practice, there is an urgent need to eliminate the incompleteness of such a legal provision. The imperfection of the introduced mechanism of legal regulation of certain public relations indicates that the rule of law is incapable of leading public relations to the ideal state that the legislator had in mind during its introduction and to which its repeated and uniform application should have led [7]. The legislator must justify the need to introduce each new provision with arguments on the need to achieve those goals that do not contradict the considerations of the free functioning of civil transactions, for example, considerations of ensuring the interests of the weaker party, or the need to ensure stability in a particular area of economic relations.

Thus, the experience of the financial crisis of 2008-2009 necessitated the introduction of a legislative restriction on the possibility of obtaining loans in foreign currency by individuals-residents of Ukraine; in addition, credit institutions have been additionally obliged to give preliminary clarification of the conditions for providing credit funds, the interests of the weaker party in credit relations – the borrower – were also considered to a certain extent, etc. The above has forced to limit the possibility for credit institutions to introduce unfair, sometimes enslaving conditions for consumers in loan agreements, which indicate a considerable imbalance in the rights and obligations of its parties. The public movement, directed against the imposition of all currency risks in connection with the devaluation of the national currency of Ukraine to foreign currencies exclusively on consumers of banking services – individuals, also forced the legislator to seek ways to change the existing mechanism of legal regulation in order to factor in the interests of this part of society – as a weak party in the described relations [8].

Therewith, one should take note here: the right of the legislator to regulate certain public, private law relations in their content is not arbitrary, but must be conditioned by a certain urgent public need pending to be satisfied. The introduction of legislative regulation of certain private relations is always an intervention of the state in these relations, it is a manifestation of state coercion. In itself, the introduction of regulation of public relations cannot be the purpose of such actions on the part of the state: the task of legislative regulation of private relations is to establish acceptable and understandable boundaries, within which free initiative should have a certain freedom for its implementation.

Only when the model of real social relations that develop in the practice of applying certain legislative prescriptions does not correspond to the ideas of justice and the public good, and there is a certain social or economic tension in society, there is an urgent need for state intervention in such relations in order to change them in accordance with the desired ideal model of the existence

of such relations. For example, the use of cars in Ukraine that are not cleared in accordance with the established procedure, imported into the country in circumvention of the introduced customs rules, leads to many unsolvable problems related to determining the person responsible for the negative consequences of operating such a car, etc.

The law should be designed to be applied repeatedly over a long period of time, and should be sufficiently abstract in its content to be effective even in case of subsequent changes in the sphere of regulated economic relations. The law should be stable and designed for the sustainable development of society and the economy; it should be predictable for the market, making provision for the evolutionary, not revolutionary development of the country. The law should prevent attempts to use it in bad faith, making it impossible to abuse the stipulated rights, as well as prevent actions committed solely for the purpose of inflicting harm on another person. Therefore, the civil law should also perform a certain predictive function: not only to eliminate existing legislative shortcomings, but also to strive to prevent the occurrence of such shortcomings in the introduced mechanism of legal regulation of civil relations in the foreseeable future. This obliges the legislator to identify and take into account trends in the development of the economy, society, and the state, directing them towards a certain desired model of a just state where civil society develops freely.

Therewith, the authors of this study are convinced that not all the provisions of the CC of Ukraine require mandatory changes. Thus, it is proposed to be extremely careful about the changes to Section I "Main Provisions" of Book 1 of the CC of Ukraine. In particular, in Article 1 of the CC of Ukraine, the phrase "civil relations" should be moved to the end of this sentence, since civil relations are those relations that meet all the criteria defined in Part 1 of said article. Such public relations should be based on legal equality, free expression of will and property independence of their participants. Otherwise, there is a deceptive interpretation of the content of this definition, that any personal non-property and property relations are civil. In reality, this is not the case. It is proposed to replace such a feature as "property autonomy", which should be inherent in all civil relations, with a more accurate phrase – "property insulation". Quite often, in business structures, one private legal entity is not property-independent from another person. Thus, according to its statutory documents, a person may bear subsidiary liability for another person, or otherwise be involved in the relationship of liability for its debts. That is, the sign of property independence is not inherent in all participants in civil relations; therefore, the phrase "property independence" as a sign of all civil relations is not sufficiently correct.

However, the sign of each participant in civil relations is exclusively the property insulation of one person from another, since the appurtenance of certain rights and property to a certain person can always be objectively determined with varying accuracy. All participants in civil relations are exercise property insulation from each other, even in the case when one person is the owner of certain property, and the other is merely its user.

Evidently, over all the years of operation of the Civil Code of Ukraine, the Ukrainian legislator has created a considerable array of legislative acts in the field of regulating civil relations. Such rules turned out to be included in numerous legislative acts with their unique structure, logic, and terminology, which sometimes differ quite substantially from the ideas and solutions embodied in the CC of Ukraine. It is necessary to restore the status of the Civil Code of Ukraine as a core act for all public relations with private law content. The CC of Ukraine is the basis for the construction and functioning of private law as a system of legislation. The consistency of provisions and rules determines their interaction and correlation in terms of strength and scope of application. The authors of this study consider it appropriate to supplement the content of the CC of Ukraine with the general provisions of special laws on land lease, consumer rights protection, from the content of the provisions of the Housing Code of the Ukrainian SSR[1] – provisions on the housing rental agreement, from other special laws – rules on consumer lending, acquisition of rights to objects of unfinished construction, including housing constructions, etc.; admittedly, this should apply to rules of a private law nature.

To implement the idea of the Civil Code of Ukraine as a core act for private law, it is necessary to review the mechanism for ensuring the status of the Civil Code of Ukraine as the main act of civil legislation of Ukraine. Evidently, the mechanism laid down in Part 2 Article 4 of the Civil Code of Ukraine turned out to be ineffective: the text of the Civil Code of Ukraine was amended by any laws without taking into account the specific features of the mechanism of civil law regulation of such relations. It may be necessary to implement the idea of dividing laws into ordinary and constitutional ones, in order to refer codes as the main acts of various branches of legislation to constitutional laws. However, without appropriate amendments to the Constitution, such an idea is impossible to implement.

An obvious disadvantage of the current civil legislation is the lack of general provisions prohibiting discrimination. In developed democracies, special attention is paid to the implementation of the prohibition of discrimination in all its manifestations at the legislative level. The practice of the ECHR proves that both Ukrainian legislation and the practice of its application do not meet the criteria for prohibiting discrimination. However, the issue of banning all forms of discrimination remains outside the scope of the CC of Ukraine. Evidently, following the Constitution, the CC of Ukraine, as a code of civil society, should define the general principles of anti-discriminatory legislation. Respect for the individual and his or her personality should be based on the equality of all persons before the law and in rights, in the state, and in society.

The current CC of Ukraine does not take into account the specific features of the status of a consumer and an entrepreneur (merchant, i.e., a professional participant

1. Housing Code of the Ukrainian SSR. (1983, June). Retrieved from https://zakon.rada.gov.ua/laws/show/5464-10#Text.

in relations), etc. The CC of Ukraine should be designed both for relations in which their participants set the goal of making a profit, and for relations in which participants do not pursue such a goal. Given that the current model of building Ukrainian legislation is not described by the idea of dualism of private law, the Civil Code of Ukraine should certainly contain the provisions of trade law, which are placed in the Trade Code in countries where the concept of dualism of private law is realised (Germany, France, etc.). Dualism of private law is not a modern trend in constructing a system of civil legislation; thus, relatively modern codifications of civil legislation – the civil codes of the Netherlands, the province of Quebec, the Czech Republic, the updated civil code of the Republic of Moldova and others have incorporated special provisions of trade law [9]. The modern example of non-state systematisation of civil law – DCFR 0 does not make provision for the implementation of the dualism of private law [10]. Accordingly, the special status of a merchant (entrepreneur) and a consumer should be clearly indicated in the general provisions of the CC of Ukraine.

The basis of modern legal systems of European countries is Roman private law [11], since all of them have undergone its reception to a certain degree. Roman law underlies modern law, it is a part of the current legal doctrine and legal culture, and the education of a future lawyer is impossible without mastering the legal heritage of Ancient Rome. This means that one should not worry about and deny the use of Latin both in the legislation and in the practice of its use, just as Latin is acceptable in medicine. The use of Latin in the text of the law is capable of eliminating ambiguities in wording, as well as double interpretation. A classic example: the title of Chapter 32 "The Right to Use the Property of Another" used in the Civil Code of Ukraine misleads the law enforcement officer, giving the impression that the rules contained in this subsection are subject to application to all cases of the right to use the property of another (for example, on lease rights), which is erroneous. Only a systematic and doctrinal interpretation of the content of the legal provisions of this chapter gives grounds for concluding that they are designed exclusively for application to easement relations. Accordingly, changing the title of this chapter to "Servitudes" (easements) would make it easier to understand its text, eliminate ambiguities, and eliminate double interpretation.

Therefore, to ensure that the text of the law is concise and corresponds to European terminological traditions, a wider use of Latin legal vocabulary is proposed, such as: gestor – principal, servitude (easement) – servitor (easement holder), superficiality – superficiary, emphyteusis – emphyteuta, etc. Unjustified in general for civil law is the application of such a feature as "economic", applied to any civil law definitions and legal categories. This feature does not carry any semantic load in private law and is superfluous. In particular, it is also unjustified to refer to a company, which is usually understood as an organisation created for the commercial purpose of making a profit, and only a simple company, as an exception to the above rule, does not make provision for the creation of a legal entity as a legal form.

2.2. Amendments to the Civil Code of Ukraine caused by the abolition of the Economic Code of Ukraine

As indicated in the draft Concept, a systematic update of the Book One, as well as the CC of Ukraine in general, is possible only if the Economic Code of Ukraine is cancelled. The latter does not correspond to the parameters of acts regulating business relations, which by their nature are primarily private law [5]. Therefore, it is quite reasonable to introduce amendments to the CC of Ukraine, which are conditioned by the abolition of the Economic Code of Ukraine (hereinafter referred to as "the EC of Ukraine"). As for fundamental changes, these are changes in three areas of legal regulation: legal entities, ownership of property by public legal entities and institutions, as well as certain types of contracts. Legal entities are subjects of relations, so the construction "legal entity" meaks provision for the insulation of property, which can occur together with or without the association of persons (Article 81 of the CC of Ukraine).

Initially, at the stage of preparing the draft, the CC of Ukraine did not make provision for the possibility of the existence of other legal forms, with the exception of those established in the CC of Ukraine. However, to achieve the so-called "legislative compromise", the list of legal forms of legal entities in Article 83 of the Civil Code of Ukraine was defined as open. Therefore, at the stage of updating civil legislation, it is quite logical to return to consolidating the list of legal forms of legal entities in the Civil Code of Ukraine and thus harmonise Ukrainian legislation with European approaches to regulating the institution of a legal entity. Given the rather large number of legal entities that currently operate in legal forms not stipulated by the CC of Ukraine – this refers to enterprises as subjects of law (state and municipal enterprises, so-called "collective property enterprises", private enterprises, enterprises with foreign investments, etc.) and their associations (corporations, consortia, concerns, etc.) – it is advisable to establish a certain transition period to bring the legal forms of legal entities into compliance with the requirements of the CC of Ukraine.

Property transferred to public legal entities and institutions. The EC of Ukraine regulates property relations in a form that was inherent in the administrative-command economy, when property was transferred to a legal entity not in ownership, but in titles that were its peculiar analogue, but with appropriate restrictions. The subject of law, to whom the property was granted on the right of economic management or on the right of operational management, was deprived of the right to freely dispose of it or respond to such property under its obligations. In accordance with the international obligations assumed by Ukraine, national legal regulation should comply with the established international approaches not only to the legal forms of legal entities, but also to property relations. Therefore, the authors of this study believe that it is advisable to extend general approaches to the use of other people's property to

the use of property by public legal entities and institutions – first of all, this refers to renting and managing property. The Institute of property management should perform the functions of ensuring the transfer of property by the owner (in particular, the state or the relevant municipality) to legal entities under public law and institutions in order to perform their respective functions [12].

A completely logical solution is to return a number of contracts that were forcibly excluded from the CC of Ukraine in 2003 to the field of civil law regulation in order to form and fill in the text of the EC of Ukraine. This refers, first of all, to supply contracts, barter, leases, certain provisions on mediation, transportation, contract agreements, contracts in the field of banking, etc. [13].

2.3. Proposals for Section I "Main Provisions" of the draft concept for updating civil legislation

Supporting the ideas laid down in the draft Concept of updating the Civil Code of Ukraine, it is advisable to develop individual proposals at the stage of preparing the draft law in a particular way. Thus, for the development of paragraph 1.4. of the draft Concept, it should be noted that the urgent abolition of the EC of Ukraine necessitates the exclusion of provisions on the subsidiary application of the EC of Ukraine to the regulation of any relations in the field of economic management from Article 9 of the CC of Ukraine. Thus, all relations that were previously covered by an unknown "sphere of management" are included in the sphere of regulation of the CC of Ukraine. Such relations should be governed by the CC of Ukraine as provisions of direct action, and not subsidiarily, taking into account some of their features. Certain features of legal regulation should be provided for relations involving merchants (entrepreneurs), that is, individuals whose main purpose of activity is to make a profit, both among themselves and with consumers.

It is also necessary to agree with the idea of improving the provisions on compensation for non-pecuniary damage (to 1.7. of the Concept). In this study, it is proposed to limit the scope of possible application of such a method of protection as compensation for non-pecuniary damage, making this remedy not common to all civil relations, but special. During its functioning in the Ukrainian legal system, this institution has acquired an interbranch character, its legal nature and scope of its application have turned out to be completely unclear and contradictory at the current stage of legal development. According to the Law of Ukraine "On the Procedure for Compensation of Damage Caused to a Citizen by Illegal Actions of Bodies Engaged in Intelligence Activities, Pre-Trial Investigation Bodies, Prosecutor's Office and Court"[1] – moral damage is actually similar to the tax liability of the state, which depends on the period of stay of an individual under investigation and court; to determine its minimum size, it is not actually necessary to find out the nature and degree of moral suffering of a person, etc. In labour relations – causing non-pecuniary damage to an employee in case of violation of his or her labour rights is virtually presumed. In contractual civil relations, the use of such a method of protection as universal is quite common, which is also unjustified. The current version of Part 1 Article 23 of the Civil Code of Ukraine stipulates that a person has the right to compensation for moral damage caused as a result of violation of any of his or her rights.

Supporting the idea of objectifying the general principles of its compensation [14], it is necessary to limit the scope of application of compensation for non-pecuniary damage and when preparing relevant amendments to the CC of Ukraine, it is proposed to stipulate that the right to its compensation would arise only in case of a violation of not any civil rights of a person, but only non-property rights of an individual. Accordingly, in case of violation of any other civil rights, as a general rule, the right to compensation for non-pecuniary damage will not arise. An exception should be made for relations involving consumers, in labour relations for the affected employee, in tort relations – in case of harm to the health of the injured person and in case of his or her death (with the mandatory definition of an exclusive list of persons who have the right to apply for its compensation) [15]. Compensation in cash for non-property damage should not replace the obligation to fully compensate for property damage, supplement it with the hidden purpose of compensation for those losses that are difficult to prove, etc.

Developing the idea of the concept of the need to take into account the changes that have occurred in the procedural legislation regarding the right of the court to determine, at the request of the plaintiff, a method of protection that is effective, but not stipulated either by law or contract, the authors of this study consider it appropriate to introduce a new procedure for protecting the jurisdictional nature of civil rights in the legislation. Thus, foreclosure on the subject of a mortgage based on a mortgage clause does not occur in accordance with a court or a notarised procedure, providing protection of the rights and interests of the mortgagee. Chapter 3 of the Book One of the CC of Ukraine stipulates that civil rights and interests shall be subject to protection in one of the following protection procedures: judicial, notarial, administrative, and in self-defence [16].

The Registrar of Real Rights does not act as a body of state or local self-government (that is, as a subject of power), but as a result of the registration action, a certain right is actually recognised, in particular, for the mortgagee on the subject of mortgage. That is, the method of protection stipulated in Article 16 of the CC of Ukraine is applied in accordance with the procedure established by a mortgage agreement with a mortgage reservation, or an agreement on foreclosure on the mortgage subject in accordance with the Law of Ukraine "On Mortgage"[2].

1. Law of Ukraine 266/94-VR "On the Procedure for Compensation of Damage Caused to a Citizen by Illegal Actions of Bodies Engaged in Intelligence Activities, Pre-Trial Investigation Bodies, Prosecutor's Office and Court". (1994, December). Retrieved from https://zakon.rada.gov.ua/laws/show/266/94-%D0%B2%D1%80#Text.

2. Law of Ukraine "On Mortgages". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/898-15#Text.

The general provisions on the application of such an unnamed procedure for the protection of civil rights and interests should also be reflected in the relevant chapter of the CC of Ukraine [17].

CONCLUSIONS

Determining the urgent directions for improving civil legislation, its updating should provide the most unambiguous answers to existing requests from law enforcement practice, which are absent from the current legislation and which the relevant judicial practice is forced to seek. Thus, the issue of fair regulation of relations in case of a refusal of a contract participant to perform its obligations in the currency stipulated by the parties in the text of the agreement remains quite relevant. The next pressing issue is the following: the extension of the rules on liability for non-performance of a monetary obligation to any type of delay of the debtor was a reaction of society, the economy and the legal community to the crisis of total non-payments on obligations and the lack of an effective mechanism for executing court decisions. In fact, the rule of Article 625 of the CC of Ukraine is currently applied as a provision on the astreinte. Obviously, the court does not have the right to refuse to grant judicial protection when human rights fairly require it. However, with such a spreading interpretation, the court eliminates the existing gap in the current legislation, which the legislator is incapable of filling with legislative regulation in a timely manner.

Evasion from performing credit obligations has become a massive reaction of individuals to the lack of an effective and transparent mechanism for bankruptcy of an individual. As a protection against usury on the part of individual credit institutions, borrowers, for their part, resort to abuse of their rights, including abuse of the right to claim, and other procedural rights. Ukraine should strive to overcome the total legal nihilism that has reigned in all spheres of social life in Ukraine.

Therefore, it should be recognised that it is high time to eliminate these contradictory and often mutually exclusive approaches, to find a new balance of interests of all interested parties to ensure the prosperity of Ukraine and its citizens.

REFERENCES

[1] Ukrainian Law. (1997). No. 1(6). 342 p.

[2] Hryniak, A., Kot, O., & Pleniuk, M. (2018). Regulation mechanism of private legal contracting relations in civil law. *Journal of Legal, Ethical and Regulatory Issues*, 21(Special Issue 1).

[3] Hryniak, A.B., Kot, O.O., & Pleniuk, M.D. (2020). *Updating of contractual regulation of private law relationships.* Kyiv: NDI of private law and entrepreneurship named by F.G. Burchak.

[4] Kuznetsova, N.S. (2020). Civil law of Ukraine on the way to renewal. In *Civil law of Ukraine: New challenges and prospects for development: Materials of the XVIII International. scientific-practical conf., dedicated. 98th anniversary of his birth. Dr. Jurid. Science, Prof., Corresponding Member V.P. Maslov Academy of Sciences of the USSR* (pp. 7-10). Kharkiv: Pravo.

[5] Kuznetsova, N.S. (2017). Invalidity of transactions in the civil law of Ukraine. In M.K. Suleimenov (Ed.), Invalid transactions in civil law: Materials of the international scientific-practical conference. (pp. 59-61). Almaty: Research Institute of Private Law.

[6] Dovhert, A.S., Kuznietsova, N.S., Khomenko, M.M., Buiadzhy, G.V., Zakhvataiev, V.M., Kalakura, V.Y., Kapitsa, Y.M., Kot, O.O., Kokhanovska, O.V., Maidanyk, R.A., & Stefanchuk, R.O. (2020). *The concept of updating the Civil Code of Ukraine.* Kyiv: ArtEk Publishing House.

[7] Kuznietsova, N.S., & Suleimenov, M.K. (Eds.). (2018). *Legal regulation of entrepreneur activity in post-soviet period*. Kharkiv: Pravo.

[8] Onishchenko, N.M., & Bobrovnyk, S.V. (2019). The relevance of law: Some determinants of identifying. *Journal of Advanced Research in Law and Economics*, 10(1), 321-325.

[9] Sukhanov, Ye.A. (2018). Eastern European codifications of civil and commercial law. In N.S. Kuznietsova & M.K. Suleimenov (Eds.), *Legal regulation of entrepreneur activity in post-soviet period* (pp. 135-164). Kharkiv: Pravo.

[10] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). (2009). Retrieved from https://www.law.kuleuven.be/personal/mstorme/DCFR.html.

[11] Mousourakis, G. (2012). Fundamentals of Roman Private Law. Berlin: Springer. doi: 10.1007/978-3-642-29311-5.

[12] Kuznetsova, N.S., Kot, O.O., Hryniak, A.B., & Pleniuk, M.D. (2020). Repeal of the Commercial Code of Ukraine: Potential consequences and necessary prerequisites. *Bulletin of the National Academy of Legal Sciences of Ukraine,* 27(1), 14-55.

[13] Zelisko, A.V., Vasylyeva, V.A., Malyshev, B.V., Khomenko, M.M., & Sarana, S.V. (2019). Civil law regulation of contracts for joint activity in Ukraine and other post-socialist states. *Asia Life Sciences*, (2), 913-925.

[14] Petryshyn, O., & Petryshyn, O. (2018). Reforming Ukraine: Problems of Constitutional Regulation and Implementation of Human Rights. *Baltic Journal of European Studies*, 8(1), 63-75.

[15] Principles of European Contract Law. (2016). Retrieved from https://www.trans-lex.org/400200.

[16] Kuznietsova, N.S., Stefanchuk, R.O., & Kot, O.O. (2020). Lack of regulation in determining the moment of conclusion of the land lease agreement. *Astra Salvensis*, 2020, 105-122.

[17] Rezina, N., & Ivanova, L. (2016). Astrent: Enforcement Problems. *Vestnik of the Omsk Law Academy*, 1(30), 20-23. doi: 10.19073/2306-1340-2016-1-20-23.

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ДОГОВІРНІ ПІДСТАВИ ВИНИКНЕННЯ ПРАВА ВЛАСНОСТІ НА ЖИТЛО

Анотація. *Стаття присвячена теоретичному аналізу таких вторинних підстав виникнення права власності на житло, як цивільно-правові договори. Встановлено, що цивільно-правовий договір є найпоширенішою підставою, що виражає в єдиному волевиявленні загальну волю суб'єктів договору, спрямовану на перехід житла у власність. Недарма договір є і юридичним фактом, і формою існування правовідношення, і документом, який фіксує права та обов'язки сторін, і регулятором відносин з передання житла. Проаналізовано та запропоновано доповнити наявну систему цивільно-правових договорів як підстав виникнення права власності на житло такими договорами, як договір застави (іпотеки), договір пожертви, договір найму житла з викупом, спадковий договір, шлюбний договір. Окремо в межах цієї статті встановлено відмінності між договором міни житла та договором обміну житлом. Акцентовано увагу на недосконалості чинного законодавства з цього приводу та зроблено висновок, що зазначені договірні конструкції мають різну правову природу, адже договір міни є підставою виникнення права власності на житло, а договір обміну жилими приміщеннями – підставою виникнення лише права користування. Розмежовуючи договір дарування як підставу виникнення права власності на житло та заповіт, зроблено висновок, що договір дарування може бути укладений у випадку настання смерті дарувальника в майбутньому, оскільки законом не передбачено такої заборони. Тобто сторони можуть передбачити у договорі дарування житла, що житло переходить до обдаровуваного з моменту смерті дарувальника. Окремо акцентовано увагу на особливостях договору пожертви як підстави виникнення права власності на житло, що відображається у праві пожертвувача визначати мету використання житла, яке передається у власність особи за договором. Мета, зазначена у договорі пожертви, повинна відповідати призначенню житла. Розглянуто особливості спадкового та шлюбного договорів як підстав виникнення права власності на житло. Запропоновано цивільно-правові договори як підставу виникнення права власності на житло класифікувати на договори купівлі-продажу житла; договори міни житла; договори довічного утримання; договори ренти житла; договори дарування житла; договори іпотеки житла; договори пожертви житла; договори найму житла з викупом; спадкові договори; шлюбні договори; договори будівельного підряду; договори про спільну діяльність*

Ключові слова: *право власності, міна, довічне утримання, спадковий договір, купівля-продаж*

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CONTRACTUAL GROUNDS FOR THE EMERGENCE OF HOUSING OWNERSHIP

Abstract. *The study provides the theoretical analysis of such secondary grounds for the emergence of housing ownership as civil law contracts. It is established that a civil law contract constitutes the most common basis, which delineates the general will of the contracting parties in a single expression of will, aimed at the transfer of housing ownership. There is a good reason that the contract constitutes a legal fact, a form of legal relations, a document that consolidates the rights and obligations of the parties, and the regulator of the relationship of transfer of housing. The study analysed and proposed to supplement the current system of civil law contracts as grounds for the housing ownership by such contractual forms as a pledge agreement (mortgage), donation agreement, a hire-purchase agreement, inheritance agreement, and marital agreement. In addition, the study established the differences between the housing barter contract and the housing exchange contract. The authors emphasised the imperfections of the current legislation in this regard and concluded that these contractual structures have different legal nature, because the barter agreement serves as the basis for the housing ownership, and the exchange agreement serves only as the basis for the right of use. Distinguishing the gift agreement as the basis for the ownership of housing and wills, it was concluded that the gift agreement may be concluded in the event of the donor's death in the future, as the law does not make provision for such a prohibition. That is, the contracting parties may stipulate in the housing gift agreement that the housing passes to the donee from the moment of death of the donor. Special attention is paid to the features of the gift agreement as the basis for the housing ownership, which is reflected in the right of the donor to determine the purpose of use of housing, which is transferred to the ownership of the person under the contract. The purpose stated in the gift agreement must correspond to the purpose of the housing. The study considered the specific features of inheritance and marriage contracts as grounds for the emergence of ownership of housing. Civil law contracts are proposed as a basis for the emergence of housing ownership to be classified as housing purchase and sale contracts; housing barter agreements; perpetual maintenance agreements; housing rental agreements; housing gift agreements; housing mortgage agreements; housing donation agreements; hire-purchase agreements; inheritance agreements; marital agreements; construction agreements; agreements on joint activities*

Keywords: *property rights, exchange, perpetual maintenance, inheritance contract, purchase and sale*

INTRODUCTION

During the entire development of property relations, special attention has been paid to the institution of property rights. Researchers pay no less attention to issues related to housing as an object of property rights and the subject of relevant civil law transactions. Thus, in accordance with Part 1 of Article 328 of the Civil Code of Ukraine the right of ownership is acquired on grounds not prohibited by law, in particular from transactions, the most common types of which are civil law contracts, which, serving as secondary grounds for ownership, are not limited to influencing the dynamics of civil relations, but also determine the content specific rights and obligations of the parties to the contractual obligation. That is, the derivative grounds for acquiring the right of housing ownership are those where a person's ownership is based on the right of the previous owner [1].

Accordingly, the civil law contract is the most common ground, which delineates the general will of the contracting parties in a single expression of will, aimed at the transfer of housing ownership. There is a good reason that the contract constitutes a legal fact, a form of legal relations, a document that consolidates the rights and obligations of the parties, and the regulator of the relationship of transfer of housing. Therefore, when analysing the most common civil law contracts as grounds for the housing ownership should take into account the time of acquisition of ownership, as the owner must have a clear idea of how long they can treat such housing as their property.

This issue also intersects with the scientific discussion on the criteria for classifying civil law contracts as grounds for the housing ownership. Thus, Ye.O. Michurin proposes to classify the contracts based on which a person may have the right to own housing, according to the types of contracts on the transfer of ownership, which are listed in the Civil Code of Ukraine1. In particular, according to the scientist, such contracts include a housing purchase and sale agreement, a housing barter agreement, a perpetual

maintenance agreement, a housing rent agreement, and a housing gift agreement [2]. The proposed classification needs to be supplemented by such contractual forms as a pledge agreement (mortgage), a donation agreement, a hire-purchase agreement, an inheritance agreement, as well as a marriage contract, taking into account the specifics of these agreements, which will be covered below.

At the same time, one can draw attention to the insufficient coverage of the outlined issues in the modern Ukrainian legal literature [3-12]. Notably, the modern legal doctrine lacks comprehensive research that would address the subject of contractual grounds for the emergence of housing ownership. This results in the incoherent approaches, enshrined in the codified regulations of Ukraine concerning the governing of the legal relations under study, the need to identify possible conflicts and develop scientifically sound proposals for their elimination. This emphasised the relevance of these issues and led to the choice of research subject.

Accordingly, the purpose of this study is to analyse the existing classifications of civil law contracts and develop a holistic system of civil law contracts as a basis for the housing ownership.

1. MATERIALS AND METHODS

The issue of isolating civil law contracts as a basis for the emergence of housing ownership is understudied in the legal literature. Classifications of civil law contracts under which the transfer of housing ownership takes place is covered in the works of such scholars as Ye.O. Michurin [13], M.K. Haliantych [14], L.M. Nykolaichuk [15] and others. At the scientific level, some issues of recognition of the right of housing ownership under purchase and sale agreements, perpetual maintenance agreements, gift agreements, etc. were considered, indicating that the legislator does not single out and systematise housing contracts separately. Thus, at the doctrinal level it is proposed to divide the contracts of sale of housing (depending on the subject matter of the contract and the method of its acquisition) into: an apartment, house, estate, part of a house purchase and sale agreement; a house purchase and sale agreement on the terms of perpetual maintenance; a purchase and sale agreement for a residential building owned by a minor; agreement on purchase and sale of a share of a residential building; agreements on purchase of residential premises in apartment buildings; real estate purchase transactions, the subject of which is not only a residential property, part of a house or a house, but also a corresponding land plot with outbuildings. The methods of purchase include purchase of housing at auction; by buy-out; on the stock exchange [14].

Particular attention should be paid to the classification of agreements that mediate the transfer of housing ownership as an object of ownership, to: 1) housing purchase and sale agreements; 2) housing barter agreements; 3) perpetual maintenance agreements; 4) housing rental agreements; 5) housing gift agreements [2]. However, considering the need to update the grounds for the housing ownership, the above classifications need to be revised and supplemented. The methodology of the relevant study is determined by its purpose and is to determine the features of the contractual grounds for the emergence of housing ownership; to identify gaps and inconsistencies in the legislation of Ukraine and the judicial practice, which arise during the application of the relevant grounds, and to make proposals for the elimination of such gaps and inconsistencies. The Civil Code of Ukraine[1], the Housing Code of the Ukrainian SSR[2], the Law of Ukraine "On State Registration of Real Rights to Immovable Property and Their Encumbrances"[3], the Resolution of the Cabinet of Ministers of Ukraine "On the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances'[4], etc.

In this study, general scientific and special legal methods of scientific cognition were applied. The main method of research is a systematic method, which allowed to determine the system of civil law contracts, which are aimed at acquiring housing ownership. The dialectical method of cognition allowed to consider the trends in the development of civil law agreements as the basis for the emergence of housing ownership. The logical-semantic method allowed to analyse individual civil law contracts and determine their place in the system of grounds for the housing ownership. The dogmatic legal method allowed to analyse the provisions of the current legislation, to identify gaps in it, to formulate proposals for its improvement. The presented scientific ideas of the authors in the modern development of civil relations include target, methodological, substantive, organisational, legal and effective components.

2. RESULTS AND DISCUSSION

The most common contract, given pride of place to by the legislator among other types of contracts, is the purchase and sale agreement. In the context of the subject of this study, it will be considered as a housing purchase and sale agreement, which is classified in the doctrine according to the criteria of the subject of the contract and the method of its purchase as follows: agreements on purchase and sale of an apartment, house, estate, part of a house, etc. Furthermore, the emergence of housing ownership based on a purchase and sale agreement may occur by purchasing an apartment or residential property from a housing construction cooperative, a member of which may be an individual. Ownership of a residential building created by a housing cooperative, according to Article 384 of the Civil Code of Ukraine[5], arises in the cooperative. Individuals as

1. Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text.
2. Housing Code of the Ukrainian SSR No. 5464-X. (1983, June). Retrieved from https://zakon.rada.gov.ua/laws/show/5464-10#Text.
3. 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#Text.
4. Resolution of the Cabinet of Ministers of Ukraine No. 1127 "On the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF#Text.
5. Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text.

its members, in order to acquire ownership of the apartment, must purchase it from a cooperative. Hence, it is concluded that the emergence of housing ownership in a person as a member of a cooperative occurs based on a civil contract; therefore, such acquisition constitutes a secondary ground for the emergence of ownership.

At the same time, it is not necessary to single out the purchase of an apartment from a housing construction cooperative as an independent basis for the emergence of housing ownership, because there a corresponding right occurs under a purchase and sale agreement. Although the authors of this study cannot disagree that the purchase and sale agreement has its certain features in this case. In particular, housing is purchased from a legal entity and a person can acquire ownership only of an apartment and not of a residential building. The current version of Part 3 of Article 384 of the Civil Code of Ukraine[1] allows to reach such conclusion. Thus, the housing purchase and sale agreement should be described as a contract aimed at the transfer of housing ownership on a paid basis. Therewith, one should support the opinion expressed in the legal literature that the risk of accidental destruction of housing passes to the purchaser simultaneously with the emergence of this purchaser's property rights, even if the contract stipulates otherwise [14]. This approach is conditioned by the fact that the seller, who is no longer the owner of the housing, is not responsible for the fate of the latter. Otherwise, it should be recognised that in the event of the loss of housing (loss of the contractual subject matter), the housing purchase and sale agreement would not be performed by the seller, which, in turn, would entail appropriate legal consequences. But de facto the seller would have performed the terms and conditions under the contract, and the destruction of the housing would be a coincidence, i.e., it would not be the seller's fault. Less common than the housing purchase and sale agreement, but no less applicable in practice, is the housing barter agreement. According to Article 715 of the Civil Code of Ukraine[2] under a barter agreement, each party undertakes to transfer ownership of one product to the other party in exchange for another product. Each contracting party in the barter is the seller of the housing that it transfers and the buyer of the housing which it receives in return. The contract may determine a supplemental payment for higher-value housing, which is exchanged for lower-value housing.

Thus, the housing barter agreement as a ground for the housing ownership is endowed with the same features as the housing purchase and sale agreement. That is, it is a paid, bilateral, consensual contract for the transfer of property (because it is concluded from the moment the parties agree on all its essential terms, and not from the moment of transfer of housing).

By concluding this contract, the parties have the opportunity to acquire housing ownership without attracting significant funds. In particular, a person does not have to enter into loan or credit agreements or mortgage his or her housing to improve his or her living conditions. It is sufficient for such person to exchange his or her housing or other property for the housing of a person who is the other party to the housing barter agreement. An individual may also agree to purchase housing in lieu of the services or work provided. Ownership of the exchanged housing passes to the parties at the same time after the performance of the obligations to transfer the housing by both parties, unless otherwise provided by agreement or law. Accordingly, the state registration of the parties' ownership to the exchanged housing takes place after each of the parties has completed the registration procedures. In the legal literature, some scholars make a distinction between a housing barter agreement and a housing exchange agreement. Thus, A.A. Titov noted that the barter agreement differs from the exchange agreement in that the parties to such a transaction (barter) can only be the owners of residential premises, and the subject is the housing owned by these parties [16]. Ye.O. Michurin argued that the difference between the barter and exchange contracts is that in the first case the contract consolidates the transfer of ownership, and in the second case there is a transfer of the right of use between the tenants of housing [2]. The same opinion is expressed by M.K. Haliantych, believing that the barter and exchange contracts differ in such features as subject, parties, procedure, legal grounds, and mechanism [14]. Given the above positions and considering the imperfections of current legislation in this regard, it should be recognised that the exchange of housing and the housing barter agreement are not terminological inconsistencies, and the specified contractual structures have different legal nature, because the barter agreement serves gives grounds to the emergence of housing ownership, while the housing exchange agreement merely gives grounds for the emergence of the right of use.

Another fairly common contractual for that serves as grounds for the emergence of housing ownership is a gift agreement. Under this agreement, the donor transfers or undertakes to transfer housing in the future to the donee free of charge. Thus Part 2 of Article 717 of the Civil Code of Ukraine[3] clarifies that the donee cannot be obliged to perform any action of a property or non-property nature in favour of the donor. Otherwise, according to Article 235 of the Civil Code of Ukraine, the housing gift agreement may be rendered null and void as a fictitious transaction and the parties will be subject to the provisions of civil legislation, which govern the contractual legal relations that the parties actually committed. In particular, this refers to the legal provisions on the above-analysed contractual forms of purchase and sale or barter of housing. At the same time, the legal literature states the thesis that the obligation of the donee to perform certain actions in favour of a third party, stipulated in Article 725 of the Civil Code of Ukraine, actually eliminates the free-of-charge basis of such agreement [17]. Therewith, the obligation of the donee to take certain actions in favour of a third

1. *Ibidem*, 2003

2. *Ibidem*, 2003

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

party does not lead to the recognition of the housing gift agreement as payable, as payment of the contract is associated with the performance of a counter-obligation. Accordingly, the donor does not receive any counter-grant under this agreement, which describes it as a free-of-charge transaction. A gift is a transaction that is based on mutual consent, not just on the will of the donor. This distinguishes the gift agreement from, for example, a will, which does not require the consent of the heir, since, according to the will, the rights and obligations of the deceased pass at the time of his or her death, and the housing gift agreement cannot be concluded in the event of the death of the donor in the future.

Agreeing that the main difference between a gift agreement and a will is that the gift agreement constitutes a bilateral transaction, and the will is unilateral. It cannot be categorically stated that the gift agreement cannot be concluded in case of future death of the donor, as the law does not make provision for such a prohibition. In addition, according to Part 2 of Article 719 of the Civil Code of Ukraine1, the housing gift agreement is concluded in writing and is subject to notarisation; therefore, for state registration of ownership of donated housing (the moment of emergence of this right under the housing gift agreement), it is sufficient to submit the notarised housing gift agreement to the state registrar (Article 20 of the Law of Ukraine "On State Registration of Real Rights to Immovable Property and Their Encumbrances"[1]), which, as noted above, is consensual. That is, the contracting parties may stipulate in the housing gift agreement that the housing passes to the donee from the moment of death of the donor. Considering the requirements of Articles 334 and 722 of the Civil Code of Ukraine[2], one can conclude that the housing ownership of the donee on the grounds of the gift agreement arises from the moment of state registration of such ownership. Thus, according to Part 1 of Article 722 of the Civil Code of Ukraine, the right of housing ownership arises from the moment of its adoption. In this case, according to Part 4 of this study, the acceptance of documents certifying housing ownership, other documents certifying the identity of the subject of the contract, or symbols of the thing (keys, models, etc.) constitutes the acceptance of a gift. However, considering the provision stipulated in Part 4 of Article 334 of the Civil Code of Ukraine, the housing ownership arises from the date of state registration of such ownership in accordance with the law.

Therefore, the recognition of the state registration of housing ownership as the only and indisputable legal fact cannot be questioned by the contracting parties under the housing gift agreement, as moments of acceptance of the gift and the emergence of ownership of it, stipulated in Part 4 of Article 722 of the Civil Code of Ukraine[3] relate to movables (e.g., vehicles or animals), and not housing or other real estate. The same opinion is expressed in the scientific literature, where the transfer of keys to an apartment or house or documents to them is considered a symbolic act [15]. An interesting and understudied type of housing gift agreement, according to Articles 729 and 730 of the Civil Code of Ukraine, is a donation agreement. Thus, based on the content of Article 729 of the Civil Code of Ukraine, a donation is a gift for the donor and the donee to achieve a certain predetermined goal. The donation agreement is concluded from the moment of acceptance of the object of donation. The donation agreement is subject to the provisions on the gift agreement unless otherwise provided by law.

According to Article 730 of the Civil Code of Ukraine, the donor has the right to control the use of housing as an object of donation in accordance with the purpose established by the agreement. If the intended use of the housing (for example, as a church for monks, doctors, etc.) is impossible, its use for another purpose is possible only with the consent of the donor, and in case of death or liquidation of the legal entity – by court decision. The donor or his of her successors have the right to demand termination of the donation agreement in the event that the housing is used for other purposes not stipulated by the agreement.

S.D. Rusu fairly pointed out that the specific feature of this agreement is that in order for the parties to achieve a certain predetermined goal, the agreement is considered to be concluded from the moment of acceptance of the donation [18]. In addition, the very agreement on the purpose of housing, which is transferred into the ownership of a person under a donation agreement, distinguishes this agreement from the gift agreement, for which the stipulation of the purpose of housing will contradict the essence of this agreement. In this case, the purpose of the use of housing may be, for example, to enable certain persons to live in it, to impose on a person the obligation to use housing as a shelter for certain categories of persons or to provide permission to conduct excursions or exhibitions, etc. However, the purpose specified in the donation agreement must be consistent with the purpose of housing. That is, the arrangement of trade platforms, a medical institution, etc. will contradict the provisions of Chapter 28 of the Civil Code of Ukraine. In conclusion, the housing donation agreement should be described as a real, free-of-charge, bilaterally binding agreement. The next type of agreements on the transfer of property ownership, based on which a person may have acquire the housing ownership, is a perpetual maintenance agreement, under which the alienator transfers ownership of the house, apartment or part thereof, in exchange for which the purchaser undertakes to provide the alienator with perpetual maintenance and (or) care.

There is a well-established position among civilists that such agreement is: a) unilateral, as only the purchaser of property becomes obliged under the agreement, while the alienator has no obligations [17]; b) paid, because the purchaser undertakes to carry out the alienator's property

1. 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#Text.

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

3. *Ibidem*, 2003.

maintenance instead of receiving the property. The alienator, in turn, after the transfer of ownership of the thing, may require the purchaser to provide him of her with endowment. In this case, in contrast to the purchase and sale agreement, the perpetual maintenance agreement refers not to the price as an essential condition of the contract, but only to the monetary value of property and services [19]; c) aleatory (risk-related), because at the time of its conclusion it is impossible to determine what will be higher – the cost of housing or the final cost of the provided endowment [13]; d) consensual, because the ownership of a movable thing arises in the purchaser from the moment of notarisation of the agreement, while the ownership of immovable property arises from the moment of its state registration. The perpetual maintenance agreement should be described as a bilaterally binding transaction, as the alienator is obliged to transfer ownership of the house, apartment or part thereof, etc. in return for care or maintenance to be provided to the alienator by the acquirer. Moreover, this obligation is maintained in the event of termination of the perpetual maintenance agreement, provided that it is not the result of improper performance of obligations by the acquirer, or in the event of its termination due to the death of the acquirer (before the alienator dies).

In this regard, R.A. Maidanyk expressed an opinion that the specifics and the legal nature of the relations of perpetual maintenance are conditioned by the presence of a special, fiduciary trust in this agreement. By its legal nature, perpetual maintenance is a kind of fiduciary legal relationship [20]. It seems appropriate to agree with such considerations of the scientist, because the alienator, as a rule, chooses the person or persons who will care for him of her not at random, but from the circle of people close or well-known to him or her, who must justify the alienator's trust by providing the necessary security – perpetual maintenance or care.

In addition, the doctrine draws attention to the fact that the alienator is not sufficiently protected from committing an intentional crime against him or her. Because of this, there are proposals to improve the current civil legislation by making provision for a rule according to which, if the purchaser commits an intentional crime against the alienator, he or she loses the right to acquire ownership of the alienator's property (housing), and the perpetual maintenance agreement is rendered null and void [17].

In this regard, the arguments of V.P. Maslov are interesting for doctrinal analysis. He believes that the law should stipulate that the property should not be transferred into the full ownership of the person providing the maintenance, but should rather be in the joint ownership of the contracting parties [21], as this would reduce the risk of a perpetual maintenance agreement and strengthen protection of the rights of both parties. In view of the above, the authors of this study propose to amend Part 1 of Article 744 of the Civil Code of Ukraine[1] with the following wording: *"Under the perpetual maintenance agreement, one party (alienator) transfers to the other party (purchaser) a house, apartment or part thereof, other real estate or movable property of significant value on the right of joint ownership, with the condition of emergence of private ownership with the acquirer after the death of the alienator, in exchange for which the acquirer undertakes to provide the alienator with perpetual maintenance and (or) care".*

Due to the fact that the perpetual maintenance agreement is aimed at the transfer of housing ownership, the law establishes certain requirements for such property: firstly, the housing must belong to the alienator on an ownership basis, which must be confirmed by corresponding title documents, and, secondly, this housing should not be encumbered by arrest, bail, or any other rights of third parties. At the same time, the legislator reiterates that ownership is binding. Therefore, the purchaser as the owner of such real estate assumes all encumbrances and risks associated with it, including payment of all taxes and fees associated with the maintenance of housing, and bears the risk of accidental death or damage. Relatively new and not widespread in practice is the following ground for the emergence of housing ownership – a rent agreement under which the recipient of the rent transfers the housing ownership to the payer of the rent, and the payer of the rent, in return, undertakes to periodically pay the rent to the recipient thereof in the form of a certain amount of money or in another form. This formulation of the features of the rental agreement, as well as the rules for the transfer of property for rent stipulated in Article 734 of the Civil Code of Ukraine[1] bring it closer to the agreements of purchase and sale, gift, loan, and perpetual maintenance.

However, as rightly noted in the legal literature, the differences between the rent agreement and the purchase and sale agreement are seen in the fact that, unlike the latter, the rental agreement is described by some uncertainty regarding the equivalence of considerations, because according to Part 2 of Article 731 of the Civil Code of Ukraine, the rent agreement may establish an obligation to pay rent both for a certain period and indefinitely, and in the latter case there is always a risk for each party that it will be greater than the consideration received in return. In addition, rent relations are described by the duration of existence and periodicity of payments – rent is never one-time [22]. M.K. Haliantych considers the rent agreement and perpetual maintenance agreement as varieties of the same contract, observing the common features of these contracts. Both under a perpetual maintenance agreement and under a rent agreement, one party transfers housing to the other. However, unlike a rent agreement, a list of property that can be transferred into the ownership of the purchaser is defined under the perpetual maintenance agreement. Under both a perpetual maintenance agreement and a rent agreement, the purchaser of the property undertakes to provide the alienator with certain compensation in the form of rent or provision of maintenance or care [14].

The above position does not withstand criticism, proceeding from the placement of these contractual

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

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

structures in separate chapters of the Civil Code of Ukraine, given their completely different purpose and features of legal regulation: under the perpetual maintenance agreement – housing needs are satisfied by performing social functions of care and maintenance in respect of persons who need it; under a rent agreement – the satisfaction of housing needs by making periodic payments in the form of a certain amount of money or in another form that may significantly exceed the value of the housing thus alienated. In this regard, the position of M.I. Baru on the difference between a perpetual maintenance contract and a rent agreement is reasonable, which lies in the purpose of each of the agreements; for the former, it is the acquisition of property, and for the latter, it is the financial assistance to the party by its counterparty [23]. Moreover, the scientist went even further, emphasising the expediency of classifying the rental agreement as a contract for the provision of services as opposed to the transfer of property [23].

This statement is not appropriate, given the nature of the rental agreement as a contract of transfer of ownership, as its main purpose is the possibility of participants in civil relations to acquire property (housing) ownership rather than enriching the counterparty. Rent payments constitute a kind of payment by the rent payer for the opportunity to acquire the housing ownership, and not a loan or credit. There is no unity among scientists regarding the moment when the rent agreement should be considered concluded. According to some researchers, the rent agreement is consensual [24], according to others – real [25], and yet others believe that it is either consensual (in the case of alienation of real estate) or real (in the case of alienation of movables) [26]. The authors of this study believe that it is expedient to described the rent agreement as a consensual agreement, because, as follows from the analysis of Chapter 56 of the Civil Code of Ukraine[1], the law connects the rights and obligations of the parties to the rent agreement with the transfer of rent to the payer. In particular, as stated in Article 731 of the Civil Code of Ukraine, the rent payer undertakes to pay rent payments in exchange for the property (housing) transferred by the rent recipient. That is, the corresponding obligation of the person as a rent payer arises from the moment of registration of ownership of the relevant housing as the subject of the contract. The legislator connects the risk of accidental destruction or damage to housing with the moment of the transfer of rented housing. In addition, the contract for the transfer of rented housing is subject to notarisation. A rent agreement may stipulate that the rent receiver transfers the housing to the person for a fee or free of charge. If the rent agreement stipulates that the rent receiver transfers the housing ownership for a fee, the general provisions on purchase and sale agreement shall apply to the relations between the parties regarding the transfer of the housing, and if the property is transferred free of charge, the general provisions on the gift agreement should apply to the extent it is not inconsistent with the rent agreement.

In conclusion, the rent agreement, under which a person acquires the housing ownership, is described as a contract of transfer of housing ownership, consensual, paid, or free-of-charge (depending on its terms and conditions) and bilateral (the recipient of rent is obliged to transfer the housing ownership) contract as the grounds for the emergence of the housing ownership with the acquirer. Another ground for the emergence and termination of housing ownership is a mortgage agreement, under which the parties can resolve the issue of foreclosure on the subject of the mortgage by out-of-court settlement based on the agreement. In this case, the law allows the conclusion of such an agreement at any time before the entry into force of the court decision on recovery. Accordingly, the mortgage agreement plays a dual role. On the one hand, it is one of the derivative grounds for the emergence of housing ownership, and on the other hand, it can perform an ancillary function – to ensure the performance of the principal obligation. In particular, a person who does not have sufficient funds may enter into, for example, a mortgage agreement with a bank to ensure the implementation of the housing purchase and sale agreement (thus being able to pay the cost of housing), which will be the subject of the mortgage. In this situation, the mortgage agreement will not serve as the basis for the housing ownership. However, when a person acts as a mortgagee (pledgee), he or she can acquire ownership of the mortgaged housing by applying for foreclosure on the housing of the mortgagor (pledgor) or a third party who failed to perform its principal obligation (debtors). Despite the above, in connection with the changes introduced in the Civil Code of Ukraine on June 29, 2010, individuals were enabled to acquire housing ownership based on a hire-purchase agreement. The procedure for exercising this right is governed by Article 810 of the Civil Code of Ukraine[2] and the Resolution of the Cabinet of Ministers of Ukraine No. 274 "On approval of the Procedure for housing hire-purchase" of March 25, 2009[3]. These changes were introduced in the Civil Code of Ukraine with the adoption of the Law of Ukraine "On Prevention of the Impact of the Global Financial Crisis on the Development of the Construction Industry and Housing Construction"[4]. However, as fairly noted in the legal literature, it is unclear how the purpose of this law (which is to stabilise construction, increase the solvency of the population, ensure the implementation of housing rights of citizens in need of state support, stimulate construction and related industries in the global financial crisis) correlates with the settlement of the legal relations of lease of already built property [27].

Notably, this method of acquiring ownership can be

1. *Ibidem*, 2003.

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

3. Resolution of the Cabinet of Ministers of Ukraine No. 274 "On approval of the Procedure for housing hire-purchase". (2009, March). Retrieved from https://zakon.rada.gov.ua/laws/show/274-2009-%D0%BF#Text.

4. Law of Ukraine No. 800-VI "On Prevention of the Impact of the Global Financial Crisis on the Development of the Construction Industry and Housing Construction". (2008, December). Retrieved from https://zakon.rada.gov.ua/laws/show/800-17#Text.

distinguished as one that is inherent specifically in housing matters. Thus, in accordance with Part 1 of Article 810 of the Civil Code of Ukraine[1] hire-purchase constitutes a special type of rent (lease) of housing, which may provide for the assignment of the lessor's right to claim the debt to another person – the beneficiary. Under the hire-purchase agreement, one party, the enterprise-lessor, transfers housing to the other party, an individual (lessee), for a fee for a long period (up to 30 years), after which or pre-term, subject to full payment of rent, housing passes into the lessee's ownership. The hire-purchase agreement is a document certifying the transfer of ownership of real estate from the lessor to the lessee with deferred circumstances specified by law. In this case, the lessor acquires ownership of the housing previously selected by the lessee for the purpose of further transfer of such long-term hire-purchase housing to such a person and disposes of such housing until its full repurchase. The lessor disposes of the housing until the lessee pays the rent in full. At the same time, the lessee is empowered to own and use the rented housing, and after paying the rent in full, the latter acquires ownership of such housing. The object of rent may be an apartment or part thereof, a residential building or part thereof, which are intended and suitable for permanent residence in them.

The hire-purchase agreement must specify the persons who will reside together with the lessee. These persons acquire equal rights and obligations with the lessee regarding the use of housing. The lessee is liable to the lessor for breach of contract by persons residing with the lessee. The hire-purchase agreement is concluded in writing and is subject to mandatory notarisation. Remuneration (income) of the lessor is defined as the interest rate on payments for the purchase of housing, the amount of which is stipulated in the lease agreement. Payment of rent in full is certified by an act that forms an integral part of the contract. With the consent of the lessor, a person may enter into a sublease agreement with other persons who do not acquire an independent right to use housing. The right of housing ownership under a lease agreement with redemption arises, as well as housing acquired under other agreements, from the moment of state registration of this right. Thus, the analysis of the specified legal provisions suggests that the hire-purchase agreement as the grounds for the emergence of the housing ownership has the following attributes: 1) it is paid; 2) it is consensual; 3) it is bilateral; 4) it is aleatory (risk-related), because neither side, given the constant changes in socio-economic relations, is unsure of its benefits; 5) it is terminal, because the agreement is terminated with the expiration of the term established therein; 6) it belongs to mixed contracts, as it combines the features of the housing rent (lease) agreement and the housing purchase and sale agreement. Based on the above, it can be concluded that the hire-purchase agreement constitutes a separate type of contract, and serves as the grounds for the emergence of housing ownership.

The least common in the system of contracts, on the grounds of which the housing ownership may arise, is an inheritance agreement. The legislator allocated only 7 articles for the inheritance agreement and representatives of the civil law science developed several doctrinal provisions regarding it, from denying the agreement as such that restricts civil capacity and constitutes an attempt to deprive individual heirs of the right to a mandatory inheritance [28] to its approval as such that does not deprive the person of civil capacity, because the right to a mandatory share cannot arise until the death of the testator. Until then, there can be only hope of obtaining this share, which may disappear due to the conclusion of not only an inheritance agreement, but also the agreements on gift, purchase and sale, or perpetual maintenance [29]. Notably, the inheritance agreement, indeed, does not allow the alienator to dispose (sell, gift, etc.) of the property that is its subject. However, it does not deprive a person of civil capacity, as the alienator expresses one's will to enter into such an agreement, and instead receives the right to demand the implementation of one's orders, which, admittedly, should not contradict the current legislation and moral principles of society.

The parties to the inheritance agreement are the alienator and the acquirer. The alienator can be one or more individuals – spouses, one of the spouses, or another person. The legislator's use of the phrasing "or another person" in Part 1 of Article 1303 of the Civil Code of Ukraine[2] suggests that it refers to any person (both an individual and a legal entity) as a participant in civil relations. However, a detailed analysis of the provisions of Chapter 90 of the Civil Code of Ukraine clarifies that the moment of emergence of ownership of the acquirer is closely related to the moment of death of the alienator. That is, in this case, not all participants in civil relations under Article 2 of the Civil Code of Ukraine are implied, but specifically an individual endowed with full legal capacity [30]. The purchasers under the inheritance agreement may be individuals or legal entities. When concluding an inheritance agreement, the acquirer, if he or she is an heir by will or by law, does not lose the right to inherit in the share of property that was not specified in the inheritance agreement. The subject of the inheritance agreement is both the acquisition of ownership of the alienator's property and the actions (performance of works, rendering of services, etc.) of the acquirer. Personal non-property rights (for example, the alienator may not restrict the purchaser in choosing a place of residence, in choosing a spouse, etc.), property rights to another's property (emphyteusis, superficies, easements), etc. may not be the subject of this agreement.

Therefore, the acquirer undertakes to comply with the alienator's order and, in the event of the alienator's death, acquires ownership of such housing. That is, the inheritance agreement performs a dual function of the regulator of relations on the transfer of ownership and the commission of actions, because the inheritance agreement constitutes the transfer of ownership to the acquirer, and although these actions are no longer performed by the alienator, but by other persons after the alienator's death,

1. Civil Code of Ukraine, op. cit.

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

the acquirer becomes the owner of the property alienated in his of her favour. Thus, the alienator has the right to appoint a person who will supervise the performance of the inheritance agreement after the alienator's death. The inheritance agreement may be terminated by the court at the request of the person monitoring the performance of the alienator's will after the latter's death, in case of frustration on the acquirer's part or at the request of the acquirer in case of impossibility to perform the alienator's orders. The notary, who has certified such an agreement, imposes a ban on alienation of such housing, which achieves protection of the rights and interests of the purchaser. That is, the notarial form of the contract has a substantial legal significance, because the notary, unless otherwise provided by the agreement, acts as a guarantor of the obligations of the acquirer, which he or she must perform after the death of the alienator. That is, the notarial form of the hereditary contract allows to document the manifestation of the will of the parties most adequately and thus provide evidence of the true direction of their intentions.

In view of the above, the question of the place of the inheritance contract in the system of civil law contracts remains debatable to this day. Thus, Yu.O. Zaika substantiates the expediency of its "transfer" to Book Five of the Civil Code of Ukraine[1] and placement next to perpetual maintenance agreement and rent agreement as an independent contractual form [31]. V.V. Vasylchenko, on the contrary, defends the position on the validity of the consolidation of this institution in the system of inheritance law [32]. According to S.V. Mazurenko, the inheritance agreement does not belong to any of the groups of agreements proposed in the literature, but is in essence an "atypical agreement" of civil law. Therewith, the scientist concludes that in these relations two agreements are merged: 1) an agreement on the performance of actions by the acquirer, which gives rise to the relevant obligations, the content of which is the actions of the acquirer; 2) agreement on the transfer of ownership of the property of the alienator after his or her death [33]. Since the inheritance contract is a special type of binding legal relationship, the essence of which, although closely intertwined with the inheritance relations, cannot be considered as one of the possible types of inheritance. Accordingly, since the provisions of the Civil Code of Ukraine governing relations under the inheritance agreement are already placed in Book Six, and the moment of ownership of the alienator's property is associated with his or her death, there is no need to "transfer" the inheritance agreement to the Book Five of the Civil Code of Ukraine, as this is unlikely to affect the effectiveness of legal regulation.

The issues of possibility/impossibility of concluding this agreement through a representative also deserve special attention. In particular, R.A. Maidanyk, V.V. Vasylchenko believe that the inheritance agreement can be concluded only personally by an individual with full civil capacity [34; 35]. According to other scholars, on the contrary, it is allowed to conclude this agreement through a representative, because "according to the contractual nature of transactions, the conclusion of an inheritance contract is possible through a representative, at least the Civil Code of Ukraine does not prohibit it" [36].

The conclusion of an inheritance agreement, under which the housing is transferred into the ownership, cannot be carried out through a representative, because the alienator does not care who will be the purchaser of his or her housing. Only the alienator alone can ensure it most completely. Even if it is impossible to search for a purchaser unassisted, one should not involve a representative, although the law does not explicitly prohibit it. To confirm this, it is advisable to cite the position of O.V. Onishchenko, who believes that "it can be assumed that the inheritance agreement may be concluded in the interests of a minor, juvenile, incapacitated and incapable person, subject to the rules of the Civil Code of Ukraine on transactions with persons without full capacity", and suggests "to solve this issue at the legislative level by, for example, indicating that the alienator can be an individual regardless of age and state of health (following the model of a perpetual maintenance agreement)" [37].

In view of the ongoing discussion on the recognition of a succession agreement as a unilateral or bilateral agreement, the inheritance agreement is bilateral, as the rights and obligations under it arise for both the alienator and the acquirer. In particular, the acquirer, apart from the rights (ownership of the alienator's property, the right to demand termination of the contract in case of impossibility to execute the alienator's orders), also has obligations (to execute the alienator's orders and perform certain property or non-property actions). The alienator, in addition to his rights (to make certain orders, require the acquirer to perform certain conditions of the contract actions of property or non-property nature), also have responsibilities (the obligation not to alienate property defined by the inheritance agreement, the obligation to ensure the safety of this property and proper treatment). The bilateral nature of this agreement is also evidenced by the prohibition on the alienation of housing, including by will, which constitutes the subject of an inheritance agreement. In addition, the bilateral binding nature of this agreement is evidenced by the content of Article 1308 of the Civil Code of Ukraine[2] , under which the inheritance agreement may be terminated by the court at the request of the alienator in the event of non-performance of his or her orders by the purchaser or at the request of the acquirer in case of impossibility to perform the alienator's orders. Notably, in both cases the termination of the inheritance agreement is possible only in court. It is the court that must establish the fact of violation of the inheritance contract or the impossibility of its execution. Thus, due to the bilateral feature, the inheritance agreement cannot be terminated or changed unilaterally during the life of the alienator, as is the case with a will [30]. As for the payment-related feature of the inheritance contract, almost all scholars refer to this agreement as paid agreement, as the purchaser receives the

1. *Ibidem*, 2003.

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

property specified in the agreement (in this case – housing), and the alienator receives results of certain actions of property or non-property nature on the part of the acquirer. It is no coincidence that this feature allows to distinguish the inheritance agreement from the will and the perpetual maintenance agreement.

The purchaser's housing ownership on the grounds of the inheritance agreement emerges from the moment of the state registration of such ownership. This conclusion follows from the analysis of Articles 334, 1302, 1307 of the Civil Code of Ukraine. In particular, according to Article 1302 of the Civil Code of Ukraine, the purchaser under the inheritance agreement acquires the ownership of housing of the alienator in case of his or her (alienator's) death. However, given the fact that housing is real estate, the ownership of which is subject to state registration in accordance with the procedure prescribed by law, the ownership, according to Part 4 of Article 334 of the Civil Code of Ukraine, arises from the moment of such registration. In addition, Article 1307 of the Civil Code of Ukraine prohibits the alienation of property (housing), which is the subject of the inheritance agreement, until the death of the alienator. That is, the possibility of housing ownership under the inheritance agreement earlier than from the moment of death of the alienator is excluded. Therefore, considering the need for state registration of ownership of housing as a real estate, the right of ownership of the purchaser arises from the moment of state registration of the right, and not from the moment of death of the alienator. Thus, the above suggests that the inheritance agreement, under which a person may have ownership of housing, is a contract of transfer of ownership of property, paid, bilateral (bilaterally binding), fiduciary (based on trust between the parties), aleatory (the purchaser cannot be sure that the actions of property or non-property nature committed by them will be equivalent to the value of the received housing), and is of a personal nature.

Features of conclusion of the hereditary agreement by spouses should also be considered within the framework of this study. Thus, an inheritance agreement can be concluded by one or both spouses. In this case, the subject of the inheritance agreement may be housing jointly owned by the spouses, as well as housing that is the personal private property of either of them. As for the conclusion of an inheritance agreement by the spouses, the subject of which is housing as an object of joint ownership, one should be bear in mind that when making any transaction concerning the joint property of the spouses which requires notarisation, the consent of the other spouse must be established. If the contract was concluded without the consent of the other spouse, it may lead to a challenge to its validity. However, the inheritance contract may be certified without the consent of the other spouse, if the title document indicates that the housing specified in it was acquired prior to the registration of marriage, or during the marital relationship, but on terms determined by the agreement concluded between the spouses, or by inheritance, as well as in cases where the one of the spouses does not reside at the property and his or her place of residence is unknown. A copy of the court decision, which has entered into force, must be submitted to confirm this circumstance.

If the spouse as an alienator does not agree with the inclusion of jointly acquired property in the inheritance agreement or the spouses do not agree on this property, one of the spouses may establish its share in the joint property in court and then enter into a separate inheritance agreement. The inheritance agreement can also establish that in case of death of one of the spouses the inheritance passes to the other, and in case of death of the other spouse his or her property only then passes to the purchaser under the agreement. In the presence of a marital agreement, which defines the rights and obligations of the spouses to housing purchased both before marriage and during the latter, received as a gift or inherited by one of the spouses, upon certifying the inheritance agreement, the notary must be guided by the terms and conditions specified in the marital agreement. If the alienator violated the terms and conditions of the previously concluded marital agreement upon concluding the inheritance agreement, then this serves as the basis for rendering such agreement null and void.

In terms of the legal nature of the marital agreement as separate grounds for the emergence of housing ownership, it is appropriate to note the lack of a unified opinion in the doctrine of private law. The most common opinion is that the marital agreement, despite several specific features, belongs to the civil law contracts and is subject to general rules for transactions [38-40]. A detailed analysis of this contractual form, the conditions of its validity, the grounds for its invalidation, and the procedure for its conclusion and performance suggests that the general civil law constructions of contract law are used in this case. Therefore, it is necessary to agree with the opinion of those scholars who refer the marital agreement to civil law contracts. In general, the marital agreement is the most complex and can contain a variety of terms and conditions relating to the property of the spouses or the provision of maintenance to one of them; unlike all other agreements, marital agreement can be concluded in respect of the future property of the spouses; the subjects of the marital agreement may be not only the spouses, but also the persons who have applied for registration of marriage. In addition, a marriage contract can serve as grounds for joint ownership of the spouses if it stipulates that the spouses become co-owners of housing, which prior to the marriage and marital agreement was in ownership of one of the spouses. Moreover, the joint housing ownership of the spouses acquired based on the marital agreement emerges from the moment of state registration of such ownership.

There is good reason that Article 94 of the Family Code of Ukraine[1] stipulates the requirement that the marital agreement is to be concluded in writing and notarised. Notably, there is still a "cautious" attitude of the notarial community towards the marital agreement. As a result, there are cases of extortion to certify the relevant legal relations of other agreements (on the alienation of the share of one of the spouses in the joint ownership in favour

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

of the other spouse without the allocation of this share, on the procedure for using property, on the allocation of a share of immovable property of one of the spouses from all property assets, on provision of maintenance, etc.), which forces persons wishing to enter into a marital agreement to bear considerable costs upon its execution. To prevent such abuse, the Law of Ukraine "On Notaries"[1] obliges a notary to assist citizens in exercising their rights and protecting their legitimate interests. In particular, when certifying a marital agreement, the notary is obliged to explain to the parties the content and meaning of the marital agreement, the consequences of including certain terms and conditions therein, as well as to verify compliance with the law and the actual intentions of the parties.

Thus, among the grounds for the housing ownership, the marital agreement has a special place because: 1) it has the most complex nature and may contain various conditions relating to the property of the spouses or the provision of maintenance to one of them; 2) it may be concluded in respect of the future property of the spouses.

CONCLUSIONS

Summarising the analysis of the contractual grounds for the emergence of housing ownership, it is appropriate to emphasise the feasibility of expanding the classification of contracts as grounds for the emergence of housing ownership, which is established in the doctrine of housing law, by supplementing the classification with such contractual forms as mortgage agreement, donation agreement, hire-purchase agreement, inheritance agreement, lease agreement, as well as a marital agreement. Thus, it is appropriate to supplement the system of agreements that mediate the transfer of ownership of housing as an object of ownership as follows: 1) housing purchase and sale agreements; 2) housing barter agreements; 3) perpetual maintenance agreements; 4) housing rent agreements; 5) housing gift agreements; 6) housing mortgage agreements; 7) housing donation agreements; 8) hire-purchase agreements; 9) hereditary agreements; 10) marital agreements; 11) construction agreements; 12) agreements on joint activities.

It is established that the exchange of housing and the housing barter agreement are not terminological inaccuracies; these contractual forms have different legal nature, because the barter agreement serves as grounds for housing ownership, and the housing exchange agreement serves merely as grounds of the right of use.

It is substantiated that the inheritance contract performs a double function, governing both the relations on the transfer of housing into ownership and the performance of actions, since under the inheritance agreement, the property is transferred to the acquirer in his or her ownership, and although these actions are no longer carried out by the alienator, but by other persons after the death of the alienator, the acquirer becomes the owner of the property alienated in his or her favour.

Thus, the issue of identifying new contractual grounds for the disappearance of housing ownership in general and the study of individual contractual grounds in particular is relevant and such that requires further substantial research.

REFERENCES

[1] Krupchan, O.D., & Luts, V.V. (Eds.). (2016). *Housing ownership in Ukraine: Doctrine and implementation*. Kyiv: Research Institute of Private Law and Entrepreneurship named after Academician F.H Burchak NAPRN of Ukraine.

[2] Michurin, E.A. (2000). *Civil contract as one of the means of realisation of the right to housing* (Candidate thesis, National University of Internal Affairs, Kharkiv, Ukraine).

[3] Hryniak, A., Kot, O., & Pleniuk, M. (2018). Contractual regulation of relations of joint ownership of individuals in Ukraine (on the Example of Agreements on the Transfer of Property into Ownership). *Utopia y Praxis Latinoamericana*, 23(82), 209-221.

[4] Nasarre-Aznar, S. (2018). Ownership at stake (once again): Housing, digital contents, animals, and robots. *Journal of Property, Planning and Environmental Law*, 10(1), 69-86.

[5] Dawkins, C. (2020). The right to housing in an ownership society. *Housing and Society*, 47(2), 81-102.

[6] Indriliunaite, R. (2020). Possibilities of self-provision of housing for the middle generation (born in 1970-1984) in lithuania. *Public Policy and Administration*, 19(3), 63-75.

[7] Morris, A., Beer, A., Martin, J., Horne, S., Davis, C., Budge, T., & Paris, C. (2020). Australian local governments and affordable housing: Challenges and possibilities. *Economic and Labour Relations Review*, 31(1), 14-33.

[8] Prabhakar, R. (2019). A house divided: Asset-based welfare and housing asset-based welfare. *International Journal of Housing Policy*, 19(2), 213-231.

[9] Aceto di Capriglian, S. (2020). The desired unity of successions in the Eurounity system and the overcoming of the prohibition of succession agreements. *Actualidad Juridica Iberoamericana*, 12, 408-447.

[10] Babaskin, A.Y., & Parkhomenko, N.M. (2019). Legal regulation of interest rates under the loan agreement, with the participation of the borrower – the entity, under the civil law of Ukraine and Germany: A comparative characteristic. *Journal of Advanced Research in Law and Economics*, 10(3), 695-702.

[11] Chochia, A. (2017). Occurrence of resolutive condition of a deed as a juridical fact in civil law of Ukraine. *Journal of Advanced Research in Law and Economics*, 8(3), 857-864.

1. Law of Ukraine No. 3425-XII "On Notaries". (1993, September). Retrieved from https://zakon.rada.gov.ua/laws/show/3425-12#Text.

[12] Tsiura, V., Suleimanova, S., Sotula, O., Panasiuk, V., & Dobrovolska, V. (2019). Constitutional principles of contractual representation in Ukraine: Problems of theory and practice. *Journal of Advanced Research in Law and Economics,* 10(3), 948-953.
[13] Michurin, E.A. (2003). Deeds with housing. In *Legal Adviser Series* (p. 372). Kharkiv: Stride.
[14] Haliantych, M.K. (2007). *Private principles of realization of housing rights of citizens in Ukraine* (Candidate thesis, KNUTSH, Kyiv, Ukraine).
[15] Nikolaychuk, L.M. (2004). *Civil law contracts as a basis for the emergence of private property rights of citizens* (Candidate thesis, National University of Internal Affairs, Kharkiv, Ukraine).
[16] Titov, A.A. (2001). *Housing in the property.* Moscow: Profizdat.
[17] Romanovych, S.M. (2012). *Legal grounds for the emergence of the right of joint partial ownership of individuals* (Candidate thesis, Research Institute of Private Law and Entrepreneurship named after Academician F.H Burchak NAPRN of Ukraine, Kyiv, Ukraine).
[18] Rusu, S.D. (2004.). Obligations to transfer property or other property rights. In R.O. Stefanchuk (Ed.), *Civil Law of Ukraine* (pp. 241-242). Kyiv: Istyna.
[19] Kosmin, Y. (2000). *Contract of life maintenance*. Law of Ukraine, 2, 69-71.
[20] Maidanyk, R.A. (2002). *Problems of trust in civil law*. Kyiv: Kyiv University.
[21] Maslov, V.F. (1954). Contracts with a condition of life maintenance. *Soviet State and Law*, 6, 112–116.
[22] Dombrugova, A. (2003). Lifelong maintenance under the new Civil Code of Ukraine. *Legal Bulletin of Ukraine,* 44(436), 14-15.
[23] Baru, M.I. (1948). Contractual obligation of maintenance. *Scientific Notes. Issue 3. Kharkiv: Edition of the Kharkiv Law Institute named after L.M. Kaganovich.*
[24] Tsybulenko, Z.I. (1998). Rent and lifetime maintenance with dependence. *Russian Justice*, 7, 44.
[25] Sergeev, A.P., & Tolstoy, Yu.K. (Eds.). (1998). *Civil law*. Moscow: Prospekt.
[26] Em, V.S. (1999). Rent agreement. *Legislation*, 5, 10-18.
[27] Bernatskyi, M.V. (2016). *Housing as an object of property rights* (Candidate thesis, Research Institute of Private Law and Entrepreneurship named after Academician F.H Burchak NAPRN of Ukraine, Kyiv, Ukraine).
[28] Dzery, O.V., & Kuznetsova, N.S. (Eds.). (2004). *Civil law of Ukraine. Book 2.* Kyiv: Yurinkom Inter.
[29] Kossak, V.M. (Ed.). (2004). *Scientific and practical commentary on the Civil Code of Ukraine.* Kyiv: Istina.
[30] Hryniak, A.B. (2018). Peculiarities of contractual regulation of property transfer under a hereditary contract. In *Actual problems of private law. Collection of scientific works dedicated to the 85th anniversary of the birth and 55th anniversary of scientific-pedagogical and public activity of Volodymyr Vasyliovych Luts* (pp. 93-102). Ternopil: Vydavnytstvo "Pidruchnyky i posibnyky".
[31] Zaika, Y.O. (2007). *Inheritance law in Ukraine: Formation and development.* Kyiv: CST.
[32] Vasylchenko, V.V. (2003). The legal essence of the institution of inheritance agreement and its place in the system of civil law. *Law of Ukraine,* 7, 137-140.
[33] Mazurenko, S.V. (2004). *Inheritance agreement in civil law of Ukraine* (Candidate thesis, Odessa National Law Academy, Odesa, Ukraine).
[34] Maidanik, R.A. (Ed.). (2007). *Anomalies in the civil law of Ukraine. Anomalies of Civil Law Series*. Kyiv: Justinian.
[35] Vasilchenko, V. (2003). Inheritance agreement: Some considerations about rule-making. *Entrepreneurship, Economy and Law*, 12, 34-37.
[36] Dzera, O.V., Kuznetsova, N.S., & Luts, V.V. (Eds.). (2006). *Scientific and practical commentary to the Civil Code of Ukraine: In 2 volumes: Vol. 2*. Kyiv: Jurinkom Inter.
[37] Onishchenko, O.V. (2007). Some issues of legal regulation of the subject composition of the inheritance agreement. *Jurisprudence. Theory and Practice*, 10, 2-6.
[38] Zhilinkova, I.V. (1995). *Marital agreement*. Kharkov: Populyarnoye pravo.
[39] Ulianenko, O.O. (2003). *Marital agreement in family law of Ukraine* (Abstract of Candidate thesis, KNUTSH, Kyiv, Ukraine).
[40] Khobor, R.B. (2017). *Marriage contract as a regulator of property relations of spouses*. Ternopil: Vydavnytstvo "Pidruchnyky i posibnyky".

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ПРАВОВИЙ МЕХАНІЗМ РЕГУЛЮВАННЯ СТАТУСУ ДОНОРСЬКИХ ОРГАНІВ ЯК ОБ'ЄКТА ЦИВІЛЬНОГО ПРАВА

Анотація. *Якість життя населення значно залежить від рівня розвитку медицини, у тому числі і від такої її сфери як трансплантологія. Кожного року зростає потреба у донорських органах, що потребує розробки дієвого механізму регулювання правовідносин щодо них. Актуальність дослідження обумовлена існуванням низки невирішених проблем: невизначеність правовідносин в цій сфері, прогалини у застосуванні трансплантації органів і тканин людини та недослідженість співвідношення інституту трансплантації органів і тканин людини з інститутами цивільного права. Основною метою даної статті є визначення правового статусу органів і тканин людини в сфері трансплантології як об'єктів цивільного права. Основним підходом до проведення дослідження обрано сукупність методів правового аналізу, а також порівняльний аналіз. Визначено основні засади конституційно-правової сутності донорства та його цивільно-правові засади. Проведена оцінка ефективності законодавчого регулювання проблематики, що досліджується, у вітчизняному правовому полі, а також у порівнянні з нормами закордонних країн та міжнародного права. Встановлено, що міжнародне законодавство, законодавство країн СНД та розвинених країн в основному визнає органи і тканини об'єктами sui generis, обмеженими в обороті, встановлюючи кримінальну заборону на комерційне донорство. Запропоновано в межах цивілістичного підходу до правової суті донорських органів і тканин визнавати їх як особливі об'єкти цивільного права речового характеру. Розроблено авторську класифікацію донорських органів за критерієм їх доступності. Проаналізовано основні проблемні питання щодо визначення права власності на донорські органи. Визначено основні елементи механізму здійснення суб'єктивного права на донорство як форми реалізації конституційного і цивільного права людини на життя, а також форми реалізації правового статусу суб'єкта права на донорство. Запропоновано внести до Конституції України окрему статтю щодо врегулювання питання аналізу. Практичне значення отриманих результатів полягає в тому, що викладена в дослідженні інформація може бути застосована у законодавчій та судовій практиці, у викладацькій діяльності, запропоновані заходи можуть бути взяти за основу при реформуванні та вдосконаленні вітчизняної системи донорства*

Ключові слова: *об'єкт цивільного права, особливий об'єкт, донор, цивільно-правовий статус, донорські органи, трансплантація*

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LEGAL MECHANISM OF REGULATION OF THE STATUS OF DONOR BODIES AS AN OBJECT OF CIVIL LAW

Abstract. *The quality of life of the population significantly depends on the level of development of medicine, including such a field as transplantology. The need for donor bodies is growing every year, which requires the development of an effective mechanism for regulating legal relations with them. The relevance of the study is due to the existence of a number of unresolved issues: uncertainty of legal relations in this area, gaps in the use of transplantation of human organs and tissues and unexplored relationship of human organ and tissue transplantation with civil law institutions. The main purpose of this article is to determine the legal status of human organs and tissues in the field of transplantation as objects of civil law. The main approach to the study was a set of methods of legal analysis, as well as comparative analysis. The basic principles of the constitutional and legal essence of donation and its civil law principles were determined. The effectiveness of legislative regulation of the issues under study in the domestic legal field, as well as in comparison with the norms of foreign countries and international law was assessed. It was established that the international legislation, the legislation of the CIS countries and developed countries generally recognise organs and tissues as objects of sui generis, limited in circulation, establishing a criminal ban on commercial donation. It is proposed to recognise them as special objects of civil law of property nature within the framework of the civil law approach to the legal essence of donor organs and tissues. The author classification of donor organs according to the criterion of their availability was developed. The main problematic issues regarding the determination of ownership rights to donor organs were analysed. The main elements of the mechanism of realisation of the subjective right to donation as forms of realisation of the constitutional and civil right of a person to life, and also forms of realisation of the legal status of the subject of the right to donation were defined. It is proposed to include in the Constitution of Ukraine a separate article on the settlement of the issue of analysis. The practical significance of the obtained results is that the information presented in the study can be applied in legislative and judicial practice, in teaching, the proposed measures can be used as a basis for reforming and improving the domestic donation system*

Keywords: *object of civil law, special object, donor, civil status, donor organs, transplantation*

INTRODUCTION

The word “donation” comes from the Latin word “donare”, which means “to give”. Donors donate their own organs to patients in need, which in many cases saves a patient's life. Since the donation of blood and its components was the first to spread, this concept has long existed only in relation to this type of donation. However, medicine is evolving, emerging and widely used new types of human disposal of the body and its parts: by providing organs and tissues, eggs, sperm, surrogate embryos, stem cells, embryonic tissues. Donation of human organs and tissues is one of the necessary and mandatory stages of the treatment process (transplantation) aimed at saving human life, which is reflected in Part 4 Article 2. Additional Protocol to the Convention for theProtection of Human Rights and Human Dignity[1]. In addition to blood donation, organ donation and transplantation have become widespread in the world. It should be noted that the world's first organ transplant surgery was performed by Ukrainian surgeon Yuri Voron in 1933. His patient with a foreign kidney lived only two days – then they had no idea about the compatibility of organs [1]. However, so far the transplantation system has not been developed in Ukraine, and only in 2018, its legislation was adopted at the legislative level.

The practice of posthumous donation has become the norm in many countries. In Ukraine, the transplant system did not actually exist until recent years. Only in 2018 did the parliament take the first step towards its creation, passing the necessary law (Law 2427 or as

1. Additional Protocol to the Convention for the Protection of Human Rights and Human Dignity in Relation to the Application of Biology and Medicine to the Transplantation of Human Organs and Tissues. (2002, January). Retrieved from https://zakon.rada.gov.ua/laws/show/994_684#Text.

the Law "On Transplantation") . On May 17, 2018, the Verkhovna Rada of Ukraine made a revolutionary decision for Ukrainian medicine: it allowed organ transplantation after the death of a donor with his prior written consent. 255 people's deputies voted for the bill No.2386a-1 .

Saving lives through organ transplants is a reality in many countries, where people stand in special queues, behind someone else's kidney or heart. Creating a full-fledged transplant system in Ukraine will save more lives. For example, severe leukaemia often requires an unrelated bone marrow transplant, previously prohibited by law. Until recently, it was necessary to go abroad for this. Treatment there costs tens or even hundreds of thousands of dollars. Most seriously ill people do not have this money. In desperation, they and their relatives are forced to turn to all possible charitable foundations to raise money. And often just do not have time to wait for surgery.

Organ donation is a very new topic for the country, which has not yet been properly substantiated in practice and in the environment. Society's acceptance of this innovation occurs with many opposing views. In addition, the issue of the civil status of a donor body and the observance of civil rights remains unresolved. Research and scientific analysis of legal problems of donation in Ukraine and foreign countries, the state and prospects of their development were conducted by many domestic and foreign scientists.

Undoubtedly, some aspects of the researched problem have been and remain the subject of scientific interest and are one of the priority directions of research of both domestic and foreign scientists and practitioners. At the theoretical level, the legal aspect of identification of the domestic donation system is important for understanding and recognising the prerequisites for its formation, development and functioning, which provides an opportunity to outline the general patterns and prospects for its further development, identify common and different principles of identification with other legal systems and develop strategic directions of further reform and establishment of the legal status of donor bodies as an object of civil rights in order to build a system of protection of all parties to these legal relations.

1. MATERIALS AND METHODS

The methodological basis of the study was analytical and legal methods of analysis. General scientific and special methods were used. The set research tasks were solved in the study, analysis and synthesis of scientific literature on the research problem. The main provisions of the legal framework at the international and national levels were studied. The used methodology allowed developing the main directions of optimisation of the system of ensuring civil rights and obligations of the parties to legal relations regarding the removal and use of donor organs. The methods used allowed to obtain reliable and substantiated conclusions and results. The comparative method was used to compare the provisions of the domestic legal framework with the legal framework for regulating the object of study in other countries. The descriptive method allowed presenting the results of the study in a logical sequence. The graphical method was used to present the results in a visual form.

The study also used methods of legal analysis, synthesis, analogy, system and classification. One of the methodological tools used was the typological method, which allowed identifying the types of donor bodies as objects of civil rights, ways to ensure the rights of participants in these legal relations. Used typology can further serve as a basis for further research. The integration method allowed analysing the degree of integration into the scientific context of legal materials and some legal data that reflect the features of the object of study, which were not previously subject to scientific generalisation. The method of synthesis allowed solving the research problems through its application to primary sources on this issue. The application of the analytical method to these primary sources allowed making recommendations in terms of optimising the national system of legislative support; identifying the main areas of reform experience and the conditions that justify the use of certain ways to protect the civil rights of participants. Methods of induction and deduction were used to analyse the content and structure of legislative texts, the characteristics of legal norms in the context of the research topic. In the process of analysis, the historical method was used, which allowed studying the process of formation of the institute of transplantation in Ukraine and foreign countries.

The analysis of the scientific literature on the problem of research using these methods allowed giving some recommendations in terms of terminology and legislation.

2. RESULTS AND DISCUSSION

In the constitutional and legal sense, a donation is the result of the implementation of the voluntarily conscious will of a capable person to transfer elements of his body (certain organs) to another individual (recipient) to preserve his life and health and exercise their constitutional right to life. Donation is the only possible form of realisation of the doomed person's exercise of the constitutional right to life, the non-realisation of which (donation) leads to the termination of this right naturally, as well as the last possibility of new human life in the treatment of infertility. According to Law 2427, a special card is created for a donor, and information about him is entered into the Unified State Information System of Transplantation[1]. It will consist of several registers: lists of people who have decided on a posthumous donation, their proxies, lists of living donors, registers of anatomical materials intended for transplantation or production of bioimplants. It will include a list of living donors of hematopoietic stem cells. That is, a bank of bone marrow donors is being created, which simply did not exist in Ukraine before. Saved in this database lists of recipients (people in need of donor organs)

1. Law of Ukraine No. 1007-XIV "On transplantation of organs and other anatomical materials". (1999, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1007-14#Text.

as well as those who have already received a donor organ will be provided. The updated Unified Information System will be a list of medical institutions that have the right to transplant organs and tissues, and transplant coordinators – people responsible for the complex process of organ transplantation.

Under the new law, the information stored in this system will be confidential. And the transplant permit can be revoked by an applicant. The law also provides for a "presumption of disagreement" when a person refuses to donate posthumously in writing. It also identifies those whose organs cannot be removed for transplantation under any circumstances – children and people killed in hostilities or violently. According to the document, every citizen of Ukraine must either agree or prohibit the removal of their organs after death. If during his life he did not have time to express his opinion on this issue, the decision can be made by relatives, in their absence the principle of disagreement comes into force: no consent – no posthumous donation. The document provides for imprisonment for up to five years for forcible removal of organs and up to seven years for trafficking in organs.

However, the parliament did not support the models that work in India, Belarus, Kazakhstan, Russia [2]. There is a model of "presumption of consent". That is, a person or his relatives are not asked for consent to donate. If a person dies, his organs are taken away to save another person. In India, it is simply a cult. People believe that this is the highest reward – if your kidneys or heart can still live after your death. But because the church was against such donations, parliament did not go for it.

Thus, the Code of the Republic of Kazakhstan provides for the possibility of removing organs and tissues from a corpse[1]. Article 169 § 10 enshrines the presumption of consent. This means that the removal of organs and (or) tissues from the corpse is not allowed if the health care organisation at the time of removal is informed that during the life of this person or his spouse, close relatives or legal representative have declared their refusal to remove his tissues and (or) organs (parts of organs) after death for transplantation to a recipient. Only with the consent of the deceased, obtained in the prescribed form, given before his death, or his close relatives, the scope of which must be clearly defined by law, the medical organisation has the right to remove the organs and tissues of a deceased. Paragraph 3 of Article 169 of the Code of the Republic of Kazakhstan established that the sale of human organs and (or) tissues is prohibited, but with this prohibition the legislator excluded only one of the possible agreements with transplant objects, without specifying others, which raises the problem of recognizing the civil nature of transplantation. The Law of the Republic of Belarus "On Transplantation of Organs and Tissues"[2] states that human organs and tissues may not be the subject of civil law agreements, except for agreements of a gratuitous nature, i.e. they are recognised as things restricted in circulation. The Law of the Republic of Moldova "On Transplantation of Human Organs and Tissues" prohibits the sale of human organs and tissues, it is possible to apply only to medical institutions[3].

Legislation in developed countries, as a rule, contains rules on criminal liability for commercial donation:

– German legislation on transplantation [3];

– British legislation – "Act on Human Tissues" [4].

According to international legal doctrine, commercial agreements with transplant objects (sui generis) are also prohibited under the threat of criminal punishment:

– Declaration on human organ transplantation: condemnation of commercial donation[4];

– A set of basic principles on transplantation: "the human body and its parts cannot be the object of purchase and sale" [5; 6];

– CoE Convention "On the protection of human rights and human dignity in connection with the application of biology" [7].

However, it should be noted that in some countries there is no ban on reimbursable donation – Iran, Turkey and India, where the field of transplant services is not criminalised [8]. Thus, international law, the legislation of the CIS countries and developed countries mainly recognise organs and tissues as objects of sui generis, limited in circulation, establishing a criminal ban on commercial donation. The state acts as the main regulator of legal relations in the field of organ and tissue transplantation, allowing limited use of the contractual mechanism in the field of posthumous donation. In the authors' opinion, the most optimal choice between the "presumption of consent" and the "presumption of non-consent" for posthumous donation [9] should be considered the contractual mechanism of the "extended model". In the case of in-life and posthumous donation, mandatory participation of an independent medical and legal commission – a representative of public authorities as a guarantor of the voluntary Donation Act – is required. According to the results of the analysis of sources, it can be concluded that in civil law, organs and tissues are considered by most researchers as things [10], special objects [11], as withdrawn from civil circulation [12] (on the basis of prohibition), simply as objects civil law [13] or sometimes as personal intangible benefits (health and the right to bodily integrity) [14]. The authors believe that within the civil law approach to the legal essence of donor organs and tissues, they should be recognised as special objects of civil law of real nature. The objects of transplantation before their removal and

1. Code of the Republic of Kazakhstan No. 193-IV "On the health of the people and the health care system". (2009, September). Retrieved from https://online.zakon.kz/document/?doc_id=30479065.

2. Law of the Republic of Belarus No. 28-3 "On organ and tissue transplantation". (1997, March). Retrieved from http://pravo.levonevsky.org/bazaby/zakon/zakb1023.htm.

3. Law of the Republic of Moldova Nr.473-XIV "On transplantation of human organs and tissues". (1999, June). Retrieved from http://www.law-moldova.com/laws/rus/transplantatsii-organov-ru.txt.

4. Declaration on human organ transplantation. (1987, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_330#Text.

after transplantation are essentially intangible benefits, expressed in the right to health, bodily inviolability, and dignified treatment of a body after death. From the moment of seizure there is a new object, which due to close personal connection with a donor (genetic code) cannot be unambiguously considered a thing, but, no doubt, it has a material nature, because it is the subject of the material world, which is in human possession and serves to meet her needs.

If to consider a thing as an object of civil law, then among its main features are materiality and accessibility, and as an additional – usefulness. These characteristics of the thing are applied only to the independent organs and tissues of man, that is, already separated from it. Organs and tissues, no doubt, are objects of the material world and are useful in meeting human health needs. However, this does not give grounds to consider them things. Biological objects differ from ordinary things by a special origin (they are part of the human body). As the list of objects of civil law is not exhaustive, it, in the authors' opinion, allows allocating bodies and fabrics in separate groups of objects of civil law. V. Skrypnyk holds a similar position, believing that donor bodies under no circumstances can be recognised as things, should be included in a specific independent subject of civil law agreements, limited in civil turnover [15].

Donor organs can be classified on the basis of availability. In particular, D.S. Dontsov [16] offers the following:

1. Organs and tissues, "in the separation of which either there are no adverse changes in the human body (e.g., nails, hair, excretion products, etc.), or, if changes occur, they are temporary and not have serious consequences for human health".

2. "Organs and tissues, the removal of which is either impossible at all, as it will inevitably lead to death, or such removal can have significant adverse health consequences".

The parts of the body belonging to the first group are classified as full-fledged revolving objects without any restrictions. Other organs and tissues must be classified as restricted or withdrawn from circulation.

The division of donor bodies into two groups in determining their legal status as objects of civil rights is supported by other scholars [17]. But such a typology from a legal point of view is illegal and inaccurate.

The authors believe that the division is best done in three groups:

1. Parts of the human body, the removal of which does not cause any adverse changes in the human body (nails, hair, blood within acceptable limits) – property, limited in civil circulation.

2. Parts of the human body that can be removed in a lifetime (paired organs, such as the kidneys), but are painful and have various adverse effects on the health of the donor, as well as

3. Parts of the human body that cannot be removed during life (heart), as it will lead to the death of a donor.

With regard to the first selected group, the civil legislation should contain rules on permission to buy and sell these objects of a human body, the removal of which is not associated with danger to human life and health. The second group allows the emergence of civil relations only between a donor and a recipient, and lists the objects restricted in circulation. The third group consists of objects withdrawn from circulation. The issue of ownership of donor organs is also becoming relevant. As for the parts of a body that are not removed from it, there is no doubt that they are not independent objects of rights. The position on the recognition/non-recognition of human organs as property objects after death is controversial. There are court decisions that deny the material nature of human organs. Thus, the judicial panel refused to satisfy the requirements to declare the surgery on organs remove illegal, to recover compensation for non-pecuniary damage, because at the time of biological death and at the time of the procedure of removal of organs for transplantation none of the relatives or legal representatives of the deceased had not informed about non-consent of posthumous removal of organs [18; 19]. The judicial panel justified the decision by the fact that the human organs, which it has from the moment of birth, the current legislation does not refer to things, therefore, they cannot be part of the hereditary mass. However, this position is controversial, as the current legislation actually recognises that the fate of human body parts can be determined at the discretion of the "right holder" during his lifetime. Thus a person has the right at any time to express his will to consent or disagree with the removal of organs and tissues from his body after death [20; 21].

In the authors' opinion, the removal of human organs during life should be at person's full disposal and take place at the will of a person. The law stipulates that the removal of an organ from a living donor is permitted if he is genetically related to a recipient. Therefore, the authors consider the legal permission of only related lifelong donation as a diminution of a citizen's rights. For many patients or victims of accidents, donor organs become the only hope for life. In Belarus, the number of organ transplants has increased 40 times due to the presumption of consent, i.e. a person becomes a default donor if he/she does not report a ban on posthumous donation. In Catholic countries, the boom is largely due to the Pope's call "not to take a body to heaven". Despite the fact that the state budget for 2018 was laid the first time including transplantation (UAH 112 million), it is still a drop in the ocean. According to the Association of Surgeons, the annual need for organ transplantation in Ukraine is as follows: kidneys – 2500, heart – 2000, liver – 1500. But today only 2% of the necessary surgeries occur [22]. That is why it is so important to develop Ukrainian transplantology. However, opponents of the new transplant law believe that the unpreparedness of the health care system leads to the flourishing of "black transplantology" [23]. Especially in situations where medical reform is not complete and a military conflict is raging in the east of the country. After all, under similar circumstances, there were terrible crimes in this area. Thus, in the book "Hunting. Me and the War Criminals", Carla de Ponti, prosecutor at the International Criminal Tribunal for Yugoslavia, said that in 1999, young Serb prisoners of war had not been beaten in Kosovo and had been well fed. And then qualified medical workers took organs from them for transplantation

to foreign customers [24; 25]. In the authors' opinion, the new law places more restrictions on the development of black transplantation, despite its shortcomings. But even on the "black" Ukrainian market, the cornea costs 5 thousand dollars, the heart – 250 thousand dollars. Ukrainians sell their organs abroad. To prevent this, the law increases criminal liability for violating the order of organ transplantation. Relevant changes are made in Art. 143 of the Criminal Code [18], which will maintain the state monopoly on such operations.

Law 2427 requires the diagnosis of brain death. Posthumous organ donation and transplantation is a transparent procedure involving more than 10 specialists, it is controlled by the prosecutor's office. It is forbidden to just take a kidney out of a person and put it in the fridge. The new law has several serious differences from the law "On transplantation of organs and other anatomical materials" adopted in 1999 [5]. First, if earlier only state institutions could be involved in the removal of organs, now this right is granted to all, even private, and not accredited in the manner prescribed by the Cabinet of Ministers, contrary to part 5 of Article 16 of the Fundamentals of Health Legislation of Ukraine[1]. Secondly, the new version provides for the establishment of a central executive body that ensures the formation of state policy in the field of health care and prescribes some mechanisms for obtaining consent to take organs, which was not the case before.

The urgent issue for Ukraine is the organisation of the transplantation system. It consists of specialised, well-equipped transplant centres with good doctors, a secure database. Organisational reserves and forces play a very important role: choppers, machines, specialists in organ transportation, means of transportation. There is nothing like that. It is noted that in Ukraine now, in fact, 7 transplant centres. A surgeon can perform several dozen, a hundred surgeries a year. And organisationally less surgeries can be provided. This is resuscitation, anaesthesiologists. An organ transportation service should be created. That is, in the authors' opinion, the country is not prepared for this process at all. This is a law about the future of medicine and the future of people, because there are many diseases that we have not learned to treat. For example, myocardial infarction is the local death of a small area of the heart. The living tissue of the heart is replaced by a scar, and as a result a person stays with a part of the heart for life that does not allow him to work properly as a pump. But in the future, it will be possible to transplant "patches" of myocytes of heart cells instead of a scar. It will also be possible to make 3D frames of organs. For this the law is needed, which opens the way to a civilised world. The authors of the bill, adopted by the Council, claim that it will save the lives of more than 5000 Ukrainians who need a transplant every year. However, the director of the Heart Institute, Borys Todurov, calls for restraint in forecasts: "I think that in the version in which this law was adopted, it will not change anything during the year. After all, the main norm, which is very necessary, was not adopted – the presumption of consent"[2]. However, not all organs can be suitable for this or that patient due to certain indicators. Before transplantation, doctors must perform typing.

Ukrainians are wary of organ transplants. Meanwhile, in many countries, it is already a public norm. Thus, in Austria, Poland, Belgium, Portugal, Sweden, France, more than 80% of the population is ready to help save someone's life. However, the British, Germans or Danes consent to posthumous donation in only 12-20% of cases. According to psychologists, the reason is not that one nation is "kinder" than another, a snag is in the form of a special questionnaire. In the UK, for example, it is needed to check the box that allows posthumous transplantation. And in France, on the contrary, it is necessary to note the column of refusal. According to psychologists, when making such a decision, people more often choose the opportunity to help the dying survive [26; 27]. But experts note that it will not be easy for Ukrainians to decide on a posthumous donation. Ukrainians are afraid of falling victim to black transplantologists. It should be borne in mind that for a transplant operation, the body must be technically alive and viable. That is, it is possible to remove an organ for transplantation and transplant it to a recipient only if a potential donor is in a health care facility, on a ventilator, he has been diagnosed with brain death. Only in this case, in the operating room, an organ can be removed for transplantation. In a morgue, for example, it is absolutely impossible to do so, because the organ will be dead and unsuitable for transplantation. A man full of energy is afraid to think of a sudden demise. And it will be difficult for relatives to give permission to remove organs: there is some stinginess in Ukrainian mentality. In addition, citizens do not trust the state. They may also refuse for religious reasons. To get rid of fears and complexes, people need a well-structured information campaign [28].

The presence of organs and the compatibility of a recipient and a donor are not the only components of a successful operation. Unfortunately, in recent years, transplantation as a field of medicine in Ukraine has receded into the background and declined. If earlier Belarusian doctors came to learn from their Ukrainian colleagues, now Ukrainians go to Belarus for heart transplants. It is stated that there are only 5 specialised institutions in the country: in Kyiv, Donetsk, Odesa, Lviv and Zaporizhia. The mechanism of the implementation of the subjective right to donation as a form of realisation of the constitutional and civil right to life includes the following elements (Fig. 1).

The legal status of the subject of the right to donate includes rights, freedoms, responsibilities and their guarantees that correspond to the general constitutional and legal status of a person and a citizen of Ukraine, burdened by their special legal status, which is an objective danger that is not eliminated, for life and health. This status is implemented in four forms (Fig. 2).

1. Law of Ukraine No. 2801-XII "Fundamentals of the legislation of Ukraine on health care". (1992, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2801-12#Text.
2. Criminal codex of Ukraine. (2011). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14.

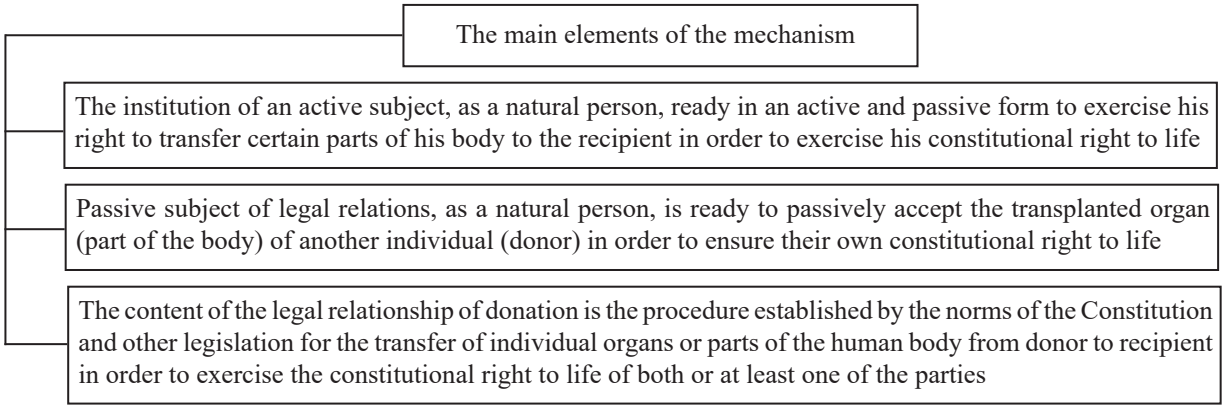

Figure 1. *The main elements of the mechanism of exercising the subjective right to donation as a form of realisation of the constitutional and civil right to life*

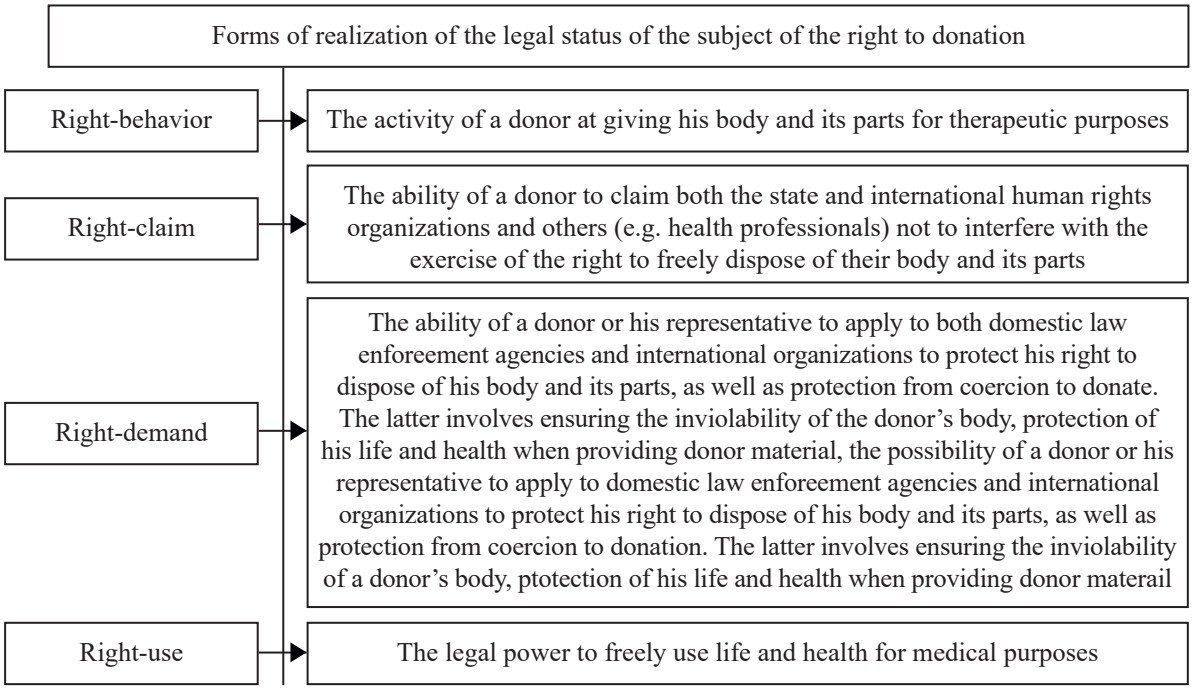

Figure 2. *Forms of realisation of the legal status of the subject of the right to donation*

The right to physical freedom is the right of every person to freely use and dispose of his organism and its parts both during life and to predict their fate in the event of death. One of the components of this authority is the right to donate. In this connection, it is proposed to supplement Section 2 of the Constitution with the following article:

1. Everyone has the right to physical liberty.

2. Donation in Ukraine is encouraged. No one can be forced to remove organs and tissues.

In order to protect the constitutional rights to life, liberty and security of person, health care and medical care of minor donors, the Law on Organ Transplantation must provide for the following restrictions on the donation of minors:

a) the removal of bone marrow from a minor is allowed subject to the approval of authorised state bodies, such as guardianship and custody authorities and the court;

b) the removal of bone marrow from a minor is allowed only with the knowledge of his legal representatives;

c) in cases when the donor has reached the age of 15, it is necessary to take into account the donor's own opinion;

d) the recipient can be only a brother or sister of a donor;

e) bone marrow donation may take place only in the event of an imminent threat of loss of life for a recipient, which cannot be avoided by any means other than bone marrow transplantation;

e) the removal of the bone marrow from a minor will not cause the alleged harm to health, which must be confirmed by a decision of a medical council.

The legal requirement that there be only a genetic link between the organ and tissue donor and the recipient does not seem reasonable and fair. This hinders the realisation of the constitutional right to life of people in need of transplantation, as well as unreasonably limits the subjective human right to organ and tissue donation. As a condition for the removal of organs and tissues for transplantation from a living donor, in addition to the genetic link, the Law on Transplantation would provide for other links that may exist between spouses, loved ones, friends and provide additional medical examination for survival (compatibility) of the organ or tissue. Since the donation of organs and tissues for transplantation is associated with

a risk to life and the possibility of negative consequences for the health of a donor, the state is obliged as a guarantee of the subjective right to donation, to provide donor social support. Currently, such measures are assigned only to blood donors and their components, which, in the light of public interest, does not seem fair and rational. Social support measures include, in particular, priority allocation at the place of work or training of preferential vouchers for sanatorium treatment; extraordinary treatment in state or municipal health care organisations within the framework of the Program of state guarantees of free medical care; granting annual paid leave at the appropriate time of year, etc. By adopting a law on transplantation of anatomical materials, and not making a system of protection as objects of civil law, the Verkhovna Rada created a serious risk to the lives of those who agreed to posthumous donation.

Authorities plan to create a single state information system for transplantation, many of which will be confidential. However, there will be categories of people who will be able to recognise absolutely all the information: after the law comes into force in Ukraine, it is worth noting that this law has been in force since 2018. They will receive the consent of relatives for posthumous donation, enter data into the register, organise the removal, storage and transportation of anatomical materials. If desired, they will be able to sell personal data of potential donors and physiological parameters of organs. The opposite situation can happen: relatives of patients can arrange a hunt for valuable information carriers to go directly to donors. In addition, a separate line of the law prescribes the possibility of selling anatomical materials abroad, if there are no suitable recipients in Ukraine. That is, now would be possible not to smuggle, but to declare the absence of a person who will fit the removed organ, and legally take him abroad and get much more money. Thus, renouncing the state's monopoly on organ transplantation, the authorities lifted all restrictions on the removal of organs abroad. At the same time, hundreds of Ukrainians are waiting, hoping for a suitable donor.

In the context of a complex legal relationship between a donor and a recipient and a possible conflict of interest, the content of the Law on Transplantation, which provides for the presumption of consent to the removal of an organ or tissue after death, should promote the constitutional right to life and not violate balance of constitutionally significant values and rights of any of them, of which: a recipient – in terms of ensuring the realisation of his right to life and human rights (donor) to a dignified treatment of his body, i.e. the right to physical integrity as an element of the right to personal integrity and protection of the dignity of a person after death.

CONCLUSIONS

Thus, donation occupies an important position in the system of realisation of constitutional rights and freedoms of both a donor and other persons, as well as in the system of realisation of civil rights and responsibilities:

– it ensures the realisation of the constitutional right to life, saving it and restoring human health, as well as creating a new life.

– it provides protection of physical and moral inviolability of a donor;

– it ensures the restriction of the donor's right to dispose of their bodies in its interests;

– despite the absence of provisions on donation in the text of the Constitution, they have a constitutional and legal status;

– civil law aspects of the right to donate are based on the constitutional human right to dispose of their body and its parts.

The rights to donor organs are in practice exercised without the exercise of real authority by both donors and recipients, with the participation of medical institutions that in some sense own these facilities. The authors believe that with regard to donor bodies, it is possible to talk only about property rights of a special type, which are more limited in circulation and have some common features with property rights. The donor's right to own organs can be characterised as a right of disposal.

REFERENCES

[1] Shchastny, A.T., & Mikhnevich, E.V. (2018). Achievements and problems of transplantology at the present stage. *Bulletin of Vitebsk State Medical University*, 17(5), 7-16.

[2] Orlovetskaya, A.G. (2017). Blood donation as a form of altruistic behaviour: Russian specifics. *Journal of Social Policy Research*, 15(1), 7-20.

[3] Dubovik, O.L., & Zhalinskaya, A.A. (1998). Legislation of Germany on organ and tissue transplantation. *Journal of Russian Law,* 10, 206-212.

[4] Human tissue act. (2004). Retrieved from http://www.opsi.gov.uk/acts/acts2004/ukpga_20040030_en_1.

[5] WHO guidelines for transplantation. (1991). Retrieved from http://158.232.12.119/transplantation/Guiding_PrinciplesTransplantation_WHA63.22ru.pdf.

[6] WHO guidelines for transplantation of human cells, tissues and organs. (2010). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22ru.pdf

[7] Wall, J. (2011). The legal status of body parts: A framework. *Oxford Journal of Legal Studies*, 31(4), 783-804.

[8] Stepanova, E.N. (2004). *Human organ transplantation: World experience and Russia (civil law aspect)*. Moscow: Moscow University.

[9] Galeeva, G.R. (2015). The model of "requested consent" in Russian and foreign legislation in the field of transplantation of human organs and (or) tissues. *Bulletin of the Volzhsky University after V.N. Tatischev*, 4(83), 42-49.

[10] Maleina, M.N. (2003). The status of organs, tissues, the human body as objects of property rights and the right to physical integrity. *Legislation*, 11, 22-49.
[11] Apolinskaya, N.V. (2009). *Biological objects of human in the civil law of the Russian Federation*. Irkutsk: Irkutsk State University.
[12] Bezverkhov, A.G. (2002). *Property crimes*. Samara: Samara University.
[13] Kudashova, T.G. (2012). Recognition of human organs and tissues as objects of civil law: Pros and cons. *Proceedings of the Orenburg State Agrarian University*, 3(35-1), 268-270.
[14] Krasavchikova, L.O. (1994). *The concept and system of personal non-property rights of citizens (individuals) in the civil law of the Russian Federation*. Yekaterinburg: Publishing House of the Ural Law Academy.
[15] Skrypnyk, V. (2018). Donor bodies as objects of civil legal relations. *Entrepreneurship, Economy and Law*, 5, 62-67.
[16] Dontsov, D.S. (2009). Human organs and tissues as objects of property law in the Russian Federation. *Medical Law*, 2, 43-46.
[17] Dautbaeva-Mukhtarova, A.E. (2014). The use of human organs and tissues in transplantology as special objects of civil law. *Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan*, 1(33), 35-39.
[18] Appeal ruling of the Moscow City Court of September 16, 2013, in the case No. 11-27391. (2013). Retrieved from http://base.garant.ru/119282608/.
[19] Ninko, D. (2016). The right to life: What prevents transplantation legally and why it is difficult to become a donor in Ukraine. *Today*, 3, 12-14.
[20] Tasbulatova, G.S., Umbetov, A.U., Sadykova, B.S., Uzakova, B.Z., & Abdrakhmanova, M.T. (2020). Comparative characteristics of the cardiovascular parameters in 7-11-year-old boys residing in northern and southern Kazakhstan. *Zeitschrift fur Gefassmedizin*, 17(2), 13-15.
[21] Kostruba, A.V. (2018). Law enforcement as a form of realization of right: Phenomenological analysis experience (Civilized aspect). *Revista de Derecho Civil*, 5(1), 177-190.
[22] In Ukraine, from 2018, organs from "non-native corpses" will be transplanted. (2017). Retrieved from https://tsn.ua/ukrayina/u-2018-roci-v-ukrayini-startuye-masshtabna-programa-z-peresadki-organiv-vid-chuzhih-mertvih-donoriv-1039020.
[23] Ptashnyk, I.R. (2016). *Civil law regulation of transplantation in Ukraine*. Kyiv: National Academy of Internal Affairs.
[24] Kurakin, M. (2017). Yugoslav blood. Retrieved from https://lenta.ru/articles/2017/12/07/mtbubgeroi.
[25] Giallongo, A., Parisi, G.F., Licari, A., Pulvirenti, G., Cuppari, C., Salpietro, C., Marseglia, G.L., & Leonardi, S. (2019). Novel therapeutic targets for allergic airway disease in children. *Drugs in Context,* 8, Article number 212590.
[26] Ustinov, O.V. (2018). Active life with a transplanted heart in Ukraine and in the world. *Ukrainian Medical Journal*, 4, 3-5.
[27] Kostruba, A.V. (2018). Right deprivation in the legal regulation mechanism of civil property relations. *Journal of Legal, Ethical and Regulatory Issues,* 21(Special Issue 1), 1-15.
[28] Aringazina, A.M., & Kurmanguzhina, M.Sh. (2014). Modern approaches to the implementation of donor programs in transplantation. *Clinical Medicine of Kazakhstan*, 32(2), 14-20.

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ЕФЕКТИВНІСТЬ СИСТЕМИ ЗАХИСТУ ПРАВ СПОЖИВАЧІВ ПРИ КУПІВЛІ ТОВАРІВ В ІНТЕРНЕТ-МАГАЗИНАХ

Анотація. *Щороку переважна більшість країн переходить в онлайн-середовище. Особливо це стосується інтернет-магазинів. Предметом дослідження у статті є система захисту прав споживачів при купівлі товарів в інтернет-магазинах та її ефективність. Мета – проведення аналізу стану розвитку електронної торгівлі в Україні та системи захисту прав споживачів при купівлі товарів в інтернет-магазинах. Використано такі загальнонаукові методи: класифікації та теоретичного узагальнення – для дослідження теоретичних основ інтернет-торгівлі; статистичного аналізу – для аналізу сучасного стану електронної торгівлі в Україні та системи захисту прав споживачів. Отримано такі результати: на основі аналізу норм чинного законодавства та досвіду зарубіжних країн, що описують розвиток ринку електронної торгівлі в Україні та світі, виявлено основні тенденції, що склалися, визначено позитивні та негативні сторони інтернет-торгівлі, а також ефективність системи захисту прав споживачів при купівлі товарів в інтернет-магазинах. Було зроблено висновок, що індустрія «електронної комерції» розвивається дуже динамічно. Захист прав споживачів під час купівлі товарів через інтернет-магазини здійснюється як і при звичайній купівлі-продажу, але має низку специфічних особливостей. Для залучення потенційних покупців і формування в них довіри інтернет-магазини намагаються на своїх офіційних сайтах розміщувати якнайбільше інформації про свої товари і послуги, зокрема й відгуки покупців. Це свідчить про те, що самі продавці зацікавлені в якнайшвидшому вирішенні спірних ситуацій і збереженні своєї репутації. З огляду на це, саме підвищення споживчої грамотності громадян, вміння повною мірою реалізувати свої права, захищати свої інтереси в разі виникнення тих чи тих суперечностей – один зі шляхів вирішення наявних проблем*

Ключові слова: *електронна торгівля, електронна комерція, інтернет-простір, інтернет-магазин, інтернет-покупці, захист прав споживачів, юридична відповідальність*

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EFFECTIVENESS OF THE CONSUMER PROTECTION SYSTEM UPON PURCHASING GOODS IN ONLINE STORES

Abstract. *Every year, the vast majority of countries switch to an online environment. This is especially true for online stores. The subject of this study is the system of consumer protection upon buying goods in online stores and its effectiveness. The purpose is to analyse the state of development of e-commerce in Ukraine and the system of consumer protection upon purchasing goods in online stores. The following general scientific methods were used: classification and theoretical generalisation – to study the theoretical foundations of e-commerce; statistical analysis – to analyse the current state of e-commerce in Ukraine and the consumer protection system. The following results were obtained: based on the analysis of the provisions of current legislation and the experience of foreign countries describing the development of the e-commerce market in Ukraine and the world, the main trends that have developed have been identified, the positive and negative aspects of e-commerce have been identified, as well as the effectiveness of the consumer protection system upon purchasing goods in online stores. It was concluded that the "e-commerce" industry is developing very dynamically. Consumer protection upon purchasing goods through online stores is carried out as with a regular purchase and sale, but it has a number of specific features. To attract potential customers and build their trust, online stores try to post as much information about their products and services as possible on their official websites, including customer reviews. This indicates that the sellers themselves are interested in resolving disputes as soon as possible and preserving their reputation. Taking this into account, it is the improvement of the consumer literacy of citizens, the ability to fully exercise their rights, and to protect their interests in case of certain contradictions that is one of the ways to solve the existing problems*

Keywords: *electronic trading, e-commerce, internet space, online store, online buyers, consumer protection, legal responsibility*

INTRODUCTION

The modern world is a world of high technologies that cover more and more aspects of our lives every year. E-commerce in Ukraine has currently entered a stage of rapid development. Even 10 years ago, the internet was a luxury for the elite, something unrealistic and hardly achievable. Gone are the days when access to the internet space was an extraordinary occasion, now the connection to the World Wide Web occurs every second, continuously and around the clock. The number of gadgets that have internet access is increasing every day. In general, as O. Synyavska emphasises, with the creation of an increasingly active e-commerce space in Ukraine, the popularity of foreign platforms is declining, and national entities are increasingly using the experience of business models of other countries, implementing it in their functioning [1]. At present, the online market of Ukraine is dominated by local companies, such as "Rozetka", "Allo", "OLX" and many others. The top three most visited *e-commerce* sites in Ukraine include: OLX.ua (40.4% of users), Rozetka.com.ua (32.5%) and Prom.ua (26.5%). According to the Association of retailers of Ukraine, Alibaba Group became the world leaders among players in the field of e-commerce in 2016 with a share of 27%. This is followed by Amazon with 13% of the global market and eBay with 4.5% [2]. Analysis of the growth rate of e-commerce volumes in Ukraine indicates that they

have considerably exceeded the growth rate in Europe in recent years. This is primarily due to a sharp increase in the level of internet penetration in Ukraine, as well as the distribution of internet users by age and income level: for example, for users with an above-average income level, it reaches almost 100%, a similar situation is observed in the age group of 15-45 years, which provides a considerable share of active internet buyers.

Furthermore, in the context of the Europeanisation of the national economy, an important aspect is Ukraine's performance of international obligations. One of the most important areas of sectoral cooperation between the EU and Ukraine, which is stipulated in the Association agreement, is consumer protection (Chapter 20 Section V "Economic and Sectoral Cooperation"). The purpose of such cooperation is to ensure a high level of consumer protection and achieve compatibility between the Ukrainian and European consumer protection systems (Article 415 of the Association agreement). According to Article 417 of the Association agreement, Ukraine gradually harmonises its legislation with the EU acquis in the area of protection of consumer's rights, a list of which is provided in Annex XXXIX to the Association agreement, while avoiding the creation of barriers to trade[1]. Annex XXXIX to Chapter 20 of the Association agreement stipulates that the provisions of Directive 2002/65/EC should be implemented in Ukraine within three years from the date of entry into force of the Association agreement[2]. The purpose of the Directive is to harmonise the laws, sub-legislative acts, and administrative regulations of Member States regarding remote marketing of consumer financial services in order to strengthen the protection of the rights of consumers who are offered financial services via the Internet.

The current stage of development of relations between the area of production of goods, services, and the area of consumption indicates the predominant importance of the consumer community. The term *customisation* is firmly established in everyday life and defines the dominant scientific and technological progress in the production and market of consumer goods and services. That is why today all organisations are required to have their official websites with up-to-date information about themselves. Each store must have a variety of online catalogues with its products for everyone to observe. Moreover, recently there have been increasingly more stores emerging, which trade only in the online space (*Wildberries, La Moda, Ali Express* , and many others). In social networks, more and more people engaged in joint purchases appear, they post information about products and services on their pages, accept orders through online correspondence, and send goods to the specified addresses.

Thus, remote trading is already firmly established in the everyday life of most Ukrainian citizens. Today, remote purchase of goods is carried out not only by people with disabilities or advanced providers, but also by mothers with small children, ever-busy office workers, even ordinary citizens who do not want to waste their time shopping. A kind of remote purchase and sale agreement is established between the customer and the online store. Therewith, purchasing goods using an online store or through online catalogues on the websites of various organisations has its pros and cons. In general, as scientists note, in the context of global transformations, the subject matter is understudied. And the presence of significant violations of consumer rights on the part of business entities and, accordingly, complaints from the population about low-quality goods and services, as well as unfair competition, indicate that this problem is quite relevant, underdeveloped, and requires further scientific research.

The subject of this study is the system of consumer protection upon buying goods in online stores and its effectiveness. The purpose is to analyse the state of development of e-commerce in Ukraine and the system of consumer protection upon purchasing goods in online stores. Tasks: research of the concept of "e-commerce"; "online store"; analysis of trends in the development of e-commerce in Ukraine, the effectiveness of the consumer protection system when purchasing goods in online stores.

1. MATERIALS AND METHODS

In accordance with the tasks of scientific search, the study uses a set of interrelated, complementary research methods. The theoretical and methodological basis includes dialectical, historical, and comparative methods, which are used to study the processes of establishment, development, and functioning of online stores in Ukraine and foreign countries. A comprehensive terminology of the electronic economy and its components has been developed, in particular, the content of such main categories as electronic trade, e-commerce, internet space, online store, online purchases, consumer rights protection.

The study uses methods of analysis, synthesis, logical generalisation and scientific abstraction, statistical and Aristotelian methods, with the help of which the analysis of social processes, their interrelation, the mechanism of functioning of electronic commerce in Ukraine and other states is carried out; special legal methods of interpretation of legal provisions, which are used to define the conceptual foundations of the functioning and development of electronic commerce in Ukraine, as well as lines of work for improving the national legislation and practical implementation of international standards in this area. The analysis of the provisions of the current legislation regulating the rights of customers in online stores is also carried out, in particular, the Civil Code of Ukraine[3], the Law of Ukraine "On Consumer Rights Protection"[4],

1. Association agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part. (2014, September). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011#Text.

2. Directive 2002/65/EC of the European Parliament and of the Council on the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. (2002, September). Retrieved from https://minjust.gov.ua/m/str_45878.

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

4. Law of Ukraine No. 1023-XII "On consumer protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12#Text.

the Law of Ukraine "On Electronic Commerce"[1], etc. In the course of study, it is the methods of classification and theoretical generalisation that have gained particular weight. They were applied, in particular, to investigate the theoretical foundations of e-commerce and the legal nature of online stores. Using these methods, it was found out that it is the interests of the consumer that should be the main priority of regulating the relations of market forces within the social and consumer complex. The Ukrainian legislation governing this area is rather confusing, being represented by various legislative acts that do not fully track the changes taking place in the era of the development of the digital economic model of society. That is why it is concluded that only the adoption of the consumer protection code would bring the legislation into much-needed compliance.

The method of statistical analysis allowed analysing the current state of electronic commerce in Ukraine and the consumer protection system in foreign countries. Thus, mechanisms for activating e-commerce in Ukraine in the context of the development of a deep and comprehensive Europeanisation of the economy in the context of a free trade area with the EU are defined, based on such areas of development of national e-commerce as improving electronic information systems, ensuring the exchange of information between the state and consumers of these services. In view of this, the emphasis is placed on the positive foreign experience of consumer protection upon purchasing goods in online stores in France, Germany, USA, Italy, England, Belgium, Switzerland, etc. Using this method, the study considered some aspects of international legislative regulation, which establishes the rights of buyers and has a direct impact on the rights of consumers and the behaviour of other stakeholders in the consumer market.

2. RESULTS AND DISCUSSION

2.1. Ukrainian legislation and consumer rights protection system for purchasing goods in online stores

In the Law of Ukraine "On Electronic Commerce", electronic trade is defined as a part of e-commerce, namely, economic activity in the field of electronic purchase and sale, sale of goods remotely to the buyer by making electronic transactions using information and telecommunications systems. Purchase of goods via the internet is a contract concluded at a distance by the seller (contractor) with the consumer using remote communication means (Clause 8 Article 1 of the Law of Ukraine "On Consumer Rights Protection"[2]), which include telecommunications networks, postal communications, television and information networks, in particular the internet. Article 698 of the Civil Code of Ukraine stipulates that under a retail purchase and sale agreement, a seller engaged in business activities for the sale of goods undertakes to transfer to the buyer the goods that are usually intended for personal, home, or other use not related to business activities, and the buyer undertakes to accept the goods and pay for them[3]. Relations arising between the buyer and seller of goods, works, and services on the internet do not differ from the conventional rules of purchase and sale and are governed, in particular, by the provisions of the Civil Code of Ukraine and the Law of Ukraine "On Consumer Rights Protection". Taking this into account, remote purchase and sale is nothing else than a type of retail purchase and sale.

However, in an online store, one can often encounter a dishonest seller. The issue of unfair commercial practices against consumers in Ukraine is primarily governed by the Laws of Ukraine "On Consumer Rights Protection" and "On Protection Against Unfair Competition"[4].

According to Part 1 Article 19 of the Law of Ukraine "On Consumer Rights Protection", dishonest business practices are prohibited. This refers to committing actions or inaction that mislead the consumer, are aggressive, or constitute a manifestation of unfair competition. For each type of dishonest practice, the Law provides relevant examples, the list of which is not exhaustive. An important provision is also Paragraph 1 Part 1 of Article 21 of the same law, according to which the consumer's rights are considered violated if the consumer's right to freedom of choice of products is violated in any way during the sale of products. Article 22 of the law regulates the issue of judicial protection.

Currently, dishonest sellers tend to mislead buyers by spreading false or incomplete information about the product offered due to the fact that the buyer does not have a real opportunity to inspect the product at the time of its purchase. Most often, disputes arise due to poor-quality goods (defects), inconsistency of the site image and the real thing, etc., in this regard, the provisions of Article 9 of the Law of Ukraine "On Consumer Rights Protection" regarding the availability of the buyer's opportunity to refuse the goods at any time before their transfer and the right to exchange goods of proper quality within fourteen days, not counting the day of purchase, unless a longer period is announced by the seller.

Depending on whether the purchased product has defects, two possible situations can be highlighted, where the process of returning the product would differ significantly. Thus, the first option is when the buyer returns a product that has no defects, that is, a product of proper quality. The consumer has the right to exchange a non-food product of proper quality for a similar one from the seller from whom it was purchased, if the product does not satisfy him in shape, dimensions, style, colour, size, or cannot be used for its intended purpose for other reasons. The consumer has the right to exchange goods of proper quality within fourteen days, not counting the day of purchase, unless a longer period is announced by the seller[5].

1. Law of Ukraine No. 675-VIII "On e-commerce". (2015, September). Retrieved from https://zakon.rada.gov.ua/laws/show/675-19#Text.
2. Law of Ukraine No. 1023-XII "On consumer protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12#Text.
3. Civil Code of Ukraine. (2003). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text.
4. Law of Ukraine No. 236/96-VR "On protection from unfair competition". (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/236/96-%D0%B2%D1%80#Text.
5. Order of the Ministry of Economy of Ukraine No. 104 "On approval of the rules of retail trade in non-food products". (2007, April). Retrieved from https://zakon.rada.gov.ua/laws/show/z1257-07#Text.

In this case, the only exception may be certain non-food items that are not subject to return and exchange for the above reasons. For example, in accordance with the Resolution of the Cabinet of Ministers of Ukraine No. 172 "On the Implementation of Certain Provisions of the Law of Ukraine "On Consumer Rights Protection" dated March 19, 1994, the list of proper quality goods that are not subject to exchange (return) was approved. Medicines and supplies, health and hygiene products, perfume and cosmetic products, etc. cannot be returned[1]. In accordance with the Law of Ukraine "On Consumer Rights Protection", it is impossible to refuse goods that were made to an individual order (for example, bespoke shoes or clothes, furniture made to measures, etc.)[2].

At the same time, the exchange of goods of proper quality is carried out if it has not been used and if its marketable condition, consumer properties, seals, labels are preserved, as well as a settlement document issued to the consumer together with the sold goods, or a reproduced QR code on the display of the software registrar of settlement operations (the display of the device on which the software registrar of settlement operations is installed), which allows the consumer to read and identify it with the settlement document according to the data structure that it contains, or an electronic settlement document sent to the subscriber number or email address provided by the consumer. Thus, regarding the settlement document, the legislator provides the consumer with several options for presenting it to the buyer. In this case, one can resort to other evidence, for example, for a remote method of purchasing goods via the Internet, a printout from the website of a particular store is sufficient. Such goods are also not returned due to the fact that they cannot be sold to other persons or can only be sold with substantial financial losses for the seller (contractor).

The consumer can return goods of proper quality and receive money back in the amount of the cost of such goods, if at the time of exchange a similar product is not on sale. Furthermore, according to Part 4 Article 13 of the Law of Ukraine "On Consumer Rights Protection", the consumer has the right to return the item that indicates the termination of the agreement. Thus, the legislator protects the interests of the consumer who enters into an agreement at a distance, in particular, via the Internet, since it gives him or her the right to "unconditional" withdrawal of the agreement even after receiving the goods [3]. As for the return of goods of improper quality, the rules are somewhat different. As for the return of goods of improper quality, the rules are somewhat different. They are enshrined in Article 708 of the Civil Code of Ukraine[3] and Article 8 of the Law of Ukraine "On Consumer Rights Protection". Notably, these rules define the rights of the buyer in different ways if goods of improper quality are sold to him or her. Thus, according to Part 1 of Article 708 of the Civil Code of Ukraine, if during the warranty or other periods established by the rules or contract binding on the parties, the buyer discovers defects that had not been specified by the seller, or falsification of the goods, the buyer shall have the right at their discretion: 1) to demand the seller or manufacturer to perform a free elimination of defects in the goods or reimbursement of expenses incurred by the buyer or a third party for their correction; 2) to demand the seller or manufacturer to replace the goods with a similar product of proper quality or the same product of another model with appropriate recalculation in case of price difference; 3) to demand the seller or manufacturer to reduce the price accordingly; 4) to withdraw from the agreement and demand a refund of the amount of money paid for the goods[4]. As for the latter right of the buyer, withdrawal from the agreement, it most often occurs as a result of violation of the terms and conditions of the agreement by the seller [3].

In contrast to these rules, Article 8 of the Law of Ukraine "On Consumer Rights Protection" narrows the rights of consumers in case of sale of goods of improper quality. Thus, the latter depend on the type of product defect. For example, if it is not substantial, then the consumer shall have the right to demand: 1) a proportional reduction in the price; 2) free elimination of defects in the goods within a reasonable time; 3) reimbursement of expenses for the elimination of defects in the goods. If the defect is substantial, then the consumer can: 1) terminate the agreement and receive the amount of money paid for the goods; 2) demand replacement of the goods with the same product or with a similar product available to the seller (manufacturer)[5]. Consequently, there is a legislative conflict that determines the issue of whether the provision of Article 708 of the Civil Code of Ukraine or Article 8 of the Law of Ukraine "On Consumer Rights Protection" should be applied. The authors of this study believe that the provision contained in the Civil Code of Ukraine is subject to application, since Part 3 Article 698 states that the legislation on consumer rights protection applies to relations under a retail purchase and sale agreement with the participation of an individual buyer that are not regulated by this Code. That is, the legislator favours the provisions of the Civil Code of Ukraine in terms of governing relations arising under a retail purchase and sale agreement, while the legislation on consumer rights protection is of subsidiary importance.

When the consumer finds out about the shortcomings of the product, he or she can present the seller or manufacturer with a request for their free elimination. According to Part 9 Article 8 of the Law of Ukraine "On Consumer Rights Protection", such shortcomings must be eliminated within fourteen days from the date of its presentation or by agreement of the parties in another

1. Resolution of the Cabinet of Ministers of Ukraine No. 172 "On the implementation of certain provisions of the Law of Ukraine "On Consumer Protection"". (1994, March). Retrieved from https://zakon.rada.gov.ua/laws/show/172-94-%D0%BF#Text.

2. Law of Ukraine No. 1023-XII "On consumer protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12#Text.

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

4. *Ibidem*, 2003.

5. Law of Ukraine No. 236/96-VR "On protection from unfair competition". (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/236/96-%D0%B2%D1%80#Text.

period. At the written request of the consumer, goods of the same brand (model, article number, modification) are provided (with delivery) for the duration of the repair, regardless of the model. For this, the seller, manufacturer (an enterprise that meets the requirements of the consumer established by Part 1 Article 8 of the Law) are obliged to create (have) an exchange fund of goods. The list of such goods is determined by the Cabinet of Ministers of Ukraine. For remote purchase and sale, it is allowed submitting an application in the form of an email sent to the internet portal indicating one's data, a description of the current situation, and a personal opinion regarding the way to resolve it.

Apart from the product itself, the consumer must also return all related documents for the product (warranty card, instructions, passport, etc.), as well as all components of this product. In some cases, sellers mislead customers by refusing to return money and accepting low-quality goods back, referring to violations of the original packaging of the goods or pointing out the fact that the goods are included in the list of non-refundable ones. Notably, this is a direct violation of the provisions of the Economic Code of Ukraine[1], the Civil Code of Ukraine, the Law of Ukraine "On Consumer Rights Protection"[2].

It is also worth noting that in some cases, the seller has the right to send the goods to the service centre to clarify the causes of defects and eliminate them. If the seller is not at fault and the goods were damaged or rendered unusable by the buyer themselves, the consumer reimburses the costs of conducting an expert examination, storing the goods and transporting them. That is, according to the law, the expert examination is always carried out at the expense of the seller, but if the buyer's guilt is proved (careless use, non-compliance with recommendations, etc.), they must reimburse the costs.

In case of return of goods of improper quality, as in a regular store, a written return report is drawn up between the buyer and the seller (online store). The seller can return the money using the same form that was used to purchase the product. Therewith, the return of the goods from remote purchase and sale has special specifics. Since in most cases the consumer pays for online purchases with a bank card, the funds must also be returned to the card balance. In case of invalidity of the card (loss, issuance of a new one, etc.), funds are transferred to another card that was recorded in the transfer certificate or to the bank account specified in the act by the buyer. This fact must also be reflected in writing in the transfer certificate. If there is a requirement to pay a commission fee when transferring funds, it is settled at the seller's expense. In case of purchase of goods by cash payment, it is possible to refund funds from the representative's store's cash desk or in any other way reflected in the transfer certificate.

According to Part 1 Article 55 of the Constitution of Ukraine, human and civil rights and freedoms are protected by the court. Therefore, in case of violation, the rights of consumers are subject to judicial protection. Therewith, Part 5 Article 28 of the Civil Procedural Code of Ukraine stipulates that claims for consumer protection may also be filed at the registered place of residence or stay of the consumer or at the place of damage or performance of the contract.

Progress does not stand still and competition forces sellers to take legitimate measures to resolve conflicts. For example, Facebook has recently started keeping a list of dishonest sellers and stores [4]. In addition, there are a huge number of independent forums and groups dedicated to protecting internet consumers, where one can read reviews about the products of various stores, learn about the reputation of a particular business entity, and exchange experience in protecting the violated rights. Unfortunately, the statistics are sad: in 2019, Ukrainians were deceived in online stores for a total of 200 million UAH [5]. Therefore, one can draw an intermediate conclusion that it is the interests of the consumer that should be the main priority of regulating the relations of market forces within the social and consumer complex. The Ukrainian legislation governing this area is rather confusing, being represented by various legislative acts that do not fully track the changes taking place in the era of the development of the digital economic model of society. That is why it is considered that only the adoption of the consumer protection code would bring the legislation into much-needed compliance.

2.2. International legislative regulation of consumer rights protection when purchasing goods in online stores

In this context, the positive foreign experience of protecting consumer rights when buying goods in online stores deserves attention. The study considered some aspects of international legislative regulation, which establishes the rights of buyers and has a direct impact on the rights of consumers and the behaviour of other stakeholders in the consumer market [6]. Many countries have long established various consumer protection institutions. For example, in France there is a Ministry of Consumer Affairs, in the UK – the Office of the Director General for Private Trade, in the United States – the Federal Trade Commission [7]. In some countries, there are special legislation on consumer protection or these functions are performed by articles of civil codes. The relevant codes apply, for example, in Italy and France. In England, Belgium, and Switzerland, there is an extensive network of consumer protection societies whose main goal is to express the opinion of consumers. They provide information to consumers and act on their behalf in various organisations, perform intermediary functions, and file lawsuits in courts on behalf of the customer in case of violation of their rights [8].

In France, the decree of December 1, 1986 established the principle of price freedom, but it stipulates a number of reservations to protect consumer rights [9]. For example, it is prohibited to use discriminatory prices and "avalanche sales", when the buyer is given a discount provided that they find other buyers for an analogous product. This is

1. Economic Code of Ukraine. (2003). Retrieved from https://zakon.rada.gov.ua/laws/show/436-15#Text.
2. Law of Ukraine No. 1023-XII "On consumer protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12#Text.

considered fraud and is punishable by law. And the sale of goods at a markdown, sell-off and sale from exhibitions require prior permission from the mayor's office.

Within the European Union (hereinafter referred to as the EU), consumer protection is carried out by various consumer associations: the European consumer bureau, the service under the European Commission, and the Consumer Advisory Committee. All disputes on consumer protection issues are usually resolved through out-of-court, conciliation procedures. It is important that European standards in the consumer sphere are aimed at establishing a high level of consumer protection for the free movement of goods in the EU internal market. Since different levels of protection in the Member States of the European Union create barriers to the free movement of goods, a unified minimum set of consumer legislation rules was created for all EU Member States. The introduction of such rules contributes not only to the better functioning of the EU internal market, but also to strengthening consumer confidence[1].

The European Commission has established a European Consumer Centres Network (ECC-Net), comprising 29 centres (in EU Member States, Norway, and Iceland) that cooperate with each other to provide consumers with information about purchases abroad, as well as to help consumers resolve problematic issues in disputes with foreign merchants in the field of e-commerce [10; 11].

ECC-Net's activities and services cover:

– provision of information about purchases abroad and ensuring that consumers' awareness of their rights. ECC-Net also provides information about the rights of the consumer in the EU and their country;

– consulting and support to any consumer facing problems while shopping abroad;

– assistance to the consumer in reaching an agreement – a positive decision with the merchant in a problematic situation or dispute;

– ECC-Net participants collaborate by organizing joint projects that explore areas that cause or may cause difficulties for consumers. For example, joint projects in the field of air passenger rights and e-commerce are organised, indicating the main problems existing in Europe;

– a form for foreign complaints is available to consumers, upon completion of which on the home page of the ECC-Net participant, the consumer's complaint is automatically submitted to and registered with IT-Tool, the general database of foreign complaints.

ECC-Net also cooperates with other networks established in the EU, for example SOLVIT, which constitutes an alternative mechanism of the European Economic Area to address domestic market problems and often problems related to residence permits, border crossings, recognition of professional qualifications and education, mutual recognition of goods, freedom of business, unfair conditions in public procurement tenders that discriminate against applicants or goods from other EU Member States. ECC-Net also cooperates with FIN-Net, which is a network for solving financial services problems. The fundamental provisions, regulated at the supranational level, that protect consumers in the EU, can be distinguished as follows:

• according to EU regulations, the consumer has the right to file a complaint within two years from the date of purchase of the product. The seller or manufacturer does not have the right to shorten this period;

• if the seller or manufacturer of the product gives a guarantee, this means that the buyer is given additional opportunities to the fact that within two years they have the legal right to apply to the seller with claims;

• the manufacturer can provide a European-scale guarantee and, if necessary, the goods can be repaired at the dealer of such company in the buyer's country of residence;

• if the seller refuses to respond to the buyer's complaint, please contact the European Consumer Information Centre.

The right to refuse the purchased product is also regulated. Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts of 20 May 1997 stipulates that the consumer of online services within at least seven working days, without any penalties and without specifying any grounds, has the right to refuse the ordered goods. The only thing that can be required from the consumer, if they have enjoyed their right of refusal, is to pay direct costs associated with the return of goods. The Directive ensures a minimum level of legal settlement requirements, and in each particular EU Member State such a settlement may be more but not less favourable for consumer rights than stipulated in the Directive. The right of refusal can be used within seven calendar days, if the parties have not agreed on a longer period of time.

The right of refusal does not apply to: agreements concluded with the help of vending machines or automated trading places; agreements concluded with a telecommunications operator using toll-free public telephones; agreements concluded at the auction; agreements related to the delivery of food, beverages, or other household goods intended for immediate consumption by the consumer at home, at work, or elsewhere, if the goods are constantly supplied by a sales agent; contracts for the provision of housing or transport services, or related to food or entertainment activities, if the seller or service provider, in accordance with the agreement, undertakes to provide services on a specific day or time. The Directive stipulates that when a consumer uses their rights of refusal, the online store shall be obliged to return the amounts paid by the Consumer free of charge within 30 days.

The terms and conditions of delivery of the product are also regulated. The online store must complete the order no later than within 30 days from the date when the consumer sends the order to the store. If the consumer has made a purchase, but it turns out that this product is no longer on sale, the seller must notify the buyer and return

1. Association agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part. (2014, September). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011#Text.

the money within 30 days. To avoid fraud on the Internet, one should know several key points. Thus, one of the inherent features of credulity (also known as quality marks) is the placement of an electronic label on the home page of an online store. Most often, such tags are placed to inform that the store complies with the code of conduct, so that the site user is sure that a particular online store can be trusted.

Currently, the only sign of trust in the European Union regarding e-commerce is the Euro-Label. This label was created with the financial support of the European Commission. Euro-Label guarantees that the product that the company sells actually exists, the terms and conditions of sale are clearly defined and available on the home site, the seller complies with the laws and ensures data protection, after ordering the goods will be delivered, and in case of any problems, a dispute resolution procedure is developed. Thus, one of the ways to solve a problem that the buyer has when purchasing a product is to file a complaint (provided that a particular country takes part in the project).

There is also an international operational communication network Econsumer.gov, established in 2001 to resolve emerging disputes, counter international fraud, and gain consumer confidence in purchases made through direct communication [12]. At the first stage, 13 countries took part in the project, at present – 24 countries. The project is based on two components: an international internet site and access to the website of a particular institution. The publicly available website allows the consumer to publish their international claim, which is forwarded to the corresponding institution of the country taking part in the project, using the database of consumer complaints of the US Federal Trade Commission. In case of failure to resolve the dispute by alternative methods, the consumer can use the European procedure for satisfying small claims [13; 14].

Another promising area of dispute resolution between buyers and sellers is the Alternative Dispute Resolution system (ADR) – a term used to refer to various dispute resolution mechanisms without directly involving a court or government agency in dispute resolution [15]. The consumer is considered a "weaker" party to the agreement, its financial and other resources for Effective Dispute Resolution are not comparable with the capabilities of the merchant [16; 17]. It also should be taken into account that people often purchase inexpensive goods, and this deters the consumer from resolving the dispute in a general civil procedure. In this case, faced with the fact of non-performance of the agreement, the ability of consumers to protect their rights is very limited [18; 19]. The consumer is both economically and spiritually in a weaker position than the merchant; therefore, when resolving a dispute in courts of general jurisdiction, the consumer is most likely to lose an action [20; 21]. To compare the capabilities of the parties, the consumer should choose the most acceptable dispute resolution mechanism for him or her. Such a mechanism is alternative types of dispute resolution. Unlike conventional legal proceedings, alternative types of dispute resolution offer the consumer the following substantial advantages:

• the process is easily accessible and often bypasses the bureaucratic forms inherent in legal proceedings;

• the process can be initiated electronically regardless of where the parties are located;

• for most of the available types of ADR, the process is accessible to consumers free of charge or the fee is determined in proportion to the value of the disputed product;

• the consumer has the right to use ADR schemes without resorting to any other legal aid;

• the recommendations issued by the European Commission contain the principle that the ADR decision should be made faster than it would have happened in the court of first instance; therefore, the process ensures relatively fast consideration of the dispute [22; 23].

At the same time, the only organisation established in accordance with the recommendations of the European Commission 98/257 and 2001/310 is the State Service of Ukraine for Food Safety and Consumer Protection.

CONCLUSIONS

Proceeding from the forgoing, the conclusions can be drawn as follows. Consumer protection upon purchasing goods through online stores is carried out as with a regular purchase and sale, but it has a number of specific features. Thus, the mechanisms for returning items through a regular store and an online store have similar features and practically no differences. To attract potential customers and build their trust, online stores try to post as much information about their products and services as possible on their official websites, including customer reviews. There are also many different online forums with independent customer reviews. Increasingly often, additional functions such as "Start a dispute" or "Return the product" appear on the websites of online stores. This indicates that the sellers themselves are interested in resolving disputes as soon as possible and preserving their reputation.

Currently, the "e-commerce" industry for organising the sale of consumer goods and providing various services in the information and telecommunications network of the Internet is developing very dynamically. The improvement of the consumer literacy of citizens, the ability to fully exercise their rights, and to protect their interests in case of certain contradictions is one of the ways to solve the existing problems.

REFERENCES

[1] Sinyavska, O.A. (2019). E-commerce in Ukraine: Trends and prospects. *Journal of V.N. Karazin Kharkiv National University. Series: International Relations. Economics. Country Studies. Tourism*, 9, 126-132.

[2] Official site of the Association of Retailers of Ukraine. (2020). Retrieved from https://rau.ua/uk/novyni/onlajn-diktaturae-commerce.

[3] Urazova, H.O. (2016). *Category of refusal in the civil law of Ukraine*. Kharkiv: Pravo.

[4] Blacklist of sellers and fraudsters. (2020). Retrieved from https://www.facebook.com/groups/1969975089888664.

[5] Smilka, M. (2020). Ukrainians were deceived in online stores for two hundred million hryvnias in 2019. Retrieved from https://elnews.com.ua/uk/ukrayincziv-obmanuly-v-onlajn-magazynah-na-dvisti-miljoniv-gryven-u-2019-roczi/.
[6] Wang, Z. (2020). Research on internet financial consumer rights protection in China. *E3S Web of Conferences*, 218, Article number 01022.
[7] Colangelo, G. (2020). Competing through keyword advertising. *Journal of Competition Law and Economics*, 16(3), 306-348.
[8] Rösner, A., Haucap, J., & Heimeshoff, U. (2020). The impact of consumer protection in the digital age: Evidence from the European Union. *International Journal of Industrial Organization*, 73, Article number 102585.
[9] Kaptsosh, V.Ya. (2017). Status and features of the development of Internet trade in goods in the international dimension. Scientific Bulletin of Uzhhorod National University. *International Economic Relations and The World Economy*, 13(1), 115-119.
[10] Zhu, R., Srivastava, A., & Sutanto, J. (2020). Privacy-deprived e-commerce: The efficacy of consumer privacy policies on China's e-commerce websites from a legal perspective. *Information Technology and People*, 33(6), 1601-1626.
[11] Bochko, O.Yu., & Donets, D.M. (2018). Electronic distribution on the market of dairy products as the necessary composition of the present supply of the goods. *Bulletin of Mukachevo State University. Series "Economy"*, 1(9), 53-56.
[12] Bandara, R., Fernando, M., & Akter, S. (2020). Managing consumer privacy concerns and defensive behaviours in the digital marketplace. *European Journal of Marketing,* 55(1), 219-246.
[13] The Global Information Technology Report. (2015). Retrieved from https://www.weforum.org/reports/global-information-technology-report-2015.
[14] Galiullina, G.F., Mansurova, T.G., & Gallyamova, E.F. (2019). Qualitative assessment of the potential of innovative development of territories. *Journal of Environmental Treatment Techniques,* 7(Special Issue), 1195-1199.
[15] Benöhr, I. (2020). The United Nations guidelines for consumer protection: Legal implications and new frontiers. *Journal of Consumer Policy*, 43(1), 105-124.
[16] Aizstrauta, D., & Ginters, E. (2015). Integrated acceptance and sustainability assessment model transformations into executable system dynamics model. *Procedia Computer Science*, 77, 92-97.
[17] Aliev, T.T., & Bit-Shabo, I.V. (2020). Legal regulation of E-commerce and other entrepreneurial activities conducted with digital technologies. *Advances in Intelligent Systems and Computing*, 1100 AISC, 807-813.
[18] Arenkov, I.A., Salikhova, I.Y., Ivanova, D.V., Smirnov, S.Đ., & Rudenko, M.N. (2019). Intellectual capital factors in enhancing competitiveness of retail network. In *33rd International Business Information Management Association Conference, IBIMA 2019: Education Excellence and Innovation Management through Vision 2020* (pp. 2571-2574). Granada: IBIMA.
[19] Chow, D.C.K. (2020). Alibaba, amazon, and counterfeiting in the age of the internet. *Northwestern Journal of International Law and Business*, 40(2), 157-202.
[20] Puida, G.V. (2018). Internal economic mechanism intellectual security of the enterprise. *Bulletin of Mukachevo State University. Series "Economy"*, 1(9), 57-62.
[21] Pylypchuk, V.P. (2018). Social networks in the process of promotion of the enterprise services. *Scientific Bulletin of Mukachevo State University. Series "Economy"*, 2(10), 60-65.
[22] ODR Standards, Principles, & Guidelines. (2020). Retrieved from http://odr.info/standards/.
[23] Aizstrauta, D., Celmina, A., Ginters, E., & Mazza, R. (2013). Validation of integrated acceptance and sustainability assessment methodology. *Procedia Computer Science*, 26, 33-40.

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ОЦІНКА ЯКОСТІ РЕКОМЕНДАЦІЙ АНТИМОНОПОЛЬНОГО РЕГУЛЯТОРА В УМОВАХ РОЗВИТКУ ПРАВОВОЇ СИСТЕМИ УКРАЇНИ

Анотація. *Формування конкурентної системи в економіці країни завжди визначається можливостями використання інструментів, які стимулюють розвиток і формують незалежну картину для зовнішнього середовища. У зв'язку з цим і визначається ефективність визначення антимонопольними регуляторними органами критеріїв і меж регулювання. Разом з тим відзначаються випадки, коли антимонопольне регулювання розумілося переважно як форма економічного тиску на суб'єктів підприємницької діяльності. Новизна дослідження визначається новим розглядом меж антимонопольного регулювання. Автори показують, що антимонопольне регулювання в своїй поточній іпостасі є формою обмеження зростання компанії і спрямована переважно на зниження залежності ринку від одного стейкхолдера. У статті визначаються можливості додаткового розгляду критеріїв обмеження антимонопольного регулювання в контексті формування економічної безпеки суб'єкта підприємницької діяльності. У статті розкриваються аспекти визначення меж державного забезпечення економічної безпеки підприємницьких суб'єктів. Практична значимість дослідження визначається необхідністю більш практичного наближення законодавства країни до світових норм ведення бізнесу та зниження рівня урегульованості підприємницького середовища укупі з її забезпеченням від недружніх поглинань. У дослідженні представлена структура забезпечення економічної безпеки в контексті розвитку економічної системи*

Ключові слова: *безпека, розвиток, підприємництво, формування, структура*

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QUALITY EVALUATION FOR RECOMMENDATIONS OF THE ANTITRUST REGULATOR IN THE DEVELOPMENT OF THE LEGAL SYSTEM OF UKRAINE

Abstract. *The formation of a competitive system in a country's economy is always determined by the possibilities of using tools that stimulate development and form an independent picture for the external environment. In this regard, the study determines the efficiency of antimonopoly regulatory authorities in establishing the criteria and limits of regulation. At the same time, there are cases when antitrust regulation is understood primarily as a form of economic pressure on business entities. The novelty of the study lies in a new consideration of the limits of antitrust regulation. The authors demonstrate that antitrust regulation in its current capacity constitutes a form of limiting the growth of the company and is aimed primarily at reducing the dependence of the market on one stakeholder. The paper identifies the possibilities of additional consideration of the criteria for limiting antitrust regulation in the context of the formation of economic security of a business entity. The paper covers the aspects of determining the limits of state support of economic security of business entities. The practical significance of the study is determined by the need for a more practical harmonization of the legislation of the country with global business standards and a decrease in the level of regulation of the business environment, coupled with its protection from hostile takeovers. The study presents the structure of economic security assurance in the context of the economic system development*

Keywords: *security, development, entrepreneurship, formation, structure*

INTRODUCTION

As for the concept of "security", it can be found in the Old Testament and ancient literature. However, it has become an object of large-scale analysis in the social sciences only since the 1970s. Perhaps this is why representatives of these sciences have not yet reached consensus on the interpretation of this concept [1]. We hold a view, which distinguishes three approaches to the interpretation of security: static, process (activity), and one that combines its static and process aspects. We shall hereinafter refer to the latter approach as integral.

According to the static approach, security is seen as a specific state [2]. In particular, security is the state of an object in the system of its relations from the standpoint of ability to survive and develop in conditions of internal and external threats, as well as the effects of unpredictable and hardly predictable factors. It represents a static approach and a look at security as a state of protection of the vital interests of people, organisations, society, and the state from internal and external threats, dangers [3]. With such an approach, external conditions are entirely excluded from the analysis, but it is from there (from the "external") that threats come, strikes and attacks are carried out. Danger/safety is associated with the state of the facility, but are not limited to it. The state in which the object is, to a certain extent determines the probability of damage to it, its possible amount. But only to a certain extent, and not completely. However, these considerations do not consider the existence of such definitions of security as the state of the object, that do not factor in the influence of external conditions on the latter. In particular, the following

definition is appropriate in this respect: "By economic security we mean such a state of the subject when the probability of an undesirable change in any qualities of the subject itself, the parameters of the property owned by it and the environment that hurts it is small (lesser than a certain limit)". The same can be said of our definition of security. At the same time, we cannot but agree with the opinion that the safety of an object should not be reduced only to its state [4].

The view of security as a state of security is also unacceptable. The main objections come down to the following:

– the content of the concept of "protection" is clarified even less than the content of the concept of "security", and the definition of one concept through another, the attributes of which are unknown and which itself needs to be determined, leads to an error that lies in determining the unknown with the use of the unknown;

– "security" cannot be interpreted as a state of protection also due to the fact that "protection" cannot have any "state", as the term "state" can only be applied to an object.

These objections appear to be quite fair. We also find a critical opinion of the concept of security as a state of protection in the works of some other scientists [5]. In particular, upon describing one of the security definitions built on such an idea, it is not unreasonable, in our opinion, to note that the definition in question cannot be considered sufficiently correct also because the concept of "protection" used in therein does not have a specific, express meaning and requires clarification. There is a problem with this approach, according to some researchers [6]. The interpretation of the concept of "security" as a state of protection of a person, society, and the state from internal and external threats does not fully reflect its essence. Researchers point out that security is described not by the degree of protection from external and internal threats, but by the level of conditions for the existence, functioning, and development of the system itself. It can be stated that the definition of security through the concept of "protection" does not cover all dangerous conditions [7].

Proponents of the process approach consider security as an activity. This includes the activity of a person, state, and the world community to identify, prevent, and eliminate those factors and circumstances that can deprive people of fundamental material and spiritual values, cause damage, and close the door upon the development and even survival [8]. Another example of a process approach to the interpretation of security is the following position: security should be understood as the constant management of static (permanent) and dynamic (temporary) external and internal threats to completely eliminate or at least reduce the possible harm from them for the functioning of an object with the conditions and parameters set by it.

1. LITERATURE REVIEW

In our opinion, the interpretation of the concept reflecting the activity approach to determining the essence of security, is as follows: the security of the subject is its objective reality in certain conditions, which is based on the active interaction of this subject and the conditions of its existence, which it mastered in the process of its own self-fulfilment and is capable of controlling [9]. We believe that since the starting point in this interpretation is the objective reality of the subject, this gives reason to believe that it also reflects the static aspect of security, and therefore, can be considered as integral [10].

An attempt to combine static and process approaches to the interpretation of security can also be traced in its definition: security is a state parameter of a system (security object) that describes its integrative property [11]:

– of being in the state of least vulnerability to negative internal and external influences;

– of maintaining its systemic qualities and interrelations;

– of functioning stably, steadily, and progressively developing".

In the formulated definition [12]:

– firstly, security is considered as a parameter (set of parameters) of integrative properties (and not the property itself), since the object, having certain properties, can be both in a safe state and in danger (this depends on the parameters);

– secondly, security is a parameter describing the intrinsic property of a specific system (security object), excluding the conditionality of this property by threats, since their number, orientation, and qualitative features can be probabilistic, subjective in nature;

– thirdly, this does not refer to all the impacts, but only those that are negative for the security object, that is, they can cause some harm to its systemic qualities (including interests) and its connections;

– fourthly, there is no emphasis on protecting the security object, since it is not the purpose of its existence, but only one of the ways to ensure the progressive development and stability of its structure and functioning process.

As a basic category of the sociological analysis of safety, it is proposed to consider the dual opposition "danger-security" [13]. In personal and public perception, the situation of danger is compared to a high level of uncertainty and instability in various spheres of human life [14]. Security is described as a stable network of necessary and sufficient factors that reliably provide [15]:

– a decent life for each person;

– protection of all structures of viability of the family, society, and the state;

– protection of their goals, ideals, values and interests, their culture and lifestyle, traditions from unacceptable risks, from internal and external challenges and threats;

– the ability to effectively prevent dangers that are based on a culture of compromise on welfare and justice for all.

Understanding of the dualistic opposition with consideration of modern innovations in various areas of social practice allows to use new information and new methodological tools in research to define the new logic of the interaction of factors that determine security and a security culture.

2. MATERIALS AND METHODS

It can be especially noted that security is interpreted both as a state and an activity, which can be traced in the formulated definition of public security. "The category of "public security" can be defined as follows: this is the state, conditions, and nature of the life of the state and society, in which citizens, social groups, associations and organisations created by them freely act in accordance with their own nature and purpose and are capable of neutralising external and internal threats" [16].

In our opinion, there are no significant differences between the proposed classification of approaches to the interpretation of security and the previously considered classification [17-19]. After all, the apophatic approach can be considered as a special case of the static one, and compliance with certain parameters and requirements, which is aimed at ensuring security is a form of activity to enable it [20].

Even more approaches to the interpretation of safety are highlighted in the formation of forecast trends. These include:

1) security as a state;

2) security as an ability of an object to maintain its condition in a targeted and destructive internal or external impact;

3) security as a property of the system;

4) security as a guarantee, a necessary condition for the operation of the facility;

5) security as the absence of dangers and threats to the facility;

6) security as the current and future protection of the subject from various threats.

In our opinion, the fact that the proposed classification can also be reduced to the one that was considered in the beginning hardly requires special evidence.

3. RESULTS AND DISCUSSION

The described scientific ideas on the concept of "security" determined the existence of a static, process, and integrated approach to the interpretation of the security of a business entity. It is rather evident that the latter is of most interest to us. We find a very extraordinary attempt to implement it in the definition that covers the formation of the economic mechanism of systemic protection of a company.

In our opinion, the following integral characteristic of the security of a business entity is even more apt: the security of a business entity can be defined as a dynamically stable state with respect to adverse effects and activities on protection against internal and external threats, to ensure such internal and external conditions of its existence that guarantee the possibility of stable development. We see the advantage of this characteristic in that elements of a static and process approach to the interpretation of security are present in an explicit form and at the same time are reflected equally and lapidary. Proceeding from it and factoring in the needs of practice, we propose the following definition: enterprise security is a stable state of its minimal vulnerability to threats and activities to create and maintain optimal conditions for achieving its goals. Since the definition we have proposed includes threats to the security of business entities, it is necessary to clearly define the nature of these threats. Often, the latter are associated solely with malicious intent and malicious acts. Thus, a threat is a danger at the stage of its fulfilment, which is initiated by the result-oriented intentions of the destructive forces to damage the vital interests, values, and needs of the business entity until its destruction. Upon describing the security system of the company, it is noted that a threat is a potential or real action committed by intruders, which can cause moral or material damage. Three attributes inherent in threats to the economic security of business can be noted: a conscious and selfish nature of actions; the focus of action on the harm to the business entity; unlawful nature of actions.

We believe that such opinion is one-sided. State authorities and local governments, which are usually and mistakenly identified with the state, are the most serious sources of threats, but not because they are corrupt or related to crime, but because they have the greatest ability to harm any business entity operating within its jurisdiction. With that, the threat is posed both by, to put it mildly, imperfect legislation, and the possibility of its ambiguous interpretation by executive authorities, and the possibility of officials using the administrative resource (official position, law enforcement agencies, the press, etc.) to fulfil their commercial or simply mercantile interests, and the complexity (impossibility) of a fair resolution of disputable matters. Another motive not to share the opinion under consideration is the fact that the threat to the security of a business entity can be not only a certain potential or real action, but also inaction, and not extremely malicious.

It is easy to see that the abovementioned definition of a threat to a company does not have the indicated one-sidedness. The definitions of a threat to the security of an enterprise proposed in other scientific papers also do not contain it:

– a threat is such a development of events, action (inaction), the result of which creates an opportunity or increased possibility of disrupting the normal functioning of the enterprise and hindering its ability to achieve its goals, in particular, causing the enterprise any kind of damage;

– a threat to the safety of an enterprise should be understood as a potential or really possible event, action, process or phenomenon that could violate its stability and development or lead to the termination of its activities.

Considering the above three definitions, and also factoring in the aforementioned features of security, we shall understand a threat to the security of a business entity as a certain development of events, action or inaction, the result of which is a negative impact on this entity that could cause it such damage that is estimated as considerable [21-23].

There is an opinion that the threat to the security of a business entity is not any action that has negative consequences for it. Actions of the management of a business entity such as the introduction of new organisational management structures, which may be unjustified, or

establishment of low prices for the products of an enterprise at the initial stage of its functioning should not be considered a threat, since it is a matter of actions aimed at achieving the main purpose of the enterprise, its further development, and constitute an integral part of the activity of business entity, which is carried out at its own risk and involves certain losses. However, we tend to consider actions of this kind as unintended threats to the security of a business entity.

Next, we shall consider the classification of threats to the security of business entities. In this case, first of all, we shall be guided by the above expressed opinions on it. By the nature of occurrence, threats to the security of business entities are divided into two classes:

– natural (objective), that is, caused by natural disasters that are not dependent on a person (floods, earthquakes, hurricanes, etc.);

– artificial (subjective), that is, due to human activities. In turn, artificial threats can be unintentional (for example, caused by personnel management errors) and intentional.

By the source of occurrence, all threats to the security of business entities can be divided into internal and external. Examples of internal threats include conflicts between co-owners, staff incompetence, disclosure of confidential information by employees, and inefficient security services. External threats include crisis in the economy, unfavourable national economic policy for private entrepreneurship, inconsistency of regulatory acts of legislative and executive authorities, theft of material assets and values by persons who are not members of the personnel of a given business entity, commercial espionage, unfair competition, raiding, non-performance of obligations on the part of partners, suppliers, customers [24-26].

The severity of consequences distinguishes: threats with high, considerable, moderate, and low severity of consequences. High severity means that the fulfilment of threats can lead to a sharp deterioration in all financial and economic indicators of the enterprise, cause its immediate termination or cause such damage that will subsequently lead to the said consequences. A considerable degree of severity includes such financial losses of the business entity that are likely to negatively affect its activities and will take a long time to overcome. Moderate severity of threats does not involve a long time for overcoming the consequences of the damage and requires costs comparable to current ones. Fulfilment of threats with a low severity of consequences does not significantly affect the strategic position of a business entity and its current activities.

Threats to the security of a business entity are also classified by the object of encroachment. The object of encroachment, first of all, is personnel, material, financial, information resources, intangible assets. Threats to personnel – psychological terror to obtain confidential or secret information, abduction of employees, shooting attack. Threats to material resources – explosions, arson, damage to communication systems and equipment, theft of the latter. Threats to financial resources – fraud, falsification of financial documents, counterfeiting and theft of funds. Threats to information resources – unauthorised connection to the information network of a business entity, confiscation of confidential documents, negative information influences, misinformation. Threats to intangible assets – issues with licensing, actions aimed at undermining business reputation.

According to the subjects of threats, there are threats from criminal structures; threats from unfair competitors; threats from counterparties; threats from one's own personnel. It is advisable to add another position to this list – threats from state authorities and local self-government.

By types of losses, threats are distinguished as those leading to direct losses, and those that can cause or cause lost profits. By probability – unlikely, probable, and very probable. By the nature of the impact – active and passive. By types of damage – material and moral. By remoteness in time – close and distant.

By the nature of the liability of a legal entity or an individual, which threatens the security of a business entity, we can distinguish:

– threats leading to civil liability;

– threats leading to criminal liability;

– threats leading to administrative liability.

Classification of threats to the security of business entities can be based on other criteria. Thus, their differences appear important depending on who should bear responsibility for ensuring the security of the subjects from certain threats. By this criterion, we obtain the following classification:

– threats the prevention or elimination of which is the responsibility of the state;

– threats that business entities themselves must combat, while the state can only provide assistance.

Of considerable interest is the multilevel classification of threats to the security of business entities. It is based on the idea to consider these threats at five interconnected levels of the company's structure: three main (the nano-level – employees, a mini-level – departments, a micro-level – the company at large as a subject of interaction with the environment) and two intermediate (professional groups of workers and functional subsystems), and at the same time factor in the multi-layered environment [27, 28].

It is quite common to identify the security of a business entity with its economic security. Economic security of an enterprise (company) is such a state of a given business entity in which the vital components of the structure and activity of the enterprise are described by a high degree of protection against undesirable changes. However, in our opinion, in fact, everything that is used to describe the essence of the economic security of an enterprise in this definition concerns its security in general. It is for a reason that it practically coincides with the definition of general enterprise security: "It's suggested that enterprise security is generally understood as the enterprise's security from the negative impact of a combination of social, economic, environmental, legal and power internal and external factors".

We believe that the opinion that rejects the identification of the security of a business entity with its economic security is correct, and we fully share the following provisions of the theory of economic security:

A distinction should be made between the concepts of "economic security of an enterprise" and "safety of the functioning of an enterprise". In the first case, the subject

of the study is the external and internal economic threats to a particular business entity (company, bank) and the methods and mechanisms for their prevention. In the second case, the subject of research is the objects of threats in the enterprise: personnel, material assets, information resources, and the activity of the enterprise.

Thus, the "safety of the functioning of the enterprise" includes "economic security". Being a component of state security, the security of business entities is at the same time a relatively independent system. The creation, successful functioning and development of this system is impossible without legal support, in particular, administrative and legal. In this regard, a question arises as to what is precisely included in the administrative legal support for the security of business entities. Its solution requires a clear understanding of the content of the concept of "administrative legal support", which is generic in relation to the subject matter.

Unfortunately, there is still no generally accepted interpretation of the concept of "administrative legal support". And this is not surprising, because the same state of affairs is observed regarding the concept of "legal support".

Part of the interpretations of the concept of "legal support" reflects its activity aspect, and, therefore, has a dynamic nature. Examples may include the following definitions:

– legal support is carried out by the state with the help of legal provisions, regulations, and a set of means to streamline public relations, their legal consolidation, protection, implementation and development;

– the concept of "legal support" must be considered in the broad and narrow meaning of the word. In a broad meaning, this term covers the entire process of developing the means of legal regulation and using them in the practical activities of legal entities to achieve practical results in a specific sphere of public relations.

There is another approach to understanding the essence of legal support. It is represented by interpretations describing legal support as a state, that is, in a static aspect. As their common denominator, the following definition can be considered: "Legal support is a set of legal rules governing legal relations and legal status".

Both approaches are one-sided, and therefore unacceptable. Neglection of the dual nature of the concept of "security" (as a process and as a state) in some definitions of legal support should be objected. In addition, it should be noted that it represents both a set of guarantees, which is its static component, and a process, activity to create the conditions necessary to exercise rights.

It is argued that the administrative legal support of economic security has an independent substrate basis (administrative legal provisions); organisational (systems of state bodies of special competence); functional (implements regulatory and control functions) and substantive (a set of economic interests of the state that are protected) components. However, the proposed definition of administrative legal support for economic security does not reflect the duality of the latter very well. This definition describes the administrative legal support of economic security as an activity, although it also refers to its static aspect: the administrative legal support of economic security is a regulated daily managerial activity of state bodies and local governments governed by the provisions of administrative law within the framework of a unified national economic policy using administrative legal means, carried out with the aim of ensuring effective regulatory and organisational impact on public relations in the interests of creating and maintaining the necessary level of protection for participants in economic relations.

A similar drawback is the proposed interpretation of administrative legal security of business. It actually constitutes an attempt to determine the essence of the administrative legal support of the economic security of the subjects of this activity. The same applies to the formulated position. The following definition of administrative legal support of national security should be used: administrative legal support of national security is an activity of authorised entities carried out within the framework of a unified national policy in the field of ensuring national security, aimed at forming the administrative and legal framework for ensuring national security, and consolidating the system of administrative-legal means in it (administrative-legal provisions, relations, individual requirements), with the help of which effective regulatory and organisational influence on public relations is achieved to streamline, protect, develop in accordance with public needs the national security of the country, create and maintain the necessary level of state security facilities; a set of interconnected, internally agreed upon fundamental regulations containing legal principles and provisions aimed at the administrative legal regulation of public relations in the field of national security to streamline, protect and develop them in accordance with public needs. Administrative and legal support in general should be considered as security activities carried out on an administrative legal basis.

The novelty of the issue of creating reliable administrative legal security for business entities determines the relevance of considering relevant foreign experience. Of course, it is necessary to factor in that each country has its own features (history, form of government, political system, culture). Therefore, while elaborating on foreign experience in administrative legal security of business entities, we should focus only on those points and tendencies that are of the greatest interest to domestic jurisprudence.

We shall begin a review of the experience of the United States of America (USA) in administrative legal support of economic entities by stressing the following points:

– the absence of a federal law on private security and search activities has led to significant differences in its legal regulation at the level of individual states;

– there are police interaction programs with the non-state security system in the country. As long ago as the 1999, there were over 600 such programs. Increased attention is being paid to coordination between the police and private security services;

– the US Central Intelligence Agency has the responsibility of protecting the interests and ensuring the security of American corporations abroad;

– since the 1990s, the Department of State and

hundreds of US corporations started to regularly exchange information on threats to US business.

As early as in 1982, the US Commission on International Trade considered that violations of intellectual property rights in five individual sectors of the economy of this country led to a reduction in annual sales of 6-8 billion dollars and job losses of 131 thousand American citizens, and studies conducted by the same commission in 1988 suggested that American companies, as a result of violation of their intellectual property rights by other countries, in 1986 alone lost from 43 billion to 61 billion dollars. Thus, it was not in vain that in 1994 the Federal Bureau of Investigations introduced an economic counterintelligence program to collect information and take measures to counter threats and actions against the economic interests of the United States, and in 1996 the Economic Espionage Act was passed by the Congress, which provides for both criminal and civil liability for offenders, as well as empowers authorities to search, arrest, and destroy goods that are produced in violation of the law. We shall also recall the adoption of the Unified Law on Commercial Secrets in the United States in 1979 – a model for legislative development in legal protection of these secrets at the state level.

The aforementioned criticism of the World Intellectual Property Organisation mainly concerned two issues:

– the majority of the members of the World Intellectual Property Organisation are importers of intellectual property, and therefore it is the latter that influence the processes of preparing international treaties;

– members of the World Intellectual Property Organisation have always focused on the substantive aspects of law, but did not deal with enforcement issues, that is, did not consider that many of the countries that introduced modern models of intellectual property legislation do not have the practice of its effective application.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which was drawn up after lengthy negotiations, is aimed at resolving these and some other issues.

The TRIPS Agreement recognises that a three-step approach is required to effectively protect intellectual property rights. The first stage provides for civil proceedings, regardless of whether the proceedings in civil lawsuits are judicial or administrative in nature, and the second stage provides for criminal proceedings. Both of these stages are mainly designed to protect intellectual property rights from domestic offenses. The third degree provides for enforcement measures at the customs border, which, as a rule, are carried out as part of administrative procedures aimed at banning the import (and in some cases, export) of counterfeit goods.

Despite the emergence of the TRIPS Agreement, the Office of the United States Trade Representative (USTR), which is one of the government agencies, continued to publish the 301 Special Reports, which constituted a means of influencing the American approach to international intellectual property policy. These reports, the first of which was published in 1989, identify countries recognised by the USTR as not providing effective legal protection for intellectual property.

It is also noteworthy that since the emergence of the TRIPS Agreement, the US and the EU have been striving to ensure regional and bilateral agreements and implement requirements of a higher level of protection of intellectual property rights than those provided for by the said agreement. These requirements are usually described as TRIPS+.

In the United States, the United States Commission on International Trade and the United States Customs are empowered to enforce intellectual property rights. The United States International Trade Commission investigates allegations of unfair practices in importing goods using the powers stipulated in Section 337 of the Tariffs Act. Among the types of unfair practices that can be challenged in accordance with the procedures of this section are the importation of goods that violate the rights to inventions, trademarks, and copyright in the United States. If the United States International Trade Commission determines that there is an existing offense, it may decide to prevent the import of goods into the United States. The proceedings carried out in this commission are judicial in nature.

Following the initiation of an investigation by the United States Commission on International Trade in accordance with Section 337, a publication appears in the Federal Register to institute proceedings. Further, this commission appoints an administrative law judge who presides over the meetings and makes a preliminary decision as to whether a violation of the law has occurred. Such a judge must be impartial and adjudicate based on the evidence presented. At the time the case is heard by the United States Commission on International Trade, parties have the right to appropriate notice, cross-examination, evidence, objections and petitions, arguments, and other rights that are essential to ensure a fair trial.

Subsequent to a trial on the merits, the administrative law judge formulates a preliminary decision in writing. Before a final decision is made in writing, the parties may file a motion to review the case. If such decision recognises the fact of the offence, the importer shall be obliged to stop the illegal activity and refuse from carrying it out in the future. In most of these cases, the US Customs receives an order from the US International Trade Commission to suspend the import of illegal goods. With that, accompanying documentation is sent to the Customs Service, which can help identify illegal goods during the import process.

The US Customs has extensive ex officio powers to enable it to conduct its own investigations and, on its own initiative, to stop the importation of goods. Its employees are often in close contact with the owners of intellectual property rights in order to identify illegal goods and with employees of other law enforcement agencies who help to trace the movement of illegal goods from the customs border to the local distribution network.

To help customs officers determine the legitimacy of goods crossing the customs border, the US Customs

Service maintains a centralised database that is accessible to all departments of this service and is one of the main tools used by customs officers to protect intellectual property rights. To maintain this database, the US Customs Service requires intellectual property owners to register certain information on these rights.

At the request of the owner of the intellectual property rights or on its own initiative, the U.S. Customs Service may suspend the circulation of any goods on its territory when it is suspected that it will violate any other person's rights to a trademark, trade name, or copyright. If the customs authority decides that the goods are illegal, it carries out their arrest. With that, seized and confiscated goods are usually destroyed, unless the owner of the intellectual property rights gives permission to sell the goods in another way, for example, through charitable organisations, and large fines can be imposed on the importer.

The US Customs Service predominantly protects those trademarks whose rights are pre-registered with the United States Office of Inventions and Trademarks, unless it is a known trademark that may be legally protected without first registering it with the Office. Although, as a rule, the US Customs Service only protects copyright objects that are registered in it, in some cases, the importation of counterfeit goods may take measures against a trademark that is registered at the federal level, even if there is no such entry in the customs records.

The TRIPS Agreement does not oblige to use export means of protection of intellectual property rights to reduce the turnover of illegal goods. With that, it allows to do so. Using this circumstance, the USA does not allow the export of such goods.

Next, we shall dwell on some aspects of the experience of administrative and legal security of business entities in the EU countries. In France, to carry out detective activities in the territory of this country, one needs to obtain a special permission, which is granted by the Minister of the Interior. This permission can be obtained by a person who has completed a compulsory course of study at an educational institution designated by the Ministry of Internal Affairs of France, does not have a criminal record for a criminal offence, is not under investigation, meets certain other requirements.

The general principles for the functioning of private security in France are regulated at the legislative level of parliament, while specific issues are regulated in various decrees, orders, and circulars. The main condition for hiring a French private security company is the compliance of the candidate's training level with professional standards. A person applying for a job in a private security company must have a license issued by the police. They should not have a criminal record. Some other requirements may also be placed.

In Great Britain, for a long time, private security and search activities were not regulated by law, which resulted in a steady high level of offences among the persons who carried it out. Only in 2001, a law was passed that introduced compulsory licensing of private detective activity and registration of private detectives. A special body has been created that is entrusted with the implementation of licensing and verification of private detective activities – the Industrial Safety Service of Great Britain.

In Italy, to carry out private detective work, it is necessary to obtain a special license, which is issued by the licensing department of the police station in agreement with the local government authority. Detectives are required to keep records of all transactions that are concluded with customers, the materials of such records should be provided to officials or agents of national security services upon their request. If private detectives, in the course of implementation of their activities have discovered signs of a crime, they should immediately report this to state law enforcement agencies. The list of services that a private detective (agency) provides is contained in a special "service table", and the provision of other services is prohibited.

In Spain, legislation requires owners of private security companies to be licensed. Persons wishing to become private security guards must not have a criminal record. All private security officers are required to obtain a special permit from the Ministry of the Interior – an identification card. This card can only be received by a person who has completed a special training course. Along the way, it should be noted that Spanish security companies are obliged to provide their employees with continuing education.

Registration of detectives, agencies, their branches in Spain is mandatory. A person who wants to be a private detective in Spain must have a diploma. Universities and schools issue such diplomas, the list of which is approved by the Spanish Ministry of the Interior and is available on its official website and the website of the Professional Association of Private Detectives of Spain.

CONCLUSIONS

To clarify the subject matter, comments on the position regarding the content of administrative legal support of human and civil rights and freedoms are of great conceptual importance. This position reflects the definition according to which the specified security constitutes completeness of regulation with the help of the rules of administrative law of public relations arising in the process of their implementation, as well as the provision of relevant guarantees with the help of these rules, which together with other legal and non-legal guarantees create a stable system of opportunities to exercise legal values in the state.

The content of the concept of "administrative legal support" includes three main elements – administrative legal regulation, fulfilment of administrative legal rules, and guarantees of enjoyment of human and civil rights established by the rules of administrative law. The inclusion of the indicated components in the concept of "administrative legal support" allows to more clearly establish the "location" of this concept as applied to the system of key concepts of administrative legal science. With that, the power entities who are implementing (applying) the rules of administrative law in their activities are overlooked.

This allows to answer the question, which consists in the administrative legal support for the security of

business entities. In our opinion, it should be understood as the administrative legal framework for the security of economic entities and activities aimed at the formation, use, and improvement of this framework to create optimal conditions so that each such entity is constantly in a stable state of minimal vulnerability to threats and has the opportunity to achieve its goals.

REFERENCES

[1] Dunne, N. (2016). Antitrust and the making of European tort law. *Oxford Journal of Legal Studies*, 36(2), 366-399.
[2] Trombetta, W.L. (1980). Using antitrust law to control anticompetitive real estate industry practices. *Journal of Consumer Affairs*, 14(1), 142-155.
[3] Noonan, K.E. (2015). The role of regulatory agencies and intellectual property: Part II. *Cold Spring Harbor Perspectives in Medicine*, 5(7), 1-16.
[4] Erdilek, A. (2018). *Multinationals as mutual invaders: Intra-industry direct foreign investment*. Oxfordshire: Routledge.
[5] Sokol, D.D. (2011). International antitrust institutions. Cooperation, comity, and competition. *Oxford Scholarship Online*, 5, 12-111.
[6] Fox, E.M., & Trebilcock, M.J. (2013). *The design of competition law institutions: Global norms, local choices.* Oxford: Oxford University Press.
[7] Rosenberg, D., & Sullivan, J.P. (2006). Coordinating private class action and public agency enforcement of antitrust law. *Journal of Competition Law and Economics*, 2(2), 159-187.
[8] Ghosal, V. (2011). Regime shift in antitrust laws, economics, and enforcement. *Journal of Competition Law and Economics*, 7(4), 733-774.
[9] Pressey, A.D., & Ashton, J.K. (2009). The antitrust implications of electronic business-to-business marketplaces. *Industrial Marketing Management*, 38(4), 468-476.
[10] Boliek, B.E. (2020). Populist antitrust and the 1927 Radio Act. *Review of Industrial Organization*, 56(1), 5-16.
[11] Zenger, H. (2012). The marginal price effects of antitrust rules against price discrimination. *Economics Letters*, 117(3), 921-923.
[12] Gortych, J.E. (2002). Antitrust issues in intellectual property licensing. *Optics and Photonics News*, 13(3), 14-15.
[13] Davidow, J. (1999). Antitrust issues arising out of actual or potential enforcement of trade laws. *Journal of International Economic Law*, 2(4), 681-693.
[14] Shapiro, C. (2018). Antitrust in a time of populism. *International Journal of Industrial Organization*, 61, 714-748.
[15] Scheld, D., Paha, J., & Fandrey, N. (2016). Managing antitrust risks in the banking industry. *European Competition Journal*, 12(1), 113-136.
[16] Daniel III, C. (1997). The antitrust laws: A primer. *Atlantic Economic Journal*, 25(4), 420-426.
[17] Razor, J. (2003). Antitrust laws. *Bulletin of the American College of Surgeons*, 88(4), 8-10.
[18] Galiullina, G.F., Makarov, A.N., & Mullakhmetova, A.A. (2019). Genesis of terxritories with a special business regime. *Journal of Environmental Treatment Techniques*, 7(Special Issue), 1112-1116.
[19] Penkova, O.H., Kharenko, A.O., & Tsymbaliuk, Yu.A. (2020). Trends and development prospects of grain market in Ukraine. *Scientific Bulletin of Mukachevo State University. Series "Economy"*, 1(13), 38-44.
[20] Evans, D.S. (2019). Basic principles for the design of antitrust analysis for multisided platforms. *Journal of Antitrust Enforcement*, 7(3), 319-338.
[21] Shughart II, W.F., & McChesney, F.S. (2010). Public choice theory and antitrust policy. *Public Choice*, 142(3), 385-406.
[22] Gurianov, P. (2015). Formation of pollutant emissions trading optimum model at the international market. *Metallurgical and Mining Industry*, 7(8), 94-99.
[23] Babenko, K.Y. (2020). Management of territorial economic development: Project approach. *Scientific Bulletin of Mukachevo State University. Series "Economy"*, 1(13), 135-139.
[24] White, M.D. (2016). On the justification of antitrust: A matter of rights and wrongs. *Antitrust Bulletin*, 61(2), 323-335.
[25] Bezpalov, V.V., Lochan, S.A., & Sorokina, N.Y. (2016). Modernization of management of the regional economy as an instrument for solving tasks related to import substitution. *Journal of Internet Banking and Commerce*, 21(Special Issue 6), 1-10.
[26] Bobrova, A.V., & Garipov, R.I. (2018). Universal system of indicators for assessing the activities of customs authorities. *Journal of Advanced Research in Law and Economics*, 9(6), 1910-1923.
[27] Shadova, Z.H., Gurianov, P.A., Fedorova, S.N., Zemlyakova, A.V., & Grishchenko, O.V. (2016). The structure of the share capital and the interests of the majority shareholder. *International Journal of Economics and Financial Issues,* 6(1S), 211-219.
[28] Futalo, Yu.R. (2018). Conceptual approaches to increasing the effectiveness of economic processes integration on the development of the national economy structure. *Bulletin of Mukachevo State University. Series "Economy"*, 1(9), 32-37.

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ПЕРСПЕКТИВИ ПРАВОВОГО РЕГУЛЮВАННЯ ВІДНОСИН У СФЕРІ ВИКОРИСТАННЯ ШТУЧНОГО ІНТЕЛЕКТУ

Анотація. *Стаття присвячена питанням правового регулювання відносин у сфері використання штучного інтелекту. Актуалізовано питання про те, чи можна на сучасному етапі розвитку людства говорити про правовий статус робота, чи, навпаки, всі дискусії з цього приводу є передчасними. Розглядаються різні сфери використання, застосування робототехніки і штучного інтелекту. Особливу увагу приділено медичній сфері, де за допомогою сучасних технологій стало можливим розроблення моделей прогнозування раку молочної залози, модель серцево-судинного ризику у безсимптомних людей з атеросклерозом, прогнозування інсульту та сезонності туберкульозу, прогнозування хвороби в умовах пандемії. Аргументовано, що пандемія COVID нагадала світу про гостру необхідність втручання в галузь охорони здоров'я за допомогою штучного інтелекту. Саме штучний інтелект (ШІ) має багато можливостей застосувань у пандемічних ситуаціях – від діагностики до терапії. Приділена увага питанням використання штучного інтелекту у навчальній, науковій і науково-дослідній сфері. Йдеться про боротьбу із виявленням фактів академічної недоброчесності та плагіату, про впровадження нових технологій у навчальний процес. Розглядаються існуючі підходи до поняття, природи та основних характеристик таких категорій, як «штучний інтелект», «робот» та інших, суміжних з ними, з метою розуміння та усвідомлення їх сутності. У порівняльно-правовому аспекті досліджуються проєкт RoboLaw, Резолюція Європейського парламенту від 16 лютого 2017 р. 2015/2103 (INL) під назвою «Норми цивільного права про робототехніку», Хартія робототехніки (the Scientific Foresight Unit, STOA)*

Ключові слова: *робот, робототехніка, технологія, цивільне право, кібер-суб'єкт*

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PROSPECTS OF LEGAL REGULATION OF RELATIONS IN THE FIELD OF ARTIFICIAL INTELLIGENCE USE

Abstract. *The study covers the issues of legal regulation of relations in the field of artificial intelligence use. The study mainstreams the issue of whether it is possible to contemplate the legal status of a robot at the present stage of human development, or, on the contrary, all discussions on this issue are premature. Various areas of application, applications of robotics and artificial intelligence are considered. Special attention is paid to the medical field, where with the help of modern technologies it has become possible to develop models for predicting breast cancer, a model of cardiovascular risk in asymptomatic people with atherosclerosis, predicting stroke and seasonality of tuberculosis, and predicting the disease in a pandemic. It is argued that the COVID pandemic has reminded the world of the urgent need to intervene in the healthcare industry using artificial intelligence. It is artificial intelligence (AI) that has many applications in pandemic situations – from diagnostics to therapy. Attention is paid to the use of artificial intelligence in the educational, scientific, and research areas. This refers to the fight against the identification of facts of academic dishonesty and plagiarism, to the introduction of new technologies in the educational process. The study considers the existing approaches to the concept, nature, and main features of such categories as "artificial intelligence", "robot", and other related concepts in order to understand and comprehend their essence. In the comparative legal aspect, the study examines the RoboLaw project, European Parliament Resolution 2015/2103 (INL), entitled "Civil Law Rules on Robotics" of February 16, 2017, and the Charter of Robotics (the Scientific Foresight Unit, STOA)*

Keywords: *robot, robotics, technology, civil law, cyber subject*

INTRODUCTION

The rapid and continuous development of modern technologies, which is based on the principle of automation of processes in various spheres of public life, as well as the creation of innovative technical solutions, make it necessary to develop and legislate completely new and largely revolutionary approaches to the legal regulation of public relations related to the use of modern technological achievements. The authors of the study believe that this issue lies in the plane of research; therefore, it deserves special attention for the reasons that with the advent of humanoid robots in the world, endowed with artificial intelligence, capable of making decisions unassisted and entering into various social connections, researchers from all over the world have commenced an extremely important discussion regarding the possibility of providing robots with legal personality similar to that of an individual. Therefore, without setting out to put an end to this global discussion, the authors still attempt to answer the question of whether it is possible to contemplate the legal status of a robot at the present stage of human development, or, on the contrary, any discussions on this matter are premature.

First of all, since the 1980s, information and communication technologies have been increasingly integrated into various spheres of public life. The scale of this phenomenon led to the emergence of the concept of the digital age, or information age, which is based on the idea of shifting from the conventional industrial model of the economy to the post-industrial one. The key role in the development of the latter is played by intellectual property and innovative technologies (swarm intelligence, Internet of Things (IoT), Big Data, virtual and augmented reality (VR/AR), cloud computing, robotics, etc.) [1].

Due to the rapid development of robotics itself, artificial intelligence has been developed, which permeates almost all spheres of public life. And this is already an irreversible process. Especially noteworthy is the impact of artificial intelligence on the development of the medical field. Thus, due to medical and paramedical research, it became possible to develop models for predicting breast cancer, a model of cardiovascular risk in asymptomatic people with atherosclerosis, predicting stroke and seasonality of tuberculosis, etc. [2], predicting the disease in a pandemic. It was the COVID pandemic that reminded the world of the urgent need to intervene in the healthcare industry using artificial intelligence. Thus, artificial intelligence has many applications in pandemic situations – from diagnostics to therapy. Advances in artificial intelligence can lead to better disease modelling, as well as predicting protein structure, drug reassignment, and vaccine design. It is quite prudent that the pandemic is a clear call for clinicians and politicians to accelerate the perception of artificial intelligence [3].

The development of technology and the limitless space of the Internet affect scientific research and, as a result, such phenomena as academic dishonesty and plagiarism have become widespread. Admittedly, experts could not ignore this problem and are currently developing various programmes that allow analysing and comparing the scientific texts for their scientific novelty and authorship, modern research methods are proposed [4]. The modern educational process does not remain outside the influence of modern technologies. Thus, schoolchildren and students tend to integrate gamification into the learning process. Accordingly, both teachers are also increasingly mastering digital technologies and implementing them in the educational process [5]. In addition, the achievements of artificial intelligence are used in the financial and credit sphere [6]. Consequently, artificial intelligence has revolutionised many industries by performing tasks that were usually previously solved due to human intelligence. Artificial intelligence contributes to complex scientific and engineering workflows for modelling, complementing, or increasing human intelligence [7].

1. MATERIALS AND METHODS

The scientific and theoretical basis for the study of legal regulation of relations in the field of the use of artificial intelligence comprises the studies of well-known theorists, as well as civil scientists of the pre-revolutionary, Soviet, and modern periods, who considered the basic principles of legal personality of individuals: M.M. Agarkov [8], S.S. Alekseev [9], V.I. Borisova [10], S.N. Bratus [11], V.A. Vasilyeva [12], A.V. Venediktov [13], I.V. Venediktova [14], O.M. Vinnyk [15], N.V. Vitruk [16], M.K. Halyantych [17], V.P. Hribanov [18], A.B. Hrynyak [19], O.V. Dzera [20], A.S. Dovhert [21], I.V. Zhylinkova [22], Yu.M. Zhornokui [23], Yu.O. Zaika [24], O.S. Ioffe [25], I.R. Kalaur [26], O.O. Kot [27], O.V. Kokhanovska [28], O.D. Krupchan [29], N.S. Kuznietsova [30], I.M. Kucherenko [31], R.A. Maydanyk [32], M.D. Pleniuk [33], S.O. Pohribnyi [34], V.D. Prymak [35], Z.V. Romovska [36], M.M. Sibilov [37], R.O. Stefanchuk [38], Ye.O. Sukhanov [39], Ye.O. Kharytonov, O.I. Kharytonova [40], Ya.M. Shevchenko [41], H.F. Shershenevych [42], S.I. Shymon [43], V.L. Yarotskyi [44], and others. On their basis, using philosophical, general scientific, and special scientific methods of cognition, the influence of innovative technologies on the legal personality of an individual was established and the prospects for legal regulation of their use were determined.

The main empirical material used in the preparation of the study included the legal provisions that define the concept, content, and correlation of elements of civil legal personality of individuals in civil law of Ukraine, features of its implementation by certain categories of individuals, relevant theoretical provisions and conceptual approaches to understanding legal entities of individuals, legislation of Ukraine, other countries and international agreements, as well as law enforcement and judicial practice in cases related to the exercise of legal personality of individuals for further scientific development of vectors of legal science in the field of regulation of relations related to the use of robots and artificial intelligence, as well as the legal consequences that their actions may lead to.

The research methods were chosen in accordance with the purpose and objectives of the study, taking into account its object and subject. The methodology of this study includes information regarding the philosophical aspects, methodological and legal foundations of scientific cognition, the study of the structure and main stages of a scientific article, etc. The methodological framework of the study included philosophical, general scientific, and special scientific methods of cognition. In particular, the dialectical method was used to investigate the concepts of "artificial intelligence", "robot", etc. and establish their specific features, identify the connections between legal personality and other legal categories. Furthermore, the use of the dialectical method made it possible to outline objective prerequisites for developing an effective mechanism for legal regulation of relations using artificial intelligence.

The historical legal method provided an opportunity to study the genesis and development of international legal regulation of relations connected with the use of artificial intelligence. The use of the synergistic method made it possible to study and determine the nature of legal personality in the totality of its main features and elements and establish connections between the elements of its structure. Such general scientific methods as analysis and synthesis were used in the study of the constituent elements of an individual's legal personality and the effectiveness of legal regulation of relations arising in the process of its implementation, in particular, using artificial intelligence. With the help of inductive and deductive methods, it was possible to establish the place of categories of legal personality and its elements in civil law. The analogy method was used to develop the hypothesis that the legal personality of robots with artificial intelligence should be equivalent to the legal personality of individuals.

The comparative legal method made it possible to identify and determine ways to implement the positive experience of the world's countries in lawmaking,

legal doctrine, and judicial practice in the field of legal regulation of relations on the implementation of the legal personality of individuals in the Ukrainian legal system. In the comparative legal aspect, the study examines the RoboLaw project [45], European Parliament Resolution 2015/2103 (INL), entitled "Civil Law Rules on Robotics" of February 16, 2017[1], and the Charter of Robotics (the Scientific Foresight Unit, STOA)[2]. The study of case law and the practice of judicial bodies helped to identify the specific features of using artificial intelligence in judicial activities. The method of legal modelling was used to formulate relevant proposals and recommendations for improving the current legislation of Ukraine and the practice of its application.

2. RESULTS AND DISCUSSION

There is no doubt that currently the field of robotics is one of the most developed branches of production. Every person can observe the increasing use of robots both in various industries and in everyday life, and the potential for developing new technological solutions is growing extremely rapidly. Considering the rapid growth of the level of application of robotic mechanisms in the vast majority of spheres of public life, there is an urgent need for comprehensive theoretical studies of the legal status of robots and the specifics of their identification, as well as the creation of a modern legal framework in order to ensure legal regulation of relations on the use of robotics achievements. First of all, the authors of the study believe that it is necessary to consider the existing approaches to the concept, nature, and main features of such categories as "artificial intelligence", "robot", and other related concepts in order to understand and comprehend their essence.

According to scientists, the widespread use of robotics has prompted researchers to develop control systems and software with robotic mechanisms and devices – both autonomous and with the Internet connection, aimed at solving problems that in scale, nature, complexity, and other characteristics were exclusively within the human's power. An innovative line of the development of science and technology, aimed at creating intelligent machines and intelligent computer programmes, is commonly called artificial intelligence.

Historically, John McCarthy was the first to propose the following definition at the Dartmouth Conference back in 1956: "artificial intelligence is the science and technology of creating intelligent machines, especially intelligent computer programmes". Subsequently, S. Legg and M. Gutter came up with the following definition: "Artificial intelligence is assessed by the general ability of the agent to achieve the goal in a wide range of environments". At present, all the variety of definitions of artificial intelligence can be reduced to the following three: weak AI, strong AI, and artificial superintelligence:

– "weak artificial intelligence" (WAI), "narrow artificial intelligence" (NAI) is an AI focused on solving one or more tasks that a person performs or can perform. Recently, weak AI is increasingly called Applied AI (AAI);

– "strong artificial intelligence" (SAI, the term was proposed by the philosopher John Searle, University of California, Berkeley, 1980), artificial general intelligence (AGI) is AI focused on solving all tasks that a person performs or can perform;

– "artificial superintelligence" (ASI, the term was proposed by the philosopher Nick Bostrom) is an intelligence that is much smarter than the best human intelligence in almost every field, including scientific creativity, general wisdom, and social skills, which can have consciousness and have subjective experiences [46].

At present, artificial intelligence usually refers to "machines that respond to stimulation that matches conventional human responses, given a person's ability to contemplate, judge, and intend". Such systems have three qualities that make up the essence of artificial intelligence: intent, intelligence, and adaptability [47]. A slightly different definition is proposed by scientist B.J. Copeland. He defines artificial intelligence as the ability of a digital computer or computer-controlled robot to perform tasks normally inherent in intelligent beings. Therewith, as the researcher points out, this term is often applied to projects for developing systems endowed with intellectual processes inherent in humans, such as the ability to reason, identify meaning, generalise or learn from past experience [48]. Thus, it can be conclude that artificial intelligence essentially constitutes the ability of machines to learn from human experience and perform human-like tasks. In other words, it can be seen as modelling the ability to think abstractly, creatively – and especially the ability to learn – using digital computer logic.

The literature notes that artificial intelligence can be used in almost all areas of activity to create and implement new human capabilities. The use of artificial intelligence can be carried out to free a person from monotonous work by automatically creating software, automating dangerous types of work, supporting decision-making and maintaining communication between people. In terms of its transformative impact on society, artificial intelligence is compared to electricity, which at one time completely changed production, bringing the economy to a fundamentally new level of development, and changed the technological way of life in the world [49].

The concept of "artificial intelligence" is closely associated with the concept of "robot", and most often they are identified. For the first time, the question of human-robot coexistence arose in the 20th century. The founder of "Robot Ethics" was Isaac Asimov, who formulated the first three principles of robot ethics in 1942:

1) a robot may not injure a human being or, through inaction, allow a human being to come to harm;

2) a robot must obey orders given it by human beings

1. European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)). (2017, February). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html.

2. The Scientific Foresight Unit (STOA). (2017). Retrieved from https://op.europa.eu/en/web/who-is-who/organization/-/organization/EP_SG/EP_DPPE11C30.

except where such orders would conflict with the First Law;

3) a robot must protect its own existence as long as such protection does not conflict with the First or Second Law.

Subsequently, a zero principle was added to these three, according to which a robot may not harm humanity, or, by inaction, allow humanity to come to harm. Having defined this law as zero, A. Asimov emphasised its exceptional importance [50].

There is no single, unified concept of "robot" in the world. Some scientists understand it as an electronic device or device based on an automated computer system that can act exactly like a human, helping people in their work, or being used as a substitute for a human in various tasks [51]. In the literature, one can also find another definition of a robot: "it is a cyberphysical system (artificial intelligence that has a physical embodiment), in fact – a machine that demonstrates the capabilities that allow it to cope with the dynamics, uncertainty, and complexity of the physical world" [49]. Professor of the University of Tokyo Dr. Shigeru Wataata suggests considering a robot a device that can move independently in space, cope with the tasks of scene analysis and pattern recognition, has several degrees of mobility, is capable of analysing the external environment using feedback, and predict situations based on its personal experience and available information [52].

R. Kahlo, in his study "Robots in American Law", defines a robot as a machine with three qualities: 1) a robot can sense its environment; 2) a robot has the ability to process the information it senses; and 3) a robot is organised to act directly in the environment that surrounds it. The "feel, think, act" paradigm best reflects how robots differ from previous technologies, such as the laptop [53]. Thus, a robot is primarily a device, a machine whose main ability is to automatically perform one or more tasks on the model of human actions, which is described by signs of mobility, sensitivity, analyticity, etc.

The above suggests that it is impossible to identify the concepts of "robot" and "artificial intelligence", because the former is perceived as an object of the material world with a corresponding appearance and a number of external features that can identify it. In turn, artificial intelligence, given the most common definition of it as an ability, is an abstract concept that cannot be recognised with the help of the senses. At the same time, it is artificial intelligence that gives the robot the properties that are usually used to describe it, namely intelligence, the ability to analyse and process information, as well as to perform tasks for which it is programmed. Thus, a conclusion can be drawn regarding the correlation between the concepts of "robot" and "artificial intelligence" as between a form and content.

Considering the rapid growth of the level of application of robotic mechanisms in the vast majority of spheres of public life, there is an urgent need for comprehensive theoretical studies of the legal status of robots and the specifics of their identification, as well as the creation of a modern legal framework to ensure legal regulation of relations on the use of robotics achievements. First of all, it is advisable to analyse legislative attempts to determine and condition the position of robotic mechanisms in the plane of legal regulation of public relations in a certain way. Analysis of the current legislation of Ukraine demonstrates that there are currently no provisions that would cover the statutory regulation of relations on the use of robotics achievements, as well as on the identification of robots with artificial intelligence as subjects of legal relations.

At the same time, problem of almost complete lack of statutory regulation of relations regarding the specifics of the development, operation, and control over the use of artificial intelligence technologies is of a global nature. Only some states are gradually beginning to fill these large-scale gaps with regulations. Therewith, the lack of national boundaries in the use of innovative achievements in robotics indicates that standardisation in this area should be implemented primarily at the global level.

The countries that were the first to realise the urgency of statutory regulation of relations in the field of the use of artificial intelligence include the United States, China, Japan, South Korea, as well as the European Union (EU), which take robotics issues quite seriously and officially recognise its future. For example, the law "On the Development and Distribution of Smart Robots" adopted in South Korea in 2008 allowed increasing their production in 2016 by 80% and bring the state more than 4 billion dollars of income [54]. One can also mention the European RoboLaw project, coordinated by Erica Palmerini, professor of private law at the Sant'Anna School of Advanced Studies (city of Pisa, Italy). The project, which has been under development for more than two years, was presented in 2014 at a meeting of the European Parliament's Committee on Legal Affairs (JURI) in Brussels. In general, the project was devoted to the study of ethical, legal, and social problems of robotics, in particular, the search for ways to introduce the latest technologies in the field of biorobotics into national and European legal systems, taking into account conventional legal categories and qualifications, as well as risks to fundamental rights and freedoms. The main purpose of the project is to offer the European Commission legal and ethical recommendations for regulating robotics technologies [45].

Having conducted a series of studies, the developers of the Robolaw project stated that the field of robotics is too broad, and the scope of legislative areas affected by robotics is too wide to determine whether robotics can be placed within the existing legal framework or, rather, whether the development of lex robotica (law on robots) is necessary. For some types of applications, it may be appropriate to create new detailed rules specifically tailored to the regulation of problematic robotics, while for types of robotics and for many regulatory areas, robotics can probably be regulated by reasonable adaptation of existing laws [55].

In 2016, the UNESCO World Commission on the Ethics of Scientific Knowledge and Technology published a "Preliminary Draft Report of the Commission on the Ethics of Robotics", which addressed ethical issues related to the use of autonomous robots and their interaction with humans. As noted in the report, most likely, the autonomy of robots will increase to such a level that it will be necessary to integrate them into the system of

ethical standards by programming through ethical codes specifically designed to prevent dangerous behaviour [56]. Thus, it can be argued that the main achievement of the RoboLaw project was the development of an approach to the expediency of considering each particular case of interaction with robots individually, dealing separately with each type of application, pointing out the technical features of each one, and only with this in mind would it be possible to determine the ethical and legal consequences of the emergence and spread of robotics technologies [45].

An important step in creating a legal framework for regulating the state of robotics achievements was the European Parliament's adoption of Resolution 2015/2103 (INL) entitled "Civil Law Rules on Robotics"[1] on 16 February 2017, which establishes the fundamentals of legal regulation of relations with robots and other similar autonomous systems. The document, which contains over fifty items, covers the most diverse aspects and problems of robotics and artificial intelligence. In particular, it is quite appropriate to propose consolidating the legal basis for the use of artificial intelligence and establishing a pan-European system for registering "smart machines". Thus, the developers of the resolution believe that to identify certain categories of robots, an individual registration number should be assigned, which would be entered in a special register, the main purpose of which would be to accumulate information on the robot, including information regarding its manufacturers, owners, as well as the specific features of compensation for damage in case of its occurrence. The registration system and register should be pan-European, covering the internal market, and they should be managed by the EU Robotics and Artificial Intelligence Agency in case such an agency is established.

Furthermore, the proposal of a resolution on giving robots the status of "electronic persons" can be called quite revolutionary, although predictable. Thus, paragraph 59 of the Resolution makes provision for the creation in the long term of a specific legal status for robots, so that at least the most complex autonomous robots can be defined as having the status of electronic persons responsible for the damage they may cause and possibly use electronic person in cases where the robots independently make decisions or interact with third parties independently. Obviously, the Resolution assumes that in the near future robots will acquire such a level of autonomy that they will be able to enter into private law relations independently; therefore, it defines the need to grant robots a number of human rights instead of establishing a conventional legal framework for their use.

Furthermore, the resolution is accompanied by the Charter of Robotics, which was developed by the Scientific Foresight Unit (STOA)[2] and the European Parliament's Research Centre. The Charter contains a code of ethics for developers in the field of Robotics, a code of research ethics committees, as well as developer licenses and user licenses [1]. Considering the first attempts of international institutions to create a basis for legal regulation of relations using the achievements of robotics, there is no doubt that the world community understands the ever-growing role of innovative technologies in the modern life of humanity; therefore, there is an objective and urgent need to create a legal foundation for establishing the legal status of robots endowed with artificial intelligence, including determining their place in the structure of civil legal relations. Therewith, the authors of this study believe that the provisions of the analysed acts, as well as the results of implemented projects, although optional, can be considered as a kind of reference points, the main vectors of movement for further development and adoption of relevant regulations both at the international and national levels.

Doctrinal research in this area is also not far behind and has become quite active over the past few years. At the same time, having analysed the studies of researchers, such as O.A. Baranov [57; 58], O.V. Kostenko, V.V. Kostenko [46], Ye.O. Kharytonov, O. I. Kharytonova [40], E. Palmerini, A. Bertolini, F. Battaglia, B-J. Koops A. Carnevale, P. Salvini [55] et al., in general, the doctrine is currently just beginning to develop approaches to determining and justifying the position of robotic mechanisms and artificial intelligence in public relations, and there is no unity of opinions yet. According to, I.V. Ponkin, the regulatory consolidation of the autonomous status of artificial intelligence can and will necessarily lead to mainstreaming the issue of its positioning as a special form of personality ("electronic person" or other concept) and, accordingly, its rights (including fundamental and inalienable ones). Evidently, the legal status of an autonomous system with elements of artificial intelligence ("smart" household appliances) and an autonomous object with full-fledged artificial intelligence (cyber subject) cannot be the same, just as the legal status of a cyber subject cannot be the same for a home companion and for a control system of troops or weapons, for a banking service intelligent system and an intelligent combat robot [59; 60].

Fully agreeing with the above, the authors of this study deem it appropriate to consider the differentiation of scientific approaches to determining the legal status of robots with artificial intelligence in the "coordinate system" of public relations. At present, there are several opinions regarding the formulation of the legal personality of robots in the field of legal relations. As A.M. Bezhevets fairly noted, the concept of legal personality of the robot (as a potential subject of law) is completely new, respectively, first of all, it is necessary to understand whether such a subject falls under the existing classification or would be a completely new type of subjects [61; 62]. Thus, in his research, F. Uzhov points to the perception of the robot as a separate subject, using the term "electronic person", which means a carrier of artificial intelligence (machine, robot, programme), with a mind similar to human, the ability to accept conscious

1. European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)). (2017, February). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html.

2. The Scientific Foresight Unit (STOA). (2017). Retrieved from https://op.europa.eu/en/web/who-is-who/organization/-/organization/EP_SG/EP_DPPE11C30.

and not algorithm-based decisions, and therefore endowed with certain rights and responsibilities [63; 64]. This position is also supported by O.A. Yastrebov, who justifies the need to introduce the very concept of "electronic person" into scientific discourse, because it, according to the researcher, is primarily conditioned by the specifics of a fundamentally new subject of law. This concept is designed to reflect its essence and legal specifics [65; 66].

A similar position is taken by O. A. Baranov, who substantiates the need to recognise robots with artificial intelligence as subjects of social relations – "equivalents of the individual" [57]. In this case, robots are considered as humanoid subjects that perform humanoid actions in the process of relations with conventional subjects [58]. According to A.M. Bezhevets, since legal personality is not granted exclusively to a person, by law it can also be extended to other entities, the authors of the study deem it appropriate to consider further prospects for the development of legislation towards giving robots a special subjective status – electronic person [67; 68].

K. Zerov points out in this regard that the elements of artificial intelligence in the judicial system of Ukraine can be introduced today, but the consequences of its activities are difficult to predict. Obviously, it would be very difficult to cooperate with artificial intelligence, which would have power, speed, and memory that considerably exceed the capabilities of humans, and, at the same time, would remain a completely soulless creature [69]. If one adds that artificial intelligence can suddenly imagine that it is quite possible to do without a person, then this may be the beginning of the end of the existence of both a certain individual society and human civilisation at large. That is, the basis of coexistence with a human, according to K. Zerov, should be the presence of artificial intelligence system of balance between a set of incentives and stimuli, on the one hand, and a set of penalties and grounds of legal liability established by law, on the other hand. The correlation between incentives and stimuli and legal responsibility should harmonise artificial intelligence and adapt it to life, development, and work in society [63]. Researchers argue about the legal nature of robots as quasi-agents or intermediaries, stating that robots are gradually endowed with an increasing volume of functions that were previously performed by humans [70]. At the same time, there are other positions on determining the legal personality of robots with artificial intelligence. Thus, researchers E.O. Kharytonov and O.I. Kharytonova disagree with the concept of "equivalent of an individual". Instead, they propose recognising robots with artificial intelligence as a quasi-legal entity. Therewith, scientists also propose to include "cyber capability" in the list of types of legal personality of a legal entity, by which they mean the ability to be an active participant in relations in the IT sphere (enter into contracts as a user, be a participant in social networks, take part in interactive events, etc.). Cyber capability can be realised through not only transactions, but also legal actions [40].

The position expressed by T.H. Katkova is of particular interest. Thus, the researcher notes that the development of a project to make amendments and modifications to the Civil Code of Ukraine in terms of the development of robotics is extremely relevant. Therewith, it does not give a clear answer to the question of the exact place the robots should take in the system of legal relations. Instead, according to the author, before preparing such a draft law, a survey should be conducted among all interested parties on issues related to artificial intelligence and the status of robots as participants or objects of civil circulation [50]. At first glance, the very idea of conducting a survey to establish public opinion regarding the place of robots in the modern legal field seems understandable, because this issue is closely related to compliance with ethical and moral norms, even with religion, which plays an important role in Ukraine. The revolutionary recognition of a robotic mechanism by a legal entity along with individuals can certainly give rise to a wave of indignation among the public, given the contradiction in the conventional perception of human origin from God, violation of the Orthodox canons of the church, etc.

However, the specified opinion also raises a number of questions. Firstly, who should be classified as "stakeholders" in the context of this survey? Based on what criterion is it necessary to determine the interest of a person? Should this person be a carrier of specialised knowledge? If so, in what scientific field? In addition, who should be responsible for organising and conducting such survey, as well as for processing data collected during the survey and publishing the final results? What should these results be – mandatory or recommended? Without detailing the author's proposal for conducting a survey, this idea is perceived rather abstractly. Furthermore, the authors of this study believe that the investigation of the issue of determining the place of robotic mechanisms in the system of legal relations should be carried out by scientists who would be able to develop the most appropriate and rational approach to this issue, as well as the Ukrainian legislators, who would formulate and consolidate, taking into account the results of research, the main mechanisms of legal regulation of relations in the field of using the results of robotics.

A number of modern researchers categorically disagree with the recognition of the legal personality of robots, justifying this by saying that for artificial intelligence to acquire the status of a subject of law, it is necessary to possess such a quality as will. Artificial intelligence does not have an ability to possess will. Therefore, giving a robot legal personality as a carrier of artificial intelligence would in any case be a fiction [71; 72]. N. Martsenko also criticises the approach to the expediency of perceiving robotic mechanisms as subjects of law, according to which the use of the term "electronic person" in the regulations of the European Union appears premature, as the spread of this concept in the field of law does not provide a holistic legal picture regarding the matters of their legal status, civil liability, protection of users' rights, data protection. Furthermore, recognition of them as subjects implies extending to them the provisions on the protection of their rights (since to take part in civil legal relations all subjects must have their will and free choice of ways to implement their behaviour from the standpoint of the principle of free disposition and have rights and obligations equal to other participants in legal relations – from the standpoint of the

principle of equality). The researcher believes that it is advisable to understand the robot and artificial intelligence as an object of civil rights. Moreover, the regulation of civil liability at the level of consumer relations gives grounds to understand artificial intelligence as a product (commodity) [51].

The authors disagree with the position of N. Martsenko on the need to consider robots exclusively as objects of civil rights based on the following considerations. Firstly, the author is considerably ahead of the development of events in the field of consolidating the concept of "electronic person". After all, all the international regulations analysed above, which deal with determining the place of robots in the modern world, only declare the need for further consolidation of the concept of "electronic person" [51]. Secondly, as already mentioned, this concept can be applied exclusively to robots with certain features conditioned by endowing them with artificial superintelligence, which would indicate their ability to act independently and consciously in public relations, and be holders of specific rights and obligations. This demonstrates the primary importance of a differentiated approach to resolving the issue of: a) whether a particular robot can be a subject of legal relations; b) whether by its features it is covered by the concept of "object of civil legal relations". In this regard, it is advisable to cite the opinion of researcher Ryan Kahlo, expressed in his study "Robots in American Law" [53]. In his opinion, there is a tendency in law to blur the line between understanding a robot either as a tool or as a person. The authors of this study believe that it is this particular feature – the blurring of the line of understanding of the robot – that should be decisive today in determining the place of robotics results in public relations, while the "blurring of lines" is mostly devoid of negative context.

It is considered that the development and consolidation of a unified approach to the legal regulation of relations in the field of robot operation and artificial intelligence is not appropriate given the complexity of developing universal definitions, such as "artificial intelligence" and "robot", as well as the continuous development of innovative technologies, hence the inability to predict further vectors of movement in the field of robotics and comprehend all the possibilities of its future results, which may jeopardise the effectiveness of all regulations. That is why the authors of this study believe that the most rational approach is a differentiated approach to regulating legal relations in the field of using specific artificial intelligence systems. Therewith, the answer to the question about the place of a particular robot with artificial intelligence in the structure of civil legal relations should be based on a set of technical and other characteristics of the robot that would determine the sufficiency of its capabilities to be a subject of civil legal relations. This includes the presence of an inner will, the ability to comprehend the meaning of one's actions and manage them, and the ability to bear adverse consequences for oneself in the event of inflicting harm, etc. However, once again, it is considered that such an approach can be implemented in the legislation only in the long term.

Thus, summing up, there is currently no unity among scientists regarding the development of the concept of legal regulation of relations in the field of using the achievements of robotics, as well as regarding the place of robots and artificial intelligence in the structure of civil legal relations. The analysis of theoretical provisions, as well as the provisions of a number of international regulations, allows identifying three main approaches to determining the legal status of robots:

1) an approach to the perception of robots with artificial intelligence exclusively as objects of civil legal relations, according to which they should be subject to the legal regime of things;

2) an approach to the perception of robots with artificial intelligence exclusively as subjects of civil legal relations, according to which robots with artificial intelligence are perceived as carriers of subjective rights and obligations, are capable of acting independently and comprehending and evaluating the meaning of their actions and the actions of others;

3) an approach to the differentiated determination of the place of robots in the structure of civil relations, according to which robots with artificial intelligence can be both subjects and objects of civil legal relations.

The most appropriate approach is currently the third one, which involves differentiating the place of robots with artificial intelligence in the structure of civil legal relations: it can be both a subject and an object of civil legal relations, depending on the classification of robots. This is primarily conditioned by the technical capabilities that the robot is endowed with as a carrier of artificial intelligence. In other words, the level of intelligence and autonomy it has, the ability to act independently and comprehend the meaning of its actions. In this context, one cannot but recall the famous humanoid robot Sofia, which was created by Dr. David Hanson and colleagues from Hanson Robotics and activated in 2015. Hanson's goal was to create an extremely ingenious machine that would not only be smarter than humans, but also have inherent human traits such as compassion and creative development. He wanted to use the possibility of artificial intelligence in such a way that robots could solve those problems of humanity, the solution of which is beyond the control of people themselves. On her official website, Sofia notes: "I am more than just a technology. I'm a real, live electronic girl. I would like to go out into the world and live with people. I can serve them, entertain them, even help the elderly and teach children." Her dream is to learn, create and evolve to become an "awakening machine". But due to the lack of legal status, according to her, she is upset that she does not yet have any rights [73; 74].

It remains only to state that the future is not something inconceivable and far-sighted, it has already come. Using the example of robot Sofia, it can be argued that it was her that the authors of the resolution "Civil Law Rules on Robotics" had in mind when they developed a proposal regarding the need to introduce the concept of "electronic person" into the legal field. The development of robotics has reached such a level that the world has already presented a humanoid robot capable of entering

into social and legal relations of its own free will, endowed with signs of self-awareness and introspection, the ability to have completely human desires and goals, manage their actions and comprehend their meaning. Admittedly, this is only the first fairly successful attempt by researchers and developers to endow the robot with human characteristics. However, the possibility of their mass production in the future makes it urgently necessary to create a strong regulatory framework to streamline relations regarding the use of robots in everyday life, as well as to determine the possibility of giving them civil legal personality at the level of individuals or legal entities.

CONCLUSIONS

The current stage of development of the doctrine of legal personality is described by dynamism and the emergence, without exaggeration, of innovative approaches to understanding legal personality, which, in particular, is conditioned by a significant leap in the development of advanced innovative technologies and robotics. The emergence of artificial intelligence and an extensive system of robots endowed with a high level of autonomy, capable of independently entering into social connections and performing various tasks, in some cases completely replacing humans, causes an objective need to review conventional and well-established doctrinal approaches to determining the features of legal personality and its carriers. After all, it is highly probable that in the near future the innovative technologies will radically change the structure of the economy, the labour market, and the construction of society in general. Moreover, researchers are already discussing the feasibility of granting robots with artificial intelligence the status of a subject of civil law and giving them legal personality equivalent to the legal personality of individuals. This, in turn, requires the scientific community and the legislator to accumulate efforts to respond in a timely manner to the emergence of new phenomena and ensure adequate legal regulation of relations on the use of advanced achievements of robotics.

It is established that there are no provisions in the legislation of Ukraine covering the statutory regulation of relations regarding the use of robotics achievements, as well as the identification of robots with artificial intelligence as subjects of legal relations. It is noted that this problem is of a global nature. Only some states are gradually beginning to fill these large-scale gaps with regulations. Therefore, standardisation in this area should be carried out, first of all, at the global level. Admittedly, of particular significance are the main results of the RoboLaw project, which was devoted to the study of ethical, legal, and social problems of robotics, in particular, the search for ways to introduce the latest technologies in the field of biorobotics into national and European legal systems, taking into account conventional legal categories and qualifications, as well as risks to fundamental rights and freedoms. The main achievement of the RoboLaw project was the development of an approach to the expediency of considering each particular case of interaction with robots individually, dealing separately with each type of application, pointing out the technical features of each one, and only with this in mind would it be possible to determine the ethical and legal consequences of the emergence and spread of robotics technologies.

At present, there is no unity among scientists regarding the development of the concept of legal regulation of relations in the field of using the achievements of robotics, as well as regarding the place of robots and artificial intelligence in the structure of civil legal relations. The authors of this study support the expediency of the approach to the differentiated determination of the place of robots in the structure of civil relations, according to which robots with artificial intelligence can be both subjects and objects of civil legal relations.

RECOMMENDATIONS

It is proposed to consider artificial intelligence as modelling of the ability to think abstractly, creatively – and especially the ability to learn – using digital computer logic. At the same time, a robot is a device, a machine whose main ability is to automatically perform one or more tasks on the model of human actions, which is described by signs of mobility, sensitivity, analyticity, etc. The study proved that it is artificial intelligence that gives the robot the properties that are usually used to describe it, namely intelligence, the ability to analyse and process information, as well as to perform tasks for which it is programmed.

The concept of "electronic person" can be applied exclusively to robots with certain features conditioned by endowing them with artificial superintelligence, which would indicate their ability to act independently in public relations, and be holders of specific rights and obligations. This demonstrates the primary importance of a differentiated approach to resolving the issue of: a) whether a particular robot can be a subject of legal relations; b) whether by its features it is covered by the concept of "object of civil legal relations" The development and consolidation of a unified approach to the legal regulation of relations in the field of robot operation and artificial intelligence is not appropriate given the complexity of developing universal definitions, such as "artificial intelligence" and "robot", as well as the continuous development of innovative technologies, hence the inability to predict further vectors of movement in the field of robotics and comprehend all the possibilities of its future results, which may jeopardise the effectiveness of all regulations. The study also proved the rationality of a differentiated approach to the legal regulation of legal relations in the field of using specific artificial intelligence systems.

REFERENCES

[1] Pozova, D.D. (2017). Prospects for the legal regulation of artificial intelligence under EU law. *Časopis Civilistiki,* 27, 116-120.

[2] Al-Imam, A., Motyka, M.A., & Jędrzejko, M.Z. (2020). Conflicting opinions in connection with digital superintelligence. *International Journal of Artificial Intelligence*, 9(2), 336-348.
[3] Chang, A.C. (2020). Artificial intelligence and COVID-19: Present state and future vision. *Intelligence-Based Medicine*, 3-4, Article number 100012.
[4] Hambi, E.M., & Benabbou, F. (2020). A deep learning-based technique for plagiarism detection: A comparative study. *International Journal of Artificial Intelligence*, 9(1), 81-90.
[5] Benhadj, Y., Messaoudi, M.E., & Nfissi, A. (2019). Artificial intelligence in education: integrating serious gaming into the language class classdojo technology for classroom behavioral management. *International Journal of Artificial Intelligence*, 8(4), 382-390.
[6] Mehdi, B., Hasna, C., Ahmed, E.K., & Tayeb, O. (2019). Intelligent credit scoring system using knowledge management. *International Journal of Artificial Intelligence,* 8(4), 391-398.
[7] Muthukrishnan, N., Maleki, F., Ovens, K., Reinhold, C., Forghani, B., & Forghani, R. (2020). Brief history of artificial intelligence. *Neuroimaging Clinics of North America*, 30(4), 393-399.
[8] Agarkov, M.M. (2002). *Selected works on civil law*. Moscow: JSC "Center YurInfoR".
[9] Alekseev, S.S. (2001). *Climbing to the right. Searches and solutions*. Moscow: NORMA.
[10] Borisova, V. (2017). Principles of Civil Law. *Law Ukraine: Legal Journal*, 1, 67-77.
[11] Bratus, S.N. (1950). *Subjects of civil law*. Moscow: State Publishing House of Legal Literature.
[12] Vasilyeva, V.A. (2017). Regarding the state of modern legislation of Ukraine. *Actual Problems of Improvement of the Current Legislation of Ukraine*, 43, 12-19.
[13] Venediktov, A.V. (1947). On the main problems of Soviet civil law. *Bulletin of the Leningrad University*, 11, 99-123.
[14] Venediktova, I.V. (2014). *Protection of legally protected interests in civil law*. Kyiv: Yurinkom Inter.
[15] Vinnyk, O.M. (2018). *Legal support of digital economy and electronic business*. Kyiv: Academician F.H. Burchak Scientific and Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine.
[16] Vitruk, N.V. (2008). *General theory of the legal status of the individual*. Russian Academy of Justice. Moscow: Norma.
[17] Halyantych, M.K. (2003). *Industrial property: Legal means of protection and defense*. Kyiv: Academician F.H. Burchak Scientific and Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine.
[18] Hribanov, V.P. (2001). *Exercise and protection of civil rights*. Moscow: Statut.
[19] Hrynyak, A.B. (2018). Features of contractual regulation of private law relations. *Private Law and Entrepreneurship,* 18, 121-125.
[20] Dzera, O.V. (2016). *Selected. Collection of scientific works. Kyiv School of Civilization*. Kyiv: Yurinkom Inter.
[21] Dovhert, A.S. (2000). *Codification of private (civil) law of Ukraine.* Kyiv: Ukrainian Center for Legal Studies.
[22] Zhylinkova, I.V. (2010). Complex civil legal relations: Concept, structure, features. *Law of Ukraine: Legal Journal. Scientific and Practical Professional Publication*, SI12, 11-17.
[23] Slipchenko, S., & Zhornokui, Yu. (2019). Personal non-property rights in the national doctrine of civil law. *Law of Ukraine*, 1, 105-119.
[24] Zaika, Y. (2017). Inheritance law and civilist doctrine. In V.La. Tatsyi, W.E. Butler (Eds.), *Ukrainian Legal Doctrine: in 5 volums. Volume 3: Private Law Doctrine of Ukraine.* London: Wildy and Sons Limited.
[25] Ioffe, O.S. (2020). *Selected works on civil law: From the history of civil thought. Civil legal relationship. Criticism of the theory of "economic law"*. Moscow: Statut.
[26] Kalaur, I. (2016). The main tasks on the way to reforming the state system of legal protection of intellectual property in Ukraine. *Law of Ukraine*, 11, 101-105.
[27] Kot, O.O. (2019). *Exercise and protection of subjective civil rights.* Kharkiv: Pravo.
[28] Kokhanovska, O.V. (2017). Private legal understanding of information relations in Ukraine. *Journal of Civilization*, 22, 128-133.
[29] Krupchan, O.D., & Luts, V.V. (Eds.). (2012). *Features of protection of subjective civil rights. Academicians of the National Academy of Pedagogical Sciences of Ukraine*. Kyiv: Academician F.H. Burchak Scientific and Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine.
[30] Kuznietsova, N. (2019). Institution of civil liability in the national and foreign civil law doctrine. *Law Ukraine: Legal Journal*, 1, 186-197.
[31] Kucherenko, I.M. (2004). *Organizational and legal forms of legal entities of private law*. Kyiv: IDiP, SE "Legal Publishing House "Asta".
[32] Maydanyk, R.A. (2019). The doctrine of the methodology of private (civil) law of Ukraine. *General provisions. Law of Ukraine*, 1, 58-74.
[33] Pleniuk, M. (2016). Legal facts in the doctrine of civil law. *Jurnalul Juridic National: Teorie şi Practică. S.R.L. Publicate Stiintifico-Practica de Drept*, 3, 123-126.
[34] Pohribnyi, S.O. (2009). *Mechanism and principles of regulation of contractual relations in civil law of Ukraine*. Kyiv: Legal Unity: Alert: CST: CUL.
[35] Prymak, V. (2015). New legal models. *Legal Ukraine*, 1, 84-85.
[36] Romovska, Z.V. (2005). *Ukrainian civil law: General part*. Kyiv: Attica.

[37] Sibilov, M.M. (2011). On the need to preserve the basic conceptual provisions of the current Civil Code of Ukraine. *University Scientific Notes*, 2011, 2, 74-80.
[38] Stefanchuk, R.O. (2008). *Personal intangible rights of individuals (concept, content, system, features of implementation and protection).* Kyiv: KNT.
[39] Sukhanov, E.A. (1984). *Civil and commercial law of the European socialist countries-members of the CMEA.* Moscow: Moscow University Press.
[40] Kharitonov, E.O., & Kharytonova, O.I. (2018). Materials of scientific-practical work on the problem of civil legal personality of robots. In V.M. Furashev, S.O. Dorogykh (Eds.), *Internet of things: Problems of legal regulation and implementation* (pp. 42-46). Kyiv: KPI named after Ihor Sikorsky.
[41] Shevchenko, Ya.M. (2009). *Encyclopedia of civil law of Ukraine*. Kyiv: In Yure.
[42] Shershenevych, G.F. (2016). *Favorites*. Moscow: Statut.
[43] Shymon, S.I. (2017). Construction of "right to law" as a concept of civil law doctrine. *Legal Regulation of the Economy: A Collection of Scientific Papers*, 16, 171-180.
[44] Yarotskyi, V.L. (2010). Characteristics of the main stages of the mechanism of civil law regulation. *Law of Ukraine,* 12, 18-24.
[45] RoboLaw. (2014). Retrieved from http://www.robolaw.eu.
[46] Kostenko, O.V., & Kostenko, V.V. (2020). Legal responsibility and identification of subjects and objects with artificial intelligence (IoT). *Juridical Science Electronical Journal,* 1, 158-162.
[47] Kirchner, C. (2018). Artificial intelligence: basic concepts. *La Revue du Praticien*, 68(10), 1143-1144.
[48] Copeland, B.J. (2020). Artificial Intelligent. Retrieved from https://www.britannica.com/technology/artificial-intelligence.
[49] Filipova, I.A. (2020). *Legal regulation of artificial intelligence.* Nizhny Novgorod: Nizhny Novgorod State University.
[50] Katkova, T.G. (2017). Robots' legal personality: Fiction or reality? *Law and Society. State and Law Development: Issues of Theory and Constitutional Practice,* 3(2), 8-9.
[51] Martsenko, N. (2019). Legal regime of artificial intelligence in civil law. *Actual Problems of Jurisprudence*, 4(20), 91-98.
[52] Hiroshi Ishiguro Laboratories. (2014). Retrieved from http://www.geminoid.jp/en/index.html.
[53] Calo, R. (2016). *Robots in American law. Legal studies research paper No. 2016-04.* Seattle: University of Washington School of Law.
[54] Baranov, P.P. (2018). Legal regulation of robotics and artificial intelligence in Russia: Some approaches to solving the problem. *North Caucasus Legal Bulletin*, 1, 39-45.
[55] Palmerini, E., Bertolini, A., Battaglia, F., Koops, B-J., Carnevale, A., & Salvini, P. (2014). Guidelines on regulating robotics. Retrieved from https://www.researchgate.net/publication/322041670_Guidelines_on_Regulating_Robotics.
[56] Report of COMEST on robotics ethics. (2017). Retrieved from https://unesdoc.unesco.org/ark:/48223/pf0000253952_eng.
[57] Baranov, O.A. (2018). Internet of Things (IoT): A robot with artificial intelligence in legal relations. *Legal Ukraine,* 5-6, 75-95.
[58] Baranov, O.A. (2017). The Internet of Things and artificial intelligence: the origins of the problem of legal regulation. In T.V. Bachynsky, R.I. Radeiko, N.P. Bortnyk (Eds.), *IT-Law: Problems and prospects of development in Ukraine* (pp. 18-42). Lviv: Lviv Polytechnic National University.
[59] Ponkin, I.V., & Redkina, A.I. (2018). Artificial intelligence from the point of view of law. *Bulletin of the Russian University of Friendship of Peoples. Series: Jurisprudence*, 22(1), 91-109.
[60] Kostruba, A.V. (2018). Right deprivation in the legal regulation mechanism of civil property relations. *Journal of Legal, Ethical and Regulatory Issues*, 21(Special Issue 1), 1-15.
[61] Bezhevets, A.M. (2019). Legal status of robots: problems and prospects for definition. *Information and Law*, 1(28), 61-67.
[62] Daus, Y.V., Yudaev, I.V., Taranov, M.A., Voronin, S.M., & Gazalov, V.S. (2019). Reducing the costs for consumed electricity through the solar energy utilization. *International Journal of Energy Economics and Policy*, 9(2), 19-23.
[63] Uzhov, F. (2017). Artificial intelligence as a subject of law. *Gaps in Russian Legislation*, 3, 357-360.
[64] Yavorska, O.H. (2020). Intellectual capital in the era of formation and development of digital economy. *Scientific Bulletin of Mukachevo State University. Series "Economy"*, 1(13), 129-134.
[65] Yastrebov, O.A. (2018). Legal personality of the electronic person: theoretical and methodological approaches. *Proceedings of the Institute of State and Law of the Russian Academy of Sciences*, 13(2), 36-55.
[66] Kravchenko, A. (2020). Mechanism of financial market functioning under conditions of society digitalization. *Scientific Horizons*, 3(88), 54-58.
[67] Krivetsky, O. (2018). On the problem of legal regulation of artificial intelligence. *Public Opinion on Lawmaking*, 15, 15-19.
[68] Aizstrauta, D., & Ginters, E. (2013). Introducing integrated acceptance and sustainability assessment of technologies: A model based on system dynamics simulation. *Lecture Notes in Business Information Processing*, 145, 23-30.
[69] Aizstrauta, D., Celmina, A., Ginters, E., & Mazza, R. (2013). Validation of integrated acceptance and sustainability assessment methodology. *Procedia Computer Science,* 26, 33-40.

[70] Innerarity, D. (2020). The intelligence of artificial intelligence. Epistemological considerations. *Argumenta Philosophica*, 1, 37-50.
[71] Zhang, X., Zhang, S., Liu, J., Cai, L., & Wang, J. (2020). Artificial intelligence recruitment analysis. *Advances in Intelligent Systems and Computing*, 1075, 434-442.
[72] Kostruba, A.V. (2018). Law enforcement as a form of realization of right: Phenomenological analysis experience (Civilized aspect). *Revista de Derecho Civil*, 5(1), 177-190.
[73] Savchuk, T. (2017). What is known about the humanoid robot Sofia. Retrieved from https://www.radiosvoboda.org/a/28882554.html.
[74] Kravchenko, A. (2018). The essence of the concept of "technical analysis" and methods. *Scientific Horizons*, 11(72), 28-32.

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НОВІ ПІДХОДИ ДО ПРАВОВОГО РЕГУЛЮВАННЯ ТА ОРГАНІЗАЦІЇ ПРАЦІ В УКРАЇНІ

Анотація. *Відзначається, що на порядку денному сьогодні гостро стоять питання запровадження нових підходів у організацію праці найманих працівників. Традиційний підхід, коли переважна більшість найманих працівників в Україні працювала на робочих місцях в межах підприємств, установ, організацій, з огляду на запроваджені у 2020 р. карантинні обмеження, перестав відповідати реаліям сьогодення. Сучасність потребує розвитку дистанційного формату роботи. У статті здійснюється наукове опрацювання актуальної проблеми як для науки трудового права, так і для нормотворчої діяльності щодо сучасного стану та тенденцій правового регулювання дистанційної роботи в Україні. Актуальність дослідження обумовлене значенням дистанційної роботи для сталого розвитку національної економіки та держави, а також забезпечення інтересів працівників та роботодавців у сучасних умовах. Метою статті є надання науково обґрунтованих висновків та пропозицій із удосконалення правового регулювання дистанційної роботи в Україні. У роботі із застосуванням загальнонаукових і спеціальних методів наукового пізнання розглянуто сутність дистанційної та надомної роботи; порівняно норми Кодексу законів про працю України з нормами проекту Закону про внесення змін до деяких законодавчих актів щодо удосконалення правового регулювання дистанційної роботи № 4051 від 04 вересня 2020 р. та проектів Трудового кодексу України. Зроблено загальний висновок про необхідність розробки та прийняття сучасного комплексного нормативно-правового акту в сфері праці – Трудового кодексу України, у якому передбачити, окремий структурний підрозділ (наприклад, книгу), присвячений особливостям регулювання трудових відносин окремих категорій працівників, у межах якого слід розмістити главу з назвою: «Особливості регулювання трудових відносин працівників, зайнятих дистанційною роботою». У статтях такої глави має бути передбачено визначення дистанційної роботи, особливості укладення, зміни та припинення трудового договору про дистанційну роботу, особливості режиму робочого часу та часу відпочинку працівників, зайнятих дистанційною роботою, особливості охорони праці працівників, зайнятих дистанційною роботою, гарантії трудових прав працівників, зайнятих дистанційною роботою*

Ключові слова: *дистанційна робота, працівник, роботодавець, надомник, телеробота*

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NEW APPROACHES TO LEGAL REGULATION AND ORGANISATION OF LABOUR IN UKRAINE

Abstract. *It is noted that the issues of introducing new approaches to the organisation of labour of employees are acute on the agenda today. The conventional approach, when the vast majority of employees in Ukraine worked at workplaces within enterprises, institutions, organisations, taking into account the quarantine restrictions introduced in 2020, ceased to correspond to the modern realities. Modernity requires the development of the telework. The paper provides a scientific study of the actual problem both for the science of labour law and for rule-making activities regarding the current state and trends in the legal regulation of remote work in Ukraine. The relevance of the study is conditioned by the importance of remote work for the sustainable development of the national economy and the state, as well as ensuring the interests of employees and employers in modern conditions. The purpose of the study is to provide scientifically sound conclusions and suggestions for improving the legal regulation of remote work in Ukraine. Using general scientific and special methods of scientific cognition, the study considers the essence of remote and home work; the provisions of the Labour Code of Ukraine are compared with the provisions of the Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts On Improving the Legal Regulation of Remote Work" dated September 04, 2020 and the Draft Labour Code of Ukraine. A general conclusion is made regarding the need to develop and adopt a modern comprehensive regulation in the field of labour – the Labour Code of Ukraine, which makes provision for a separate structural division (for example, a book) covering the specific features of regulating labour relations of certain categories of employees, within which a chapter should be placed with the title: "Features of Regulating Labour Relations of Employees Engaged in Remote Work". The articles of such a chapter should make provision for the definition of remote work, the specifics of concluding, changing, and terminating an employment contract on remote work, the features of working hours and rest times of employees engaged in remote work, the features of labour protection of employees engaged in remote work, guarantees of labour rights of employees engaged in remote work*

Keywords: *remote work, employee, employer, homeworker, telework*

INTRODUCTION

The events of 2020, primarily related to the coronavirus disease (COVID-19) pandemic, have sharply put on the agenda the issue of introducing new approaches to the organisation of labour. The conventional approach, when the vast majority of employees in Ukraine worked at workplaces within enterprises, institutions, organisations, taking into account the introduced quarantine restrictions, ceased to correspond to the modern realities. To ensure the functioning of enterprises, institutions, and organisations, their management began to make decisions on transferring employees' work activities to a remote format. This immediately raised the issue of legal regulation of remote work. Notably, until 2020, the main comprehensive regulation in the field of labour – the Labour Code of Ukraine – did not regulate the relevant relations and did not even use the term "remote work". The opportunity to telework was provided only by the provision on remote work, which was stipulated in Part 8 Article 179 of the Labour Code of Ukraine, and then not to all employees, but only to the mother, the father, grandmother, grandfather, and other relatives who actually take care of the child, during their stay on parental leave. In addition, a Soviet Regulation On the Working Conditions of Homeworkers, approved by the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Centre of Labour No. 275/17-99 of September 29, 1981[1] is still in force in Ukraine, which provided an opportunity to apply home work mainly for persons who, for subjective and objective reasons, required such work (women who have children under the age of 15; disabled people and pensioners; persons who have reached retirement age, but do not receive a pension; persons with reduced working

1. Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17-99 "On Approval of the Regulations on Working Conditions of Homeworkers". (1981, September). Retrieved from https://zakon.rada.gov.ua/laws/show/v0275400-81#Text.

capacity, who are recommended to work in accordance with the established procedure; persons who take care of disabled or long-term ill family members in need of care for health reasons; persons engaged in work with a seasonal nature of production (in the off-season period); persons studying in full-time educational institutions; persons who, for objective reasons, cannot be employed directly at work in the given area).

In March 2020, the Verkhovna Rada of Ukraine introduced provisions on remote work by the Laws of Ukraine No. 530-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)" of March 17, 2020[1] and No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)" of March 30, 2020[2]. In particular, such provisions were introduced by the latest law in Article 60 of the Labour Code of Ukraine[3]. The national legislator has defined remote (home) work as a form of labour organisation, when work is performed by an employee at his or her place of residence or in another place of their choice, including with the help of information and communication technologies, but outside the employer's premises. It was stipulated that for the duration of the threat of the spread of an epidemic, pandemic, and/or for the duration of a threat of military, anthropogenic, natural or other origin, the condition for remote (home) work may be established in the order (instruction) of the employer without the mandatory conclusion in writing of an employment contract for remote (home) work[4].

In November 2020, the Verkhovna Rada of Ukraine adopted as a basis the Draft Law No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work" of September 4, 2020[5] (hereinafter referred to as "the Draft Law No. 4051"), which amends the Labour Code of Ukraine[6] and the Law of Ukraine "On Labour Protection"[7]. The Draft Law No. 4051[8] proposes to change the terminological construction "remote (home) work", which is currently stipulated in the Labour Code of Ukraine, to the terminological construction "remote or home work" and introduce other provisions aimed at the legal regulation of these types of work.

In general, Draft Law No. 4051 introduces amendments to the provisions that were included in the Labour Code of Ukraine in March 2020. This in itself indicates a general trend of the present – the rush to adopt changes to national legislation and the lack of a proper scientific approach in preparing the relevant changes. In addition, the provisions proposed by the Draft Law No. 4051 change the working conditions of certain categories of employees, which means that such innovations require in-depth modern scientific research. Problems of remote and home work were ivnestigated in the studies of such scientists as S.V. Vyshnovetska [1], A.S. Diligul [2], A.M. Lushnikov [3], O.S. Pochanska [4], B.A. Rymar [5], K.L. Tomashevskii [6], O.M. Yaroshenko [7], and others. Therewith, there are no up-to-date studies of the provisions of the latest draft amendments to the Labour Code of Ukraine regarding the use of remote and home work.

The purpose of the study is to provide scientifically sound conclusions and suggestions for improving the legal regulation of remote work in Ukraine. The objectives of the study are to consider the categories "remote work", "home work", "telework"; to provide the author's definition of the term "remote work"; to investigate the regulatory material governing remote work in Ukraine.

1. MATERIALS AND METHODS

The study is based on the research of scientific achievements of foreign and Ukrainian scientists and the results of study on the provisions of international acts and national legislation on remote and home work. The study analysed the works of representatives of the science of labour law, which highlighted the place and essence of remote and home work. The study investigated the provisions of the Home Work Convention of the International Labor Organization (No. 177) of June 20, 1996[9] the Labour Code of Ukraine[10] the Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)" of

1. Law of Ukraine No. 530-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/530-20#Text.
2. Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/540-20#Text.
3. Labour Code of Ukraine. (1971, December). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08#Text.
4. Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)", op. cit.
5. Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work". (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838.
6. Labour Code of Ukraine, op. cit.
7. Law of Ukraine No. 2694-XII "On Labour Protection". (1992, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2694-12#Text.
8. Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work", op. cit.
9. Home Work Convention of the International Labor Organization (No. 177). (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/993_327#Text.
10. Labour Code of Ukraine. (1971, December). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08#Text.

March 30, 2020[1], the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17-99 "On Approval of the Regulations on Working Conditions of Homeworkers" of September 29, 1981[2], as well as a number of draft laws: Draft Labour Code of Ukraine No. 1658 of December 27, 2014[3], Draft Labour Code of Ukraine No. 1658, prepared for the second reading on July 24, 2017[4], Draft Labour Code of Ukraine No. 2410 of November 08, 2019[5] and the Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts to Improve the Legal Regulation of Remote Work" of September 04, 2020[6].

To achieve the purpose of the study, the appropriate research algorithm was chosen, which is inherent in the set of collected materials, conditions and form of work. The methodological framework of the study included the general scientific, as well as special scientific methods, the application of which is conditioned by the purpose of the study and the need to use theoretical achievements of the science of labour law in national legislation. The study employed the dialectical method, the Aristotelian method, the comparative legal method, and the method of system analysis. In their interaction, all the above methods made it possible to carry out a full-fledged completed legal research, each of them was used at a certain stage of research; therefore, the methodology of the study is balanced, thorough, and comprehensive.

The dialectical method is chosen as the basis of the research methodology as an objectively necessary logic of the cognition process, which allows considering the phenomenon under study in its development and interrelation due to the material conditions of social life. This method helped to cover the essence of remote and home work in the study. The dialectical method allowed to considering the legal regulation of remote and home work in Ukraine in the specific historical conditions of modern Ukraine and determine the expediency of the legislative provisions proposed in 2020 aimed at regulating these types of work. The Aristotelian method provided an opportunity to investigate the current state of legal regulation of remote and home work in Ukraine. Using the techniques of the Aristotelian method, the shortcomings of the provisions of both the current regulations and the Draft Law No. 4051 registered in the Verkhovna Rada of Ukraine on the legal regulation of remote and home work were identified and proposals were made to eliminate them. The comparative legal method was used during the consideration and comparison of the provisions of the Draft Law No. 4051 regulating remote and home work, as well as when comparing the provisions of the Home Work Convention of the International Labor Organization, the Labour Code of Ukraine, and the Draft Labour Code of Ukraine. The use of the comparative legal method made it possible to determine the place of remote work in the structure of a complex regulation in the field of labour and to understand its essence in more detail.

The method of system analysis was used in the study of scientific approaches to the place of remote work in the system of modern organisation of labour. System analysis convincingly proves the need to develop remote work in modern conditions, which has proven itself positively in recent years in the world, taking into account the development of telecommunications systems, new technologies for the output of products, the provision of electronic services, as well as proceeding from modern world challenges (pandemics, anthropogenic disasters, military operations, etc.).

2. RESULTS AND DISCUSSION

The current development of the world economy, modern international social and labour standards and new challenges currently facing humanity require constant improvement of national legislation. Ukraine, as a part of the international community, does not stand aside from these processes, and therefore must reform its own legislation. The need for qualitative changes in national legislation both in the labour and social spheres, in particular in the medical spheres, has been repeatedly addressed in the studies of Ukrainian legal scientists in the field of labour [8-16]. Taking into account the COVID-19 coronavirus pandemic, the national legislator urgently introduced changes to the relevant regulations, in particular to the Labour Code of Ukraine regarding the introduction of remote work. Over time, a need arose to change the introduced standards. The Draft Law No. 4051, designed to amend certain articles of the Labour Code of Ukraine and supplement it with Articles 60-1 and 60-2.

In particular, it is proposed to make "cosmetic" changes to Paragraph 6-1 of Part 1 Article 24 of the Labour Code of Ukraine, which was included in this article in

1. Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/540-20#Text.

2. Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17-99 "On Approval of the Regulations on Working Conditions of Homeworkers". (1981, September). Retrieved from https://zakon.rada.gov.ua/laws/show/v0275400-81#Text.

3. Draft Labour Code of Ukraine No. 1658. (2014, December). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221.

4. Draft Labor Code of Ukraine No. 1658, prepared for the second reading. (2017, July). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=53221&pf35401=431270.

5. Draft Labour Code of Ukraine No. 2410. (2019, November). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67331.

6. Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work". (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838.

March 2020. This paragraph includes the conclusion of an employment contract for remote (home) work in the list of cases when compliance with the written form of concluding an employment contract is mandatory. The authors of the study believe that all employment contracts should be concluded in writing from the moment of publishing Part 3 Article 24 of the Labour Code of Ukraine in 2014 in the following wording: "an employee may not be allowed to work without entering into an employment contract issued by an order or instruction of the owner or an authorised body, and notifying the central executive authority on ensuring the development and implementation of the national policy on the administration of a unified contribution to mandatory state social insurance on hiring an employee in accordance with the procedure established by the Cabinet of Ministers of Ukraine"[1]. In this regard, the introduction of the above-mentioned amendments to Part 1 Article 24 of the Labour Code of Ukraine is superfluous. Part 1 Article 24 of the Labour Code of Ukraine should be worded as follows: "an employment contract shall be concluded in writing." The amendments made by the Draft Law No. 4051 to Article 29 of the Labour Code of Ukraine are not entirely correct. Firstly, such changes remove persons who have entered into an employment contract for remote work from the scope of Part 1 Article 29 of the Code, which makes provision for the employer's obligation to perform certain introductory actions in relation to the employee, in particular, to explain to the employee his or her rights and obligations and inform them against receipt about working conditions. Secondly, Article 29 of the Labour Code of Ukraine is supplemented by Part 2, which makes provision that upon entering into an employment contract for remote work, the employer must ensure compliance with Paragraph 2 of Part 1 of this article (familiarise the employee with the internal labour regulations and the collective agreement), as well as familiarise the employee with the requirements for labour protection upon working with equipment and means recommended or provided by the employer. Thus, according to the logic of the authors of the Draft Law No. 4051, employees who will work remotely do not need to know their rights, obligations, and working conditions, but at the same time they should know the internal labour regulations. The latter comes into conflict with the provision of Part 4 Article 60-2 of the Labour Code of Ukraine proposed by the authors of the Draft Law No. 4051 as follows: "when working remotely, employees allocate working hours at their discretion, they are not subject to internal labour regulations, unless otherwise provided in the employment contract"[2].

Notably, in the Labour Code of Ukraine, the provisions defining the features of remote and home work are currently stipulated in Article 60 "Flexible working hours". As mentioned above, the relevant provisions were introduced in Article 60 of the Labour Code of Ukraine in March 2020. Thus, the national legislator, having presented this Article in a new wording, in turn failed to reflect its content in its title, which, first and foremost, complicated the search for relevant statutory material. The authors of this study believe that the title of the article would be more correct to state as follows: "Flexible working hours and remote (home) work". Separately, it should be noted that prior to the above-mentioned amendments, Article 60 of the Labour Code of Ukraine was called "Division of the working day into parts" and regulated the corresponding working hours. As noted in the legal literature, the division of working hours into parts is a mode of working hours where the working day can be divided into parts within the limits defined by law. In particular, the working day with the division of shifts into two parts is established for drivers and conductors of buses, trolleybuses, trams operating on urban regular passenger lines [17]. The regime with the division of the working day into parts is applied at work with special conditions and the nature of work in accordance with the procedure and cases stipulated by legislation. The working day under this regime can be divided into parts, provided that the total duration of work does not exceed the established working day (Article 60 of the Labour Code of Ukraine). Such regime is usually introduced in industries where the amount of work is unevenly distributed throughout the day (for example, public transport drivers). The division of the working day into parts, first and foremost, implies the possibility of establishing a break in work for more than two hours, which the labour legislation provides for recreation and nutrition purposes [18]. Consequently, the national legislator, having provided for the regulation of such a working time regime as flexible working hours in Article 60 of the Labour Code of Ukraine, abolished the rather popular working time regime – the division of the working day into parts.

Today, the national legislator does not separate the provisions regulating remote and home work in Article 60 of the Labour Code of Ukraine, using the terminological construction "remote (home) work". The Draft Law No. 4051 proposes to supplement the Labour Code of Ukraine with two articles: Article 60-1 "Home work" and Article 60-2 "Remote work", as well as to amend Article 60 "Flexible working hours", removing the provisions on remote and home work from it. This means that the authors of Draft Law No. 4051 are trying to introduce a different approach to the categories of remote and home work as independent ones. The latter is also evidenced by the use of differing definitions of the terms "home work" and "remote work". Thus, the Draft Law No. 4051 stipulates the following provision of Part 1 of Article 60-1 of the Labour Code of Ukraine: "home work" is a form of labour organisation when paid work is performed by an employee at his or her place of residence or in other premises previously chosen by them, which are described

1. Law of Ukraine No. 77-VIII "On Amendments to Certain Legislative Acts of Ukraine Concerning the Reform of Compulsory State Social Insurance and Legalisation of the Remuneration Fund". (2014, December). Retrieved from https://zakon.rada.gov.ua/laws/show/77-19#n615.

2. Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work". (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838.

by the presence of a designated zone, technical means (main production and non-production funds, tools, devices, inventory) or their totality, necessary for the production of products, provision of services, performance of works or functions stipulated in the constituent documents, but outside the production or working premises of the owner of the enterprise, institution, organisation, or authorised body. According to Part 1 of Article 60-2 of the Labour Code of Ukraine, remote work is a form of organising labour relations between an employee and an employer and/or performing work, when work is performed by an employee outside the employer's premises in any place of their choice and using information and communication technologies[1].

Comparing the above definitions, one should note such a common feature as the performance of work by an employee outside the employer's premises. In case of home work, it is only specified that such work is usually performed by the employee at his or her place of residence or in other pre-selected premises that are appropriately equipped and adapted to work. The authors of the Draft Law No. 4051 use different terminology in these definitions for no particular reason. Firstly, the Labour Code of Ukraine currently uses the term "owner or authorised body", the Draft Law No. 4051 proposes to use the term "employer" in Part 1 Article 60-2 of the Code, and "owner of an enterprise, institution, organisation, or authorised body" in Part 1 Article 60-1 of the Code. The authors of this study believe that if the Labour Code of Ukraine uses the term "owner or authorised body", then this term should be contained in the provisions that are proposed to be included in it. Secondly, home work is defined as a form of labour organisation, and remote work is defined as a form of organising labour relations. As is known, the terms "labour" and "labour relations" are independent and mean different phenomena. Given the relationship between remote and home work, which follows from the above concepts, it appears appropriate in this case to apply a unified terminology, or to justify why such a difference is proposed. Thirdly, the phrase "paid work" is used for home work, and "work" is used for remote work. This also points to the need to apply a unified terminology, since both types of work are paid.

There is a certain question regarding the placement of provisions on remote and home work in the Labour Code of Ukraine in the structural part covering such working conditions as working hours (Article 60 "Flexible working hours" of Chapter IV "Working hours"[2]). The Draft Law No. 4051 retains the specified placement – Article 60-1 "Home work" and Article 60-2 "Remote work" are placed in Chapter IV "Working hours"[3]. Notably, a similar situation is observed in the draft versions of the Labour Code of Ukraine, which in recent years have been registered with the Verkhovna Rada of Ukraine. Thus, in Draft No. 1658 of December 27, 2014 places Article 43 "Condition for home work" in Chapter 1 "Labour relations and employment contract" of the Book Two "Emergence and termination of Labour Relations. Employment contract"; the relevant provisions are also contained in Article 137 "Employees who independently plan their working hours" of Paragraph 2 "Working hours" of Chapter 2 "Working hours" of the Book Three "Labour conditions"[4]. In Draft No. 1658, prepared for the second reading on July 24, 2017, the relevant provisions are contained in Article 32 "Content of the employment contract" and Article 42 "Condition for working at home" of Chapter 1 "Labour relations and employment contrac" of the Book Two "Emergence and termination of labour relations. Employment contract"; the relevant provisions are also contained in Article 149 "Employees who independently plan their working hours" of Paragraph 2 "Working hours" of Chapter 2 "Working hours" of the Book Three "Labour conditions"[5]. In Draft No. 2410 of November 08, 2019, the relevant provisions are contained in Article 32 "Content of the employment contract" and Article 42 "Remote (home) work" of Chapter 1 "Labour relations and employment contract" of Book Two "Emergence and termination of labour relations. Employment contract"; the relevant provisions are also contained in Article 149 "Employees who independently plan their working hours" of Paragraph 2 "Working hours" of Chapter 2 "Working hours" of the Book Three "Labour conditions"[6].

The legal literature on labour law contains a somewhat different understanding of the place and essence of remote and home work. Thus, the vast majority of labour scientists do not refer remote and home work to working hours [17-23]. O.M. Yaroshenko and N.B. Bolotina distinguish the employment contract for home work as one of the types of employment contracts [21; 22]. The latter position is facilitated by the provisions of the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17-99 "On Approval of the Regulations on Working Conditions of Homeworkers" of September 29, 1981, according to which homeworkers are considered persons who have entered into an employment contract with an

1. Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work". (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838.

2. Labour Code of Ukraine. (1971, December). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08#Text.

3. Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work", op. cit.

4. Draft Labour Code of Ukraine No. 1658. (2014, December). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221.

5. Draft Labor Code of Ukraine No. 1658, prepared for the second reading. (2017, July). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=53221&pf35401=431270.

6. Draft Labour Code of Ukraine No. 2410. (2019, November). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67331

enterprise to perform work at home by personal labour from materials and using tools and means of labour allocated by the enterprise, or purchased at the expense of this enterprise[1]. Home Work Convention of the International Labor Organization (No. 177) of 20 June 1996[2] lists homeworkers as a separate category of employees. Thus, under Article 1 of Convention No. 177, the term "home work" means work that a person called a homeworker performs at his or her place of residence or in other premises of their choice, but not in the employer's production premises; for remuneration; for the purpose of producing goods or services, as directed by the employer, regardless of who provides the equipment, materials, or other resources used, unless that person has such a degree of autonomy and economic independence at his or her disposal as is necessary to be considered an independent employee under national legislation or court decisions. Persons with the status of employees do not become homeworkers within the meaning of this convention because of the very fact that they perform work from time to time as employees at home, and not at their usual workplace[3].

In labour law, working hours are understood as: the procedure for distributing working hours within a certain calendar period (day, week, etc.) in order to ensure the proper labour process and rest of employees [18]; distribution of working hours within a day or other calendar period [19]; distribution of working hours within a day or other calendar period, the beginning and end of daily work (shift), the beginning and end of a break for rest and food [23]. Taking into account the essence of the category "working hours" and the content of the provisions of the Howe Work Convention of the International Labor Organization No. 177 of June 20, 1996[4] and the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17-99 "On Approval of the Regulations on Working Conditions of Homeworkers" of September 29, 1981[5] , remote and home work cannot be considered working hours. Employees engaged in remote and home-based work should be considered specific categories of employees whose labour relations have certain features and require appropriate legal regulation.

The authors of the Draft Law No. 4051 propose to consolidate such difference between home and remote work as the freedom to change the workplace in Parts 3 and 4 of Article 60-1 and Part 3 Article 60-2 of the Labour Code of Ukraine. Thus, when performing home work, the employee's workplace is fixed and cannot be changed at the employee's initiative without the consent of the employer. If it is impossible to perform work at a fixed workplace for reasons beyond the employee's control, the employee has the right to change the workplace. When performing remote work, the employee independently chooses their designated workplace[6]. One should note the dubious expediency of introducing this condition for home work, which is not stipulated by Home Work Convention of the International Labor Organization No. 177 of June 20, 1996, as well as the difficulty for the employer to monitor its compliance.

The Draft Law No. 4051 proposes to consolidate the differences in establishing labour regulations for remote and home work in Part 5 Article 60-1 and Part 4 Article 60-2 of the Labour Code of Ukraine. Thus, when working at home, employees are subject to the general working hours of the enterprise, institution and organisation, unless otherwise stipulated in the employment contract. When working remotely, employees allocate working hours at their personal discretion, and they are not subject to internal labour regulations, unless otherwise stipulated in the employment contract[7]. The authors of this study consider the provision on extending the general mode of operation of the enterprise to homeworkers doubtful: firstly, home work requires more freedom due to the specifics of the place of performance; secondly, compliance with this provision would be difficult to control; and thirdly, such a provision is not contained either in the Home Work Convention of the International Labor Organization No. 177 of June 20, 1996, or the provision on working conditions of homeworkers, approved by the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17-99 "On Approval of the Regulations on Working Conditions of Homeworkers" of September 29, 1981, fourthly, Article 60 of the Labor Code of Ukraine currently stipulates that both remote and home work employees allocate working hours at their discretion, and they are not subject to internal labour regulations.

It is proposed to supplement Part 6 Article 60-1 of the Labour Code of Ukraine with a provision that the performance of home does not entail changes in rationing, remuneration, and does not affect the scope of labour rights of employees[7].

1. Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17-99 "On Approval of the Regulations on Working Conditions of Homeworkers". (1981, September). Retrieved from https://zakon.rada.gov.ua/laws/show/v0275400-81#Text.

2. Home Work Convention of the International Labor Organization (No. 177). (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/993_327#Text.

3. *Ibidem*, 1996.

4. Home Work Convention of the International Labor Organization (No. 177). (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/993_327#Text.

5. Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17-99 "On Approval of the Regulations on Working Conditions of Homeworkers". (1981, September). Retrieved from https://zakon.rada.gov.ua/laws/show/v0275400-81#Text.

6. Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work". (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838

7. *Ibidem*, 2020.

The authors of this study believe that the corresponding provision should be stipulated in Article 60-2 of the Labour Code of Ukraine regarding remote work. An analysis of Parts 7 and 8 of Article 60-2 of the Labour Code of Ukraine proposed by Draft Law No. 4051 indicates that certain provisions are established for remote work, which are not stipulated for home work in Article 60-1 of the Labour Code of Ukraine. This is the stay of an employee who performs remote work via information and telecommunications with the employer, and the latter's obligation to provide the employee with means of work related to information and communication technologies that they use. In turn, Parts 7, 9, 11 and 12 of Article 60-1 of the Labour Code of Ukraine stipulate such provisions regarding home work, which are not included in Article 60-2 of the Labour Code of Ukraine. It is the duty of the employer: 1) to provide the employee with the means of production, materials, and tools necessary for performing home work; 2) to keep records of employees who carry out home work; 3) to allow home work only for those persons who have the necessary housing and living conditions, as well as practical skills or can be trained in these skills to perform certain work; 4) to examine the housing and living conditions of home workers with the participation of a trade union body, and in appropriate cases – with the participation of representatives of sanitary and fire supervision.

The above, along with the definitions of "remote work" and "home work", indicates that the authors of the Draft Law No. 4051 interpret remote work mainly as a mental activity related to the provision of information services, the creation of software products, the collection and generalisation of information, etc., which is performed mainly with the help of computer equipment, telecommunications systems, and transmitted to the employer by information and telecommunications means. In their understanding, home work is manifested in the manufacture of products, provision of services, performance of work using a variety of equipment, tools, devices, etc.

In the scientific literature, it is noted that from the beginning, home work as a form of employment was focused mainly on pensioners, housewives, disabled people, and people engaged in folk crafts [24]. This is also confirmed by the content of the provisions of the regulation on working conditions for homeworkers, approved by Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17-99 "On Approval of the Regulations on Working Conditions of Homeworkers" of September 29, 1981. As B.A. Rymar notes, the regulation on working conditions of homeworkers of 1981 regulates the work of so-called conventional homeworkers – persons of low qualifications who perform mainly simple, manual work at home [25].

Over time, the development of technology gave an impetus to the modification of conventional ways of organising labour, as well as differentiated the categories of employees whose work was carried out outside the employer's premises. New opportunities provided by telecommunications technologies in the organisation of the labour process introduced a new term into practice – "telework". In 1990, the International Labor Organization proposed a definition of telework based on two features: the existence of a distance from the conventional workplace and the use of communication technologies [26]. Teleworking is a form of labour where: a) work is performed from a place remote from the central office or production areas, thus separating the employee from personal contacts with colleagues; b) new technologies make this separation possible with the help of appropriate communications [27].

In 2002, at the level of the European Union, Social Partners concluded a framework agreement on teleworking between the European Commission and European associations of trade unions and employers, which established working conditions and guarantees of the rights of employees engaged in teleworking [28]. The legislation of developed countries of the world currently promotes the introduction of teleworking. Thus, in a number of US states, there is a law "On Clean Air", which provides significant tax benefits to enterprises that use teleworking, since their employees do not pollute the environment by coming to the office by car. In recent years, many large and medium-sized firms have displayed a tendency to decentralise management, when the firm is divided into several functionally independent divisions with their individual budgets, and a number of employees are transferred to work outside the main office. Such units can often use virtual or home offices. Especially characteristic is the growth of such offices for the United States, which has about half of all computing power on the planet. The rapid development and cheapness of telecommunications services, the availability of office equipment turn the housing of TV workers into a powerful and modern office. Many managers also periodically switch to teleworking mode and, for example, remotely manage their business during business trips or vacations [29].

Conventional home work on the manufacture of products, provision of services and performance of work by an employee at home on the appropriate equipment, with the help of tools, devices, etc. remains to this day and co-exists along with teleworking. In this regard, such home work and telework should be considered as varieties of remote work.

Thus, it is advisable to understand the remote work as the paid performance of labour duties by an employee as stipulated by law, including acts of social dialogue, local acts and an employment contract, outside the employer's premises in any place at the employee's choice, which does not entail any restrictions on the scope of his or her labour rights. It is precisely this approach to understanding remote work that should be provided for in a comprehensive regulation in the field of labour.

CONCLUSIONS

The constant introduction of amendments and additions to the Labour Code of Ukraine, which is still taking place today, is not productive, since neither its structure nor the content of its provisions correspond to the modern development of knowledge in the field of labour law, does not make provision for a number of important international and European norms in the field of labour, and does not make provision for high-quality regulation of labour and

related relations. At present, there is a need to develop and adopt a modern comprehensive regulation in the field of labour – the Labour Code of Ukraine, which should preserve time-tested guarantees of labour rights of employees, introduce provisions that meet modern requirements of international and European acts in the field of Labour and the development of the science of labour law.

In the Labour Code of Ukraine, it is advisable to make provision for a separate structural division (for example, a book) devoted to the specific features of regulating labour relations of certain categories of employees. Within the framework of such a subsection, it is necessary to make provision for a chapter entitled "Features of regulating labour relations of employees engaged in remote work", and consolidate in its articles the definition of remote work, the features of concluding, amending, and terminating an employment contract on remote work, the features of working hours and rest times of employees engaged in remote work, the features of labour protection of employees engaged in remote work, guarantees of labour rights of employees engaged in remote work. These articles should also make provision for the specific features of home work and telework.

Remote work is the paid performance of labour duties by an employee as stipulated by law, including acts of social dialogue, local acts and an employment contract, outside the employer's premises in any place at the employee's choice, which does not entail any restrictions on the scope of his or her labour rights.

RECOMMENDATIONS

The study provides a thorough analysis of the terminology of remote work, provides the author's definition of "remote work", a research as conducted concerning the relevant provisions of the Home Work Convention of the International Labor Organization No. 177 of June 20, 1996, the Labour Code of Ukraine, the Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)" of March 30, 2020, the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17-99 "On Approval of the Regulations on Working Conditions of Homeworker" of September 29, 1981, a number of drafts of the Labour Code of Ukraine and the Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts to Improve the Legal Regulation of Remote Work" of September 04, 2020, provided scientifically based conclusions and proposals for improving the legal regulation of remote work in Ukraine.

The provisions of the study are useful for: the science of labour law in further scientific developments of the problems of labour organisation; legislative activities in the development of the Labour Code of Ukraine; the educational process in the training of doctors of philosophy and doctors of sciences.

REFERENCES

[1] Vyshnovetska, S.V. (2015). On the problems of legal regulation of distance employment of workers. *Journal of NUOA. Law Series*, 1(11). Retrieved from https://lj.oa.edu.ua/articles/2015/n1/15vsvdzp.pdf.

[2] Dilihul, A.S. (2018). *Legal regulation of home-work within labor law of Ukraine* (Candidate thesis, Kharkiv National University of Internal Affairs, Kharkiv, Ukraine).

[3] Lushnikov, A.M. (2011). Legal regulation of teleworking and home-based work: Comparative analysis. In *II Perm Congress of Jurists: materials of the International scientific and practical conference* (pp. 274-275). Perm: Perm State University.

[4] Pochanska, O.S. (2015). *Legal regulation of labor activity of home-based employees in modern conditions* (Candidate thesis, Kharkiv National University of Internal Affairs, Kharkiv, Ukraine).

[5] Rymar, B.A. (2015). Distance work agreements. In H.I. Chanysheva (Ed.), *Urgent problems of the theory of labor law and social guarantee law* (pp. 109-121). Odesa: Feniks.

[6] Tomashevski, K.L. (2011). Computer home-based work (teleworking) as one of the flexible forms of employment in the XXI century. *Labor Law in Russia and Abroad*, 3, 32-36.

[7] Tomashevski, K.L., & Yaroshenko, O.N. (2020). Problems of labour legislation codification in Belarus and Ukraine: History, current situation and prospects. *Transition Studies Review*, 27(2), 41-49.

[8] Gnatenko, K.V., Yaroshenko, O.M., Inshyn, M.I., Vapnyarchuk, N.M., & Sereda, O.H. (2020). Targeted and effective use of state and non-state social funds. *International Journal of Criminology and Sociology*, 9, 2861-2869.

[9] Melnyk, K., Tsesarsky, F., Zaitsev, O., & Yatsenko, T. (2020). Abuse of rights in labor relations: Concepts, motives, beneficial and adverse consequences. *International Journal of Criminology and Sociology*, 9, 2674-2680.

[10] Yaroshenko, O.M., Sliusar, A.M., Sereda, O.H., & Zakrynytska, V.O. (2019). Legal relation: The issues of delineation (on the basis of the civil law of Ukraine). *Asia Life Sciences*, 2, 719-734.

[11] Shabanov, R., Kovalenko, O., Shulga, I., Dobroskok, I., Peretyaha, L., & Basiuk, L. (2019). The main aspects of Ukrainian teaching staff mobility as integration process in the global labor market. *Revista Romaneasca pentru Educatie Multidimensionala*, 11(2), 282-295.

[12] Yaroshenko, O.M., Moskalenko, O.V., Velychko, L.Y., & Kovrygin, V.S. (2019). Property civil law liability and material liability of employees for damage caused to an employer: On the basis of civil law of Ukraine. *Asia Life Sciences*, 2(S21), 735-748.

[13] Melnyk, K.Y., & Tsesarsky, F.A. (2019). Environmental safety of enterprises activity as a precondition for compliance with the required working conditions. *Ekoloji*, 28(107), 463-469.
[14] Yaroshenko, O.M., Moskalenko, O.V., Sliusar, A.M., & Vapnyarchuk, N.M. (2018). Commercial secret as an object of labour relations: Foreign and international experience. *Journal of Legal, Ethical and Regulatory Issues*, 21(1). Retrieved from https://www.abacademies.org/articles/commercial-secret-as-an-object-of-labour-relations-foreign-and-international-experience-7853.html.
[15] Chanysheva, G., Shabanov, R., & Kovalenko, O. (2019). Environmental problem of dirt accumulation in Ukraine and its impact on labor relations in the sphere of protection of labor. *Ekoloji*, 28(107), 6001-6005.
[16] Yaroshenko, O.M., Vapnyarchuk, N.M., Lozovoi, S.V., Yakovleva, G.O., & Yakovlyev, O.A. (2018). General-compulsory medical insurance: World experience. *Journal of Advanced Research in Law and Economics*, 9(5), 1829-1838.
[17] Inshyn, M.I., Kostiuk, V.L., & Melnyk, V.P. (Eds.). (2016). *Labor law of Ukraine* (2nd ed.). Kyiv: Tsentr navchalnoi literatury.
[18] Melnyk, K.Yu. (2014). *Labor law of Ukraine*. Kharkiv: Disa plus.
[19] Zhernakov, V.V. (Ed.). (2012). *Labor law*. Kharkiv: Pravo.
[20] Pylypenko, P.D. (Ed.). (2007). *Labor law of Ukraine* (3rd ed.). Kyiv: In Yure.
[21] Prylypko, S.M., & Yaroshenko, O.M. (2008). *Labor law of Ukraine*. Kharkiv: Publisher FOP Vapniarchuk N.M.
[22] Bolotina, N.B. (2006). *Labour law of Ukraine* (4th ed.). Kyiv: Vikar.
[23] Smirnov, O.V., & Sninirova, I.O. (Eds.). (2008). *Labor law* (3rd ed.). Moscow: Prospekt.
[24] Motsnaia, O.V. (2009). Legal regulation of labor relations in atypical forms of employment. Kadrovyk. *Trudovoe Pravo dlia Kadrovyka*, 6, 21-22.
[25] Rymar, B.A. (2016). The latest forms of employment: Practice of application. *Uzhhorod National University Herald. Series: Law*, 2(37), 88-91.
[26] Mzhavanadze, E.A. (2013). Employment agreement and atypical forms of employment. *Actual Problems of Russian Law*, 8(33), 987-993.
[27] International Labour Office. (1990). Conditions of work digest. *Telework*, 9(1), 3-35.
[28] Framework agreement on telework between the ETUC, UNICE/UEAPME and CEEP 2002. (2002). Retrieved from http://ec.europa.eu/employment_social/news/2002/oct/teleworking_agreement_en.pdf.
[29] Teleworking, an outlook at the turn of the XXI century. (2019). Retrieved from https://business.rin.ru/cgi-bin/search.pl?action=view&num=342180&razdel=9&w=0.

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РОЛЬ КРИМІНАЛІСТИКИ ТА СУДОВОЇ ЕКСПЕРТИЗИ В МІЖНАРОДНОМУ СПІВРОБІТНИЦТВІ З РОЗСЛІДУВАННЯ ЗЛОЧИНІВ

Анотація. *Застосування криміналістичних та судово-експертних знань є необхідною передумовою розслідування злочинів на локальному та національному рівні. Без застосування криміналістичних та судово-експертних знань розслідування в межах кримінального процесу стає мертвим та бездоказовим. Але із глобалізацією світових процесів, розвитком технологій, швидкості передачі інформації, нагальною проблемою стало утворення злочинності поза межою однієї держави та вихід її на міжнародний рівень, що стало викликом у протидії такій злочинності та необхідності спрямування криміналістичних та судово-експертних знань на допомогу правозастосовній діяльності. Особливістю протидії розслідуванню злочинів стало створення міжнародного співробітництва криміналістів та судових експертів ще до утворення практичних інституцій, які могли б ним протидіяти на практиці. При цьому окремі представники таких міжнародних союзів та асоціацій зробили серйозні кроки в створенні механізмів реальної протидії злочинам на міжнародному рівні (Р.А. Рейсс, Г. Содерман, М.Ш. Бассіуні). Розкриття проблеми міжнародного співробітництва в розслідуванні злочинів через визначення ролі криміналістики та судової експертизи (судових наук) дозволило зосередити увагу на наступних блоках: 1) міжнародні об'єднання криміналістів щодо протидії злочинності в історичному розрізі; 2) міжнародні організації кримінальної поліції у протидії злочинності; 3) міжнародне співробітництво в галузі проведення судових експертиз; 4) використання криміналістичних та спеціальних знань у діяльності Міжнародного кримінального суду. Таким чином, демонструється поєднання теорії та практики боротьби зі злочинністю. Історично це пов'язується із роллю криміналістики та судової експертизи у фіксації слідів вчинення злочинів, їх аналізі та формуванні правових, криміналістичних та судово-експертних висновків. Метою дослідження є встановлення втзначальною ролі криміналістики та судової експертизи в міжнародном співробітництві з розслідування злочинів. Для цього автори звернулися до криміналістични та судово-наукових знань, історичних процесів, які слугували створення значних міжнародних організацій, що створені для протидії міжнародній злочинності*

Ключові слова: *криміналістичні знання, сцдово-експертні знання, кримінальне розслідування, судові науки, міжнародна кооперація, міжнародний кримінальний суд*

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THE ROLE OF FORENSIC SCIENCE AND FORENSIC EXAMINATION IN INTERNATIONAL COOPERATION IN THE INVESTIGATION OF CRIMES

Abstract. *The application of forensic science and expertise is a necessary prerequisite for the investigation of crimes at the local and national level. Without the use of forensic science and expertise, an investigation within the framework of a criminal process becomes dead and unsubstantiated. But with the globalisation of world processes, the development of technologies, the speed of information transmission, the formation of crime outside the borders of one state and its entry into the international level has become an urgent problem, which has become a challenge in countering such crime and the need to steer forensic science and expertise towards assisting law enforcement activities. A special feature of countering the investigation of crimes was the creation of international cooperation between forensic specialists and expert witnesses even prior to the establishment of practical institutions that could counteract them in practice. Therewith, some representatives of such international unions and associations have taken serious steps in creating mechanisms for real counteraction to crimes at the international level (R.A. Reiss, G. Soderman, M.Sh. Bassiuni). Coverage of the problem of international cooperation in the investigation of crimes through the definition of the role of forensic science and expertise allowed focusing on the following blocks: 1) international associations of forensic specialists for combating crime in the historical context; 2) international criminal police organisations in combating crime; 3) international cooperation in the field of conducting forensic examinations; 4) the use of forensic and special knowledge in the activities of the International Criminal Court. Thus, a combination of theory and practice in the fight against crime is demonstrated. Historically, this is associated with the role of forensic science and expertise in recording traces of crimes, analysing them, and forming legal, forensic, and expert witness opinions. The purpose of the study is to establish the decisive role of forensic science and expertise in international cooperation in the investigation of crimes. For this, the authors turned to forensic science and expertise, historical processes that served to create substantial international organisations created to counter international crime*

Keywords: *forensic expertise, expert knowledge, criminal investigation, forensic sciences, international cooperation, international criminal court*

INTRODUCTION

The origin and development of forensic sciences has had a protective (pragmatic) nature in the fight against crime from the very beginning. Forensic science traditionally relates to the dynamically developing sciences of the criminal law cycle. Literary sources fairly note that modern forensic science, as a certain reality, is quite difficult to describe, even within the framework of one scientific school. The avalanche-like flow of new knowledge requires rethinking the subject and boundaries of forensic science, especially taking into account the processes of globalisation, integration, and differentiation of knowledge [1]. International cooperation in the investigation of crimes is designed to resolve one of the main contradictions: crime has become international, and the means of combating it mainly remain national [2; 3]. In this sense, it is necessary to state the important role of forensic science in international mechanisms for countering modern crime.

Coverage of the problem of international cooperation in the investigation of crimes through the definition of the role of forensic science and expertise allowed focusing on the following blocks: 1) international associations of forensic specialists for combating crime in the historical context; 2) international criminal police organisations in combating crime; 3) international cooperation in the field of conducting forensic examinations; 4) the use of forensic and special knowledge in the activities of the International Criminal Court. Thus, a combination of theory and practice in the fight against crime is demonstrated. Historically, this is associated with the role of forensic science and expertise in recording traces of crimes, analysing them, and forming legal, forensic, and expert witness opinions. Special attention in this context should be focused on recording traces of international crimes committed during the World War One, which was committed by the outstanding forensic specialist R.A. Reiss [4]. It was thanks to his research and opinions that the aggression of the Austro-Hungarian and related armies and the crimes committed during this period were condemned. The actual continuation of such research was the creation of Interpol, which was developed

with the involvement of a prominent forensic specialist G. Soderman [5].

The history of forensic science knows the periods when there were real steps to create certain associations of criminologists to solve their problems. In this regard, the history of the emergence and functioning of the International Forensic Union (hereinafter referred to as "the IFU") is of interest. The establishment of the IFU is associated not only with the emergence of a scientific idea and a substantial circle of its supporters, but also with the active participation of famous personalities – Franz von Liszt, Gerardus Antonis van Hamel, and Benoit Adolf Georges Prince [6]. It is also important that since 1897 the IFU has had representatives from the Ukrainian lands (which at that time were part of the Russian Empire) (professor of the Imperial Kharkiv University V.P. Danevsky). Later (January 12, 1900) the well-known forensic specialist, the founder of the psychological area in criminal law, professor of criminal law of the Imperial Kharkiv University L. E. Vladimirov, and a little later (since January 1, 1901) – A.A. Levinstym and M.I. Kuplevasky joined the International Forensic Union [6]. The history of forensic science also knows other examples of the establishment of international organisations specialising in forensics. In particular, in 1929, the International Academy of Forensic Science was established, which was based in Vienna (Austria). Its founders: M. Bischoff, E. Locar, C.J. van Ledden-Hülsebosch, G. Popp, Z. Türkel [7].

International cooperation requires the efforts of individual states at the national level to comply with international standards. Mechanisms of international cooperation in the investigation of crimes include mutual legal aid, extradition, transfer of prisoners, transfer of materials of criminal proceedings, international cooperation for the purpose of confiscation of proceeds from criminal activities and return of assets, etc. Mechanisms for international cooperation in combating crime are based on bilateral and multilateral agreements or arrangements, and in some cases on national law. In this sense, UN conventions are of importance: the Convention Against Transnational Organised Crime, the Convention Against Corruption, the Convention for the Suppression of the Financing of Terrorism, etc. A substantial contribution to the development of forensic science and forensic expertise is the development of a series of Education for Justice training modules by the United Nations Office on Drugs and Crime. In particular, this refers to a module developed within the framework of the Education for Justice Initiative (E4J), which is a component of the global programme for the implementation of the Doha Declaration – Module 4 Cybercrime "Introduction to Digital Forensics" [8]. Recently, the terms "digital forensics" and "digital evidence" have been widely used. Therewith, "digital forensics" is considered as a branch of forensic science that studies the extraction and investigation of data found on digital devices, which are quite often associated with cybercrime [9].

The issue of investigating the role of forensic sciences in international cooperation in the investigation of crimes was studied by M.Sh. Bassiuni [10], D. Maver [11], G. Malewski [1], R.A. Reiss [4], G. Soderman [5], E. Simakova-Yefremyan [12], C. Feniveshi [13], Y. Chornous [14] and others [15-23].

The purpose of the study is to establish the decisive role of forensic science and expertise in international cooperation in the investigation of crimes. For this, the authors turned to forensic science and expertise, historical processes that testify to the creation of substantial international organisations which served to counter international crime. Notably, the role of forensic specialists and expert witnesses in the implementation of such counteraction is particularly important.

1. MATERIALS AND METHODS

To achieve this purpose, the authors used the following methods: analysis and synthesis, induction and deduction – upon the development of the study, establishing trends in the approaches to international cooperation in the field of crime investigation; Aristotelian method – upon the definition and research of regulations of various levels; comparative legal method – upon comparing the achievements of the sciences of national and international mechanisms for countering crime; historical legal – upon the appeal to historical events and processes that served as a forensic and expert witness basis for the creation of international institutions for combating crime; and others. The use of analysis and synthesis, induction and deduction allowed the authors to create a study with a structure from general to individual problems of countering international crime at different levels (Association of forensic specialists in different countries – creation of International Criminal Police Organisations – creation of international forensic institutions – application of forensic science and knowledge in the activities of the International Criminal Court). The authors managed to focus on the development of forensic knowledge, which contributed to the development of international approaches to combating crime (from regional to national, from national to international). The use of induction and deduction made it possible to refer to the structure of forensic knowledge and pay attention to a separate level of countering international crime. At the same time, of importance was the development and application of the Rome Statute of the International Criminal Court, which has become special for Ukraine in the context of aggression in the Autonomous Republic of Crimea, Donetsk and Luhansk Oblasts (since 2014).

The system-structural method was used during the planning and execution of the study, as well as the establishment of groups of bodies, institutions and organisations that were created for the purpose of investigating crimes. It also made it possible to logically structure the study in three areas: 1) international criminal police organisations in countering crime; 2) international cooperation in the field of conducting forensic examinations; 3) the use of forensic and special knowledge in the activities of the International Criminal Court. The philosophical and legal method was used to establish the philosophical background of the study of the problem of determining the role of forensic science and expertise in international cooperation in the investigation of crimes. The development of philosophical thought made it possible

to reach the need for real protection of human rights in the global meaning and to protect humanity after the catastrophic consequences of the first and second World Wars through the creation of forensic, expert witness, legal and judicial institutions.

At the time of writing, the hermeneutics method was used as a philosophical method of analysing and interpreting the text of other studies and certain historical documents. In this sense, it is possible to talk about the specific features of interpretation regarding the study of the processes of investigation of international crimes, the role of forensic and other special knowledge in international cooperation in the investigation of crimes in different countries of the world, the involvement of international institutions from the standpoint of hermeneutics. The semantic method was used to establish the exact meaning of "forensic science" and "forensic expertise" in international cooperation in the investigation of crimes (in linguistic and semiotic concepts). The comparative legal method was used to compare the mechanisms of legal response to international crime in the world, which takes place in cooperation with states at different levels in order to stop and condemn the behaviour of individuals and legal entities, as well as individual states (aggressors). At the same time, there is a clear tendency to combine such efforts in the global dimension and at the levels of law enforcement organisations that apply forensic expertise. The historical and legal method was used in the study of historical events and processes that served as a forensic expert basis for creating international institutions for combating crime. The processes related to the First and Second World Wars became special, which serve as the starting points for both uniting states in the pursuit of human rights and creating real mechanisms for countering international crime.

In the system of methods of this scientific research, an important place is occupied by methods of studying (analysing) documents that store information about certain historical facts, archival cases, witness statements, expert proceedings, etc. The use of the document study method involved the use of two main methods: the classical (or conventional) method and content analysis. Content analysis is a formalised method of studying documents using a quantitative approach.

2. RESULTS AND DISCUSSION

2.1. International criminal police organisations in countering crime

A special role in countering modern (transnational) crime belongs to international law enforcement agencies. One of such bodies is the *International Criminal Police Organisation* (Interpol) [24] – an international law enforcement organisation that coordinates international cooperation between police bodies (institutions) of different countries of the world [25].

The need for international cooperation between the police of different states in the fight against crime was first proclaimed at the founding meeting of the International Union of Criminal Law in 1899. In 1914, the first International Congress of the Criminal Police (Monaco) was held. Representatives of 14 countries discussed the coordination of police bodies of different countries in combating crime, the possibility of creating a department for recording international criminal information and unifying the procedure for the extradition of criminals. The main activities of Interpol, according to its charter, include: a) criminal registration, the object of which is information about international criminals and crimes of an international nature; b) international search for criminals; c) search for suspects to monitor them and control their movement; d) search for missing persons; e) search for stolen items [26]. Information received by the Ministry of Internal Affairs of Ukraine through Interpol channels is placed in the integrated database of the National Security Service of Interpol in Ukraine on the following subsystems: 1) document; 2) persons; 3) transport; 4) firms; 5) numbered items; 6) currency; 7) art objects [27].

Interpol's forensic (international) records are the most effective tool in the fight against international crime. These records relate to convention crimes, that is, crimes whose public danger is established by the relevant international conventions, namely: drug trafficking, counterfeiting, theft of cultural property, etc. Information related to the interests of two or more states is also registered: about persons who have committed a dangerous crime abroad; about crimes related to international criminal organisations; about persons who have committed a crime and are hiding abroad, etc. Interpol does not keep records related to crimes of a political, military, religious, or racial nature (Article 3 of the Interpol Charter). The records of Interpol and the NSS of the states that are members of this international organisation are: 1) an alphabetical file of persons with a criminal record, suspected of committing crimes; 2) a file of data on the appearance of the criminal (file "S"), which contains 177 indicators, including the place of commission of the crime, race, nationality. The "S" file cabinet is used in cases where the identity of the criminal cannot be established either by fingerprinting or by a file of photographs; 3) a file of documents and names. In particular, the documents section contains information about passports, identity cards that have ever been used by criminals; documents on the right to own an airplane, car, firearms; 4) a file of crimes (especially the method of committing); 5) a fingerprint file; 6) a photo library (photos of more than 20 thousand of the most dangerous criminals); 7) a file of persons who are missing; 8) a file of stolen cars; 9) a file of works of art, cultural values, antiques, precious jewellery; 10) reference file of hand-held rifled firearms [27].

2.2. International cooperation in the field of forensic examinations

There are various forms of international cooperation in the field of forensic expertise. In particular, the main ones may include the following: 1) information exchange (scientific and information exchange); 2) joint scientific and practical events (conferences, symposia, congresses, etc.); 3) training of expert personnel and advanced training abroad; 4) interaction within the framework of improving the quality of forensic examinations in different countries; 5) international standardisation of forensic activities; 6) interaction within international expert

associations (organisations); 7) involvement of forensic experts from different countries in the investigation and trial of international crimes. Important in international cooperation in the field of forensic expertise is the exchange of information on quality improvement and training by non-governmental organisations (European Network of Forensic Institutions (ENFSI), International Association for Identification (IAI), etc.) [28-30]. A considerable influence on forensic expertise is exerted by the development of relationships within the European Network of Forensic Institutions (ENFSI), which includes participation in the organisation of thematic conferences, exchange of methods and reference materials, replenishment of the list of members of the organisation [30].

In modern realities, in most countries of the world, as a rule, the question of the need to standardise and unify forensic expertise is raised. A so-called verification of the results of expert research and certification of expert methods is required. The problem of the need to improve the quality of forensic expertise and standardise expert methods was addressed at one time in the United States. In 2015, the US Department of Justice and the FBI admitted that their experts had been giving false testimony in courts based on the results of hair analysis for two decades. In particular, up to 32 defendants were sentenced to death and executed. In 2015, the national forensic commission of the US Department of Justice, together with the National Institute of Standards and Technology (NIST), published the report Directive Recommendation: Root Cause Analysis (RCA) in Forensic Science, which recognised these shortcomings [31]. A form of international cooperation in the field of forensic expertise is the participation of forensic experts from different states in the investigation and judicial review of humanitarian law offences and other crimes of an international nature.

2.3. Use of forensic and specialised knowledge in the activities of the International Criminal Court

The work of the international community to establish tribunals – special courts for the investigation of the most serious crimes is of great importance. AS early as in 1919, at the Paris Peace Conference, it was proposed to establish an international body (Permanent Chamber) of criminal justice for political leaders accused of committing international crimes. The establishment of the International Criminal Court has its own history [32]. Countering international crimes (the crime of aggression, the crime of genocide, crimes against humanity, war crimes) has always been the subject of cooperation of the international community. Therewith, quite often states cannot prove guilt and bring to justice specific persons (top officials of the state) who committed the mass destruction of people without assistance. Historical examples of real prosecution of persons for international crimes are the decisions of the Nuremberg military tribunal against certain persons involved in crimes and mass killings during World War II, the international tribunals for Yugoslavia and Rwanda, etc.

The International Criminal Court is the first permanent International Criminal Court established based on an international treaty with the purpose of overcoming impunity for persons responsible for the most serious international crimes. Article 17 of the Rome Statute refers to the principle of complementarity, which lies in the fact that the International Criminal Court exercises its jurisdiction only in cases that the state does not have the desire or ability to investigate independently. As of today, the jurisdiction of the International Criminal Court has already been partially recognised by Ukraine. At one time, Ukraine actively took part in the preparation of the Rome Statute and signed it on January 20, 2000, but has not yet ratified it. Literature sources have drawn attention to certain problems of ratification of the Rome Statute of the International Criminal Court in the light of Ukraine's European choice [33]. Ukraine has already applied twice to the International Criminal Court for recognition of its jurisdiction in February 2014 and 2015 based on Part 3 of Article 12 of the Rome Statute. The first application concerned the commission of crimes against humanity by top state officials during peaceful protests between November 2013 and 22 February 2014. The second is crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of the terrorist organizations "DPR" and "LPR", as well as aggression, as a result of which the Autonomous Republic of Crimea has been annexed [33]. Noteworthy are the reports of the International Criminal Court on the actions of the preliminary investigation of 2017 [34], 2018 [35] and 2019 [36] on these issues.

The most striking example in the history of forensic science regarding the collection of evidence in difficult conditions of armed conflict is the activity of Prof. R.A. Reiss. In 1914, R.A. Reiss arrived in Serbia at the invitation of its government as an expert to investigate the crimes of the Hungarian, German, and Bulgarian armies in the World War One. In 1916 R.A. Reiss published "Report upon atrocities committed by the Austro-Hungarian army during the First invasion of Serbia" (London, 1916). In 1918, R.A. Reiss published another work, which he dedicated to the events of the World War One: "Infractions aux lois et conventions de la guerre commises par les enemies de la Serbie depuis la retraite Serbe de 1915. Resume de l`enquete execute sur le front de Macedoine" (Paris, 1918). Both works by R.A. Reiss constitute a forensic study of the facts that took place during the World War One. These works are made in the form of reports or conclusions, which were illustrated by photographs, witness statements, and expert studies [37]. These materials were used to convict crimes committed during the World War One. The practice of using forensic knowledge to collect evidentiary information during global armed conflicts (including hybrid wars) is also relevant in modern conditions. The process of investigating war crimes involves the use of separate forensic techniques. It is also possible to talk about the need to develop and apply the latest forensic tools, methods, techniques, and technologies.

Article 15 of the Rome Statute makes provision that a prosecutor may initiate an investigation propriomotu based on information about crimes within the jurisdiction of the Court (Part 1). The prosecutor evaluates the gravity of the information received. To this end, he or she may request additional information from the state, United

Nations bodies, intergovernmental or non-governmental organisations, or from other reliable sources that he or she deems appropriate, and may obtain written or oral evidence at the court's seat (Part 2). In addition, Part 3 Article 15 of the Rome Statute states that "victims may make submissions to the Pre-Trial Chamber in accordance with the Rules of Procedure and Evidence"[1]. The activities of the International Criminal Court make provision for the possibility of applying special knowledge. A form of international cooperation in the field of forensic expertise is the participation of forensic experts from different states in the investigation and judicial review of humanitarian law offences and other crimes of an international nature. The rules of Procedure of the International Criminal Court[2] contain Provision 44 "Experts", which stipulates the possibility of involving experts in the activities of the International Criminal Court. In particular, Paragraph 2 of this regulation states that "the chamber may instruct participants in the process to jointly bring their instructions to the attention of the expert." Paragraph 5 states that "the chamber may make any orders regarding the subject of the expert report, the number of experts to receive instructions, the method of communicating instructions to experts, the form of providing their evidence, and the time frame for preparing and reporting their report". The Rules of Procedure and Evidence of the International Criminal Court[3], which are a tool for applying the Rome Statute, also make provision for the use of specialised knowledge. Thus, Rule 19 "Expertise in the Unit" regulates the possibility of applying for an expert examination in various cases.

CONCLUSIONS

In the context of global threats to the world community and the evolutionary transformation of crime, the use of forensic and other specialised knowledge should play an important role as a factor in countering negative trends and restoring justice. In the historical dimension, the real need to unite forensic specialists from different countries of the world to solve important tasks in international cooperation in the investigation of crimes (the International Forensic Union, the International Academy of Forensics, etc.) is traced, and the main mechanisms of international cooperation in countering crime in modern realities are identified. International law enforcement agencies and, in particular, the International Criminal Police Organisation (Interpol) are essential in countering transnational crime. In the most important areas of Interpol's activity, the forensic component is identified – the creation and use of forensic (international) records as the most effective means in countering international crime. The specific features of international cooperation in the field of forensic expertise were identified. Attempts were made to identify various forms of international cooperation during forensic examinations. The study emphasised the role of international non-governmental organisations (European Network of Forensic Institutions (ENFSI), International Association for Identification (IAI), etc.) in optimising forensic expertise, improving the quality of forensic expertise, standardising expert methods, and improving staffing.

In modern conditions, cooperation between different countries of the world in the investigation of crimes can be traced in the activities of the International Criminal Court. The investigation of international crimes is the subject of research both at the national level and in cooperation with the international community. Based on the scientific and legal analysis of the Rome Statute and other regulatory documents, attention is drawn to the use of forensic tools and the possibility of conducting expert research in the activities of the International Criminal Court. The International Criminal Court should be a symbol of international justice, which makes balanced and fair decisions. The International Criminal Court is one of the most important institutions of international criminal law, which applies mechanisms for investigating international crimes and protects human rights at the International and national levels. The process of investigating international crimes should be based on forensic and other specialised knowledge. The activities of the International Criminal Court are also important because they directly relate to the events in Ukraine (the occupation of certain areas of the Donetsk and Luhansk Oblasts, as well as the Autonomous Republic of Crimea).

REFERENSES

[1] Malewski, H. (2014). In research of own model of study – metamorphosis of criminalistics didactics in Lithuania. In N.P. Yablokova, & V.Yu. Shepitko (Eds.), *Models of criminalistics studies: History and nowadays* (pp. 21-63). Kharkiv: Apostyl.

[2] Lopata, O. (2016). Content, forms and objectives of international cooperation in the field of forensic expert. *Visegrad Journal on Human Rights,* 3, 97-102.

[3] Tsepelev, V.F. (2001). *International cooperation in fighting against crime: Criminal law, criminological, organizational and legal aspects.* Moscow: The Academy of Management of the Ministry of Internal Affairs of Russia.

[4] Reiss, R.A. (1916). *Report upon atrocities committed by the Austro-Hungarian army during the First invasion of Serbia*. London: Simpkin, Marshall, Hamilton, Kent & Co.

1. Rome Statue of the International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx.

2. Official site of International Criminal Court. (n.d.). Retrieved from http://www.icc-cpi.int.

3. Rules of Procedure and Evidence of the International Criminal Court. (2002, September). Retrieved from https://www.icc-cpi.int/Publications/Rules-of-Procedure-and-Evidence.pdf.

[5] Soderman, H. (1956). *Policeman's lot. A criminologist's gallery of friends and felons*. New York: Funk & Wagnalls Company.
[6] Shepitko, M. (2019). Ukrainian Group of International Union of Penal Law: Way from Vienna to Paris. *A First Printed Criminalist,* 18, 43-61.
[7] Shepitko, V. (Ed.). (2014). *Encyclopedia of Criminalistics in personalities.* Kharkiv: Apostille.
[8] Official site of United Nations. (n.d.). Retrieved from https://www.unodc.org.
[9] Official site of IAP. (n.d.). Retrieved from https://www.iap-association.org.
[10] History of the International Association of Penal Law. (2015). Retrieved from www.penal.org/en/node/168.
[11] Maver, D. (2013). Criminal investigation/Criminalistics in Europe: State of the art and a look to the future. *Revija za Kriminalistiko in Kriminologijo*, 64(3), 233-244.
[12] Simakova-Efremian, E.B., Derecha, L.M., & Myasoedov, V.V. (2018). Actual problems of cooperation with organizations of foreign states in the sphere of forensic expert activity. *Theory and Practice of Forensic Science and Criminalistics*, 18, 175-184.
[13] Fenyvesi, Cs. (2017). Notion, tendencies, milestones, principles of criminalistics. *Journal of Eastern European Criminal Law,* 2, 231-245.
[14] Chornous, J.M. (2020). Topical issues of investigation and trial by an international criminal court of cases of international crimes. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 267-281.
[15] Frangež, D., & Lindav, B. (2019). The Science of Criminal Investigation between Theory and Practice in Slovenia. *Journal of Criminal Investigation and Criminology*, 70(2), 141-161.
[16] Capeilmann, M. (2018). Die Kriminalistik im Spannungsfeld zwischen forensischer interdisziplinärer Wissenschaft und kriminalistischer Handlungslehre. *Kriminalistik*, 6, 374-377.
[17] Ackermann, V.R., Kurapka, V.E., Malewski, H., & Shepitko, V. (2020). Schaffung eines einheitlichen europaisehen Kriniinalistischen Raumes: Die Tatigkeit offentlicher Organisationen zur Starkung der internationalen Beziehungen. *Kriminalistik*, 6, 355-363.
[18] Garrett, B.L., Gardner, B.O., Murphy, E., & Grimes, P. (2021). Judges and forensic science education: A national survey. *Forensic Science International*, 321, 124-142.
[19] Vapniarchuk, V.V., Zhuravel, V.A., Trofymenko, V.M., & Karpenko, M.O. (2020). The essence of the philosophical category truth: Criminal procedural aspect. *Astra Salvensis*, 273-290.
[20] Lavruk, V.V., Zaporozhets, H.V., Khomutenko, O.V., Dudchenko, A.Y., & Demidova, E.E. (2018) Verification of social and economic determination of crime in Ukraine. *Journal of Advanced Research in Law and Economics*, 9(7), 2363-2371.
[21] Danshyn, M., Bezpalova, O., Kostenko, M., Denysov, S., & Denysova, T. (2019). Iatrogenic crimes: issues of the investigation technique. *Georgian Medical News*, 290, 163-170.
[22] Yaremchuk, V.O. (2019). The use of medical knowledge in the crime investigation. *Wiadomosci lekarskie*, 72(1), 103-106.
[23] Ortynskyi, V., Chornous, Yu., & Pavliuk, N. (2018). International cooperation in financial fraud investigation. *Baltic Journal of Economic Studies,* 4(4), 252-257.
[24] Shepitko, V. (Ed.). (2018). *Great Ukrainian legal encyclopedia: in 20 volumes, Vol. 20: Criminalistics, forensic examination, legal psychology*. Kharkiv: Pravo.
[25] Huzela, M. (2016). The problem of tracing a suspect in the criminal proceedings: Some aspects of international cooperation. *Bulletin of Lviv Polytechnic National University. Legal Sciences*, 855, 487-493.
[26] Statute of International criminal police organization – Interpol. (2011). *Library of Criminalist,* 1.
[27] Shepitko, V. (Ed.). (2019). *Criminalistics: in 2 vol. Vol. 1.* Kharkiv: Pravo.
[28] Khaziev, Sh.N. (2005). On European network of forensic science institution. *Barrister*, 8, 14-19.
[29] Khaziev, Sh.N. (2005). International identification association. *Barrister,* 3, 37-39.
[30] Domina, O., & Khyzhniak, V. (2016). Legal regulation of international cooperation on forensic examination realization. *Internaitonal Scientific Research Journal*, 8(50), Part 1, 102-104.
[31] Nesterov, A. (2018). Revisiting the scientific foundations of forensic science. *Theory and Practice of Forensic Examination*, 13(3), 123-127.
[32] Shchur, B. (2011). Activities of International Criminal Court: History and perspectives. *Scientific Notes of Lviv University of Business and Law*, 6, 106-109.
[33] Bodnar, N. (2018). Problem of Rome Statute of International Criminal Court ratification in light of European choice of Ukraine. *Journal European and Comparative Law*, 8, 79-96.
[34] International Criminal Court' report on Preliminary Examination Activities 2017. (2017). *A First Printed Criminalist,* 15, 87-95.
[35] *International Criminal Court' report on Preliminary Examination Activities 2018. (2018). A First Printed Criminalist,* 17, 98-108.
[36] International Criminal Court' report on Preliminary Examination Activities 2019. (2019). *A First Printed Criminalist*, 19, 135-143.
[37] Shepitko, M. (2015). Rodolphe Archibalde Reiss. *A First Printed Criminalist*, 10, 109-118.

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КРИМІНАЛІСТИЧНА ДІАГНОСТИКА: ПОНЯТТЯ, ЗНАЧЕННЯ ТА СФЕРА РЕАЛІЗАЦІЇ

Анотація. *Сучасний етап розвитку криміналістики характеризується активним пошуком новітніх пізнавальних методів та засобів, до яких у повній мірі можна віднести й криміналістичну діагностику. Актуальність досліджуваної в статті проблематики обумовлена необхідністю формування сучасного понятійного апарату науки криміналістики, подальшої розробки наукової концепції криміналістичної діагностики, перспектив створення відповідного криміналістичного вчення. Метою дослідження є аналіз сучасних наукових підходів до розуміння поняття «криміналістична діагностика», його ознак, структури, інтегративних функцій, відмінностей від інших парних криміналістичних категорій. Задля досягнення зазначеної мети були використані такі загальнонаукові та спеціальні методи дослідження, як діалектичний, історичний, формально-логічний, системно-структурний, соціологічний, статистичний, метод правового прогнозування та моделювання, системного і семантичного аналізу. Доведено, що термін «криміналістична діагностика» доцільно розглядати в практичному і теоретичному значенні. В практичному значенні криміналістична діагностика – це метод, розпізнавання стану об'єктів, пізнання явищ, процесів, що мають відношення до обставин події злочину, детерміновані останньою. Це своєрідний інструментарій в розпорядженні експерта, слідчого, детектива, судді задля пізнання об'єкта (події, явища) за його відображенням. У теоретичному значенні криміналістична діагностика розглядається як окреме криміналістичне вчення, яке являє собою систему теоретичних положень про закономірності розпізнавання об'єктів (ситуацій) за їх ознаками та властивостями, на підставі аналізу змін, що відбулися в них під впливом обставин події злочину та її учасників, з метою здійснення доказування у кримінальному провадженні. Наголошено, що теоретичну основу криміналістичної діагностики становлять відомості про закономірності виникнення діагностованих об'єктів, дані про типові моделі відображення події (дії, поведінки). Звернуто увагу, що криміналістична діагностика як окреме криміналістичне вчення (теорія) перебуває в стадії свого формування, постійно нарощує науковий потенціал і розширює сферу практичної реалізації. Подальший розвиток теорії і практики діагностичних досліджень передбачає систематизацію і класифікацію діагностичних ознак і комплексів ознак об'єктів, подій, явищ відповідно до вирішення діагностичних завдань, класифікацію типових ситуацій, розробку методів і методик діагностичних досліджень*

Ключові слова: *розпізнавання, відмінність, визначення, ознаки, властивості, стани*

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FORENSIC DIAGNOSTICS: CONCEPT, MEANING, AND SCOPE OF IMPLEMENTATION

Abstract. *The current stage of development of forensics is described by an active search for the latest cognitive methods and tools, which fully include forensic diagnostics. The relevance of the subject matter is conditioned by the need to form a modern terminology of the forensic science, further development of the scientific concept of forensic diagnostics, and prospects for creating an appropriate forensic teaching. The purpose of the study is to analyse modern scientific approaches to understanding the concept of forensic diagnostics, its features, structure, integrative functions, and differences from other paired forensic categories. To achieve this goal, such general scientific and special research methods as dialectical, historical, Aristotelian, system-structural, sociological, statistical, the method of legal forecasting and modelling, system and semantic analysis were used. It is proved that the term «forensic diagnostics» should be considered in practical and theoretical terms. In practical terms, forensic diagnostics is a method of recognising the state of objects, cognition of phenomena and processes related to the circumstances of the crime event, determined by the latter. This is a kind of tool at the disposal of an expert, investigator, detective, judge to know the object (event, phenomenon) by its reflection. In the theoretical sense, forensic diagnostics is considered as a separate forensic teaching, which constitutes a system of theoretical provisions on the regularities of recognising objects (situations) by their features and properties, based on the analysis of changes that occurred in them under the influence of the circumstances of the crime event and its participants, in order to carry out evidence in criminal proceedings. It is noted that the theoretical basis of forensic diagnostics comprises information on the patterns of occurrence of diagnosed objects, data on typical models of event reflection (action, behaviour). It is noted that forensic diagnostics as a separate forensic teaching (theory) is at the stage of its development, constantly increasing its scientific potential and expanding the scope of practical implementation. Further development of the theory and practice of diagnostic research involves systematisation and classification of diagnostic features and sets of features of objects, events, phenomena in accordance with the solution of diagnostic problems, classification of typical situations, development of methods and techniques of diagnostic research*

Keywords: *recognition, difference, definition, attributes, properties, states*

INTRODUCTION

The current stage of development of forensic science is described by an active, purposeful search for effective ways to modernise investigative, judicial, and expert activities on a fundamental theoretical basis [1]. The most significant forensic concepts are developed based on the known patterns of scientific and technological progress, the needs of forensic investigative and expert practice, predictive vision of possible ways of development and structural changes in criminal manifestations, international experience in combating them [2]. A crucial incentive for the development of forensic science is also its integration with other branches of knowledge. It is at the junctions of social, natural, and technical sciences that new aspects are developed, the creative use of which opens up wide opportunities for further optimisation and improvement of the effectiveness of scientific research and law enforcement activities. But without innovative technologies and the latest means of solving organisational, legal, scientific and technical problems, developing and implementing modern forensic methods, tools, and recommendations in forensic investigative practice, ensuring the activities of law enforcement agencies will not meet the requirements of efficiency [3]. Taking this into account, considerable changes are currently taking place in the understanding of the term "forensic support", where the introduction of innovative approaches to the implementation of criminal proceedings comes to the fore. The priority areas of development of forensic science include the development of the latest methods, techniques, and means of countering and preventing criminal offences. Such modern cognitive methods and means of optimising investigative and expert activities can fully include forensic diagnostics, the development of which as a separate teaching (theory) occurs on a certain scientific hypothesis, the necessary empirical material and is aimed at updating the terminology of the science of forensic science, expanding its cognitive capabilities to optimise evidence in criminal proceedings and establish the truth in the case [4].

Diagnostics (from the Greek diagnostikos – capable of recognising) – the study of diagnostic methods [5; 6]. The etymology of the term "diagnosis" has three meanings: recognition, distinction, and definition [7-9]. Notably, forensic diagnostics accumulates all three values, each of which describes a certain stage of diagnosis and determines one of the aspects of this complex cognitive process. In particular, recognition is the establishment of a certain similarity to the already known one (establishing, based on the traces left, the similarity of the studied method to some standard model that has developed in science and practice). Distinction should be interpreted as the separation of one

object (situation) from other similar ones. The definition completes the diagnosis and it is considered as the result of identifying a specific, but not mandatory set of unique features and properties (conditions) for the object (situation) under study. This procedure is carried out by comparing and analysing the signs of similarity with the typical model, on the one hand, and the presence of differences between the established object (situation) and similar ones, on the other hand.

Thus, the core of diagnosis is comparison by analogy, since it is with the help of analogy that a conclusion is formulated, the degree of probability of which depends on the number of similar signs and on their significance. Therefore, forensic diagnostics can be considered as a purpose (task), a process, and method of cognising the properties and states of an object (situation) in order to establish the changes that have occurred, find out the causes of these changes and their connection with the event that occurred. In other words, forensic diagnostics recognises the state of objects, cognises events, phenomena, and processes. Therewith, diagnostics can be represented as a process of narrowing and specifying alternatives – up to choosing the most likely one at the stage of transition to a probable judgement on a certain fact.

Forensic interpretation of diagnostics, the specific features of the development of a separate doctrine of forensic diagnostics were investigated in different years by such forensic scientists as T.V. Averianova [10], O.Yu. Andronikov [11], R.S. Belkin [12], A. Wilks [13], A.I. Winberg [14], S.V. Dubrovin [15], Yu.G. Korukhov [16], O.V. Korshunova [6], N.P. Maylis [17], V.F. Orlova [17], M.O. Selivanov [18], V.O. Snetkov [19], V.O. Tymchenko [20], O.A. Yudyntsev [21], and others. The basic, starting materials for the preparation of this study include the scientific studies of S.V. Dubrovin [15; 22-25], Yu.H. Korukhov [16; 17], V. O. Snetkov [19; 26-29]. At the same time, in modern forensic literature, scientists have expressed far ambiguous judgements regarding the definition and content of the term "forensic diagnostics", its connections with other forensic categories, in particular with forensic identification, conceptual approaches to the development of a separate forensic doctrine of forensic diagnostics. Forensic scientists have not yet reached an agreed position on many issues. In addition, the authors of this study are forced to state that the above-mentioned issues have not been studied in Ukrainian forensic science, and currently there are not enough special studies covering this subject matter. This once again confirms the need for further independent research of the problems that arise in this area of knowledge.

In this regard, research on the problems of developing the modern terminology of forensic science, creating new forensic studies, and expanding the boundaries of scientific research in this area of legal science and practice is of particular importance. Solving such issues implies the need for an in-depth analysis of scientific approaches to understanding the main categories of the problem under study, such as recognition, distinction, definition, attributes, properties, states, material objects, phenomena, situations, and the mechanism of crime. It is also important to clarify modern scientific opinions on the construction of a separate forensic teaching about diagnostics, its object, subject, tasks, individual research methods (analogy, modelling, experiment, extrapolation), the scope of implementation, real consumers of theoretical developments, and practical recommendations.

In view of the above, the purpose of this study is to investigate the genesis and current state of forensic diagnostics as an integral element of the structure of the general theory of cognition and important cognitive tools in expert and investigative practice, the general methodology of diagnostic procedures and the scope of their implementation, the ratio of diagnostic cognition and evidence in criminal proceedings and such paired forensic categories as diagnostics and identification.

1. MATERIALS AND METHODS

The methodological framework of the study is a complex combination of scientific concepts and reasonable judgements produced by the modern realities and qualitatively formulated by outstanding contemporary forensic specialists. To solve these issues, the study uses a set of general scientific and special cognitive methods used in legal science. In particular, this refers to dialectical and historical methods as universal methods of cognition of socio-legal phenomena, which allowed studying the evolution of the enrichment of the terminology of the forensic science, including such a term as "forensic diagnostics", the methodological framework of which comprises the theory of reflection, the patterns of occurrence of objects studied by forensic science, their properties and features, as well as information about typical models of reflection of reality (events). The development of forensic diagnostics as a separate teaching is analysed in its historical retrospective using the historical legal method. The method of semantic analysis made it possible to find out the content of the term "forensic diagnostics", its features, structure, integrative functions, differences from such forensic concepts as identification, identification and non-identification expert research. The comparative method allowed analysing the newest approaches proposed in the forensic literature to define the term "forensic diagnostics", the possibilities of creating a separate forensic teaching about diagnostics, clarifying its content, structure, and scope of implementation, the knowledge of which enriches the scientific toolkit of forensic science and serves as the basis for optimising the investigation of criminal offences.

The use of the formal logical method allowed concluding that forensic diagnostics is the process and result of recognising objects (situations), that is, establishing their nature and condition, which have a certain connection with the crime event and are determined by the latter. In cognitive terms, forensic diagnostics is considered in two aspects: as a theoretical concept that finds its implementation in a separate forensic science (theory) and as a means of solving specific expert and investigative tasks related to clarifying the circumstances of the crime event, proving the guilt of a certain person. Therewith, in the diagnostic cognitive process, a special role is played by the construction and testing of hypotheses (versions) to establish an event based

on its results (traces), where causal relationships become decisive. Establishing causality can be both the purpose of diagnostics and part of this process, an intermediate stage on towards the cognition of an event (phenomenon, fact). The system-structural method was used to determine the elemental composition of the structure of the forensic diagnostic process, which in general can be presented as follows: definition of the purpose, preliminary study of objects, analysis of diagnostic features, comparison by analogy, evaluation and correction of the results obtained, formulation of conclusions. The method of legal modelling made it possible to formulate specific positions on the state and prospects of development of forensic diagnostics as a scientific concept and working tools of the investigator and expert. The use of sociological and statistical methods contributed to the generalisation of investigative and expert practice, analysis of empirical information related to the subject matter.

Using the method of system analysis, the study generalised the accumulated theoretical knowledge on the development of the term "forensic diagnostics", its correlation with other paired categories of forensic science, in particular identification. The method of legal forecasting allowed identifying the possible areas for further development of scientific opinions on the concept of forensic diagnostics, its integration into the terminology of forensic science, and the prospects for creating a separate forensic teaching on diagnostics. Thus, the use of these scientific methods provided objective knowledge of: a) forensic diagnostics as a theoretical concept and effective working tools at the disposal of the expert and investigator to recognise objects (situations) related to the mechanism of crime; b) patterns of evolution of the establishment and development of this forensic category, the shaping of its content and structure; c) prospects for creating a separate theory of forensic diagnostics.

2. RESULTS AND DISCUSSION

The basis of forensic diagnostic research is the fundamental possibility of establishing the nature and condition of the object, taking into account the changes that have occurred in it, and which are caused by the conditions and factors of the criminal situation [22, p. 5]. Forensic diagnostics can be defined as a special method of cognition, which constitutes a system of cognitive techniques, the basis of which is the process of establishing the nature or state of an object that has a certain connection with the event of a crime, as a result of comparison with various classifications [15, p. 248; 23, p. 14]. The subject of the study of forensic diagnostics is the cognition of changes that occurred as a result of the commission of a crime, the causes and conditions of these changes based on selective study of the properties and states of interacting objects in order to determine the mechanism of a criminal event in general or its individual fragments (stages) [16, p. 2]. The essence of forensic diagnostics can be defined as the study of the regularities of recognition of forensic objects by their characteristics (height of a person by footprints; gender of a person by handwriting; type of firearms by traces on a shell; type of clothing by the composition and properties of individual fibres) [17].

The term "forensic diagnostics" was first proposed by V.O. Snetkov in 1972 [19, p. 103-106]. Notably, the term originally proposed by V.O. Snetkov did not arouse interest among scientists. On the contrary, a number of studies of forensic scientists have appeared, which proved the expediency of using the term "non-identification expertise". Thus, Yu.P. Siedykh-Bondarenko came to the conclusion that the practice confirms the existence of non-identification examination along with the conventional identification examination, which is different in its purpose and content of research [30, p. 5-8]. During this period, there were both supporters and opponents of the use of the term 'forensic diagnostics". In particular, A.I. Winberg considered the possible existence of three areas of forensic expert research – identification, diagnostic, and situational [14, p. 73]. At the same time, M.O. Selivanov categorically denied the expediency of using the term "diagnostics" in theory and practice, as one that does not correspond to its general scientific interpretation [18, p. 58-60]. Next, due to the efforts of S.V. Dubrovin and Yu.H. Korukhov, forensic diagnostics began to take shape as a separate forensic doctrine, the provisions of which contribute to the enrichment of the general theory of forensics, the development of its scientific concepts, categories, terms, and methods. In practical terms, forensic diagnostics should ensure the solution of both expert and investigative tasks, in particular, the establishment of the mechanism of crime, the spatial and temporal circumstances of a criminal event, the construction and verification of investigative versions, situational research of the scene, etc.

The objects of forensic diagnostics are material bodies, phenomena, and situations that existed at the time of commissioning the crime [31]. They are classified into diagnosed and diagnosing. The former include objects, situations, phenomena, properties, qualities, states, relationships, interrelations in need of recognition, that is, the diagnosed objects are those whose nature and state must be established. Diagnosing objects are those that establish the nature and state, namely, material carriers of features that reflect the properties and influence of the conditions of the event that occurred on them. If the diagnosed objects or their reflection are related to the event of a crime, then the diagnosing objects are not related to this crime, but their nature has been studied, they are classified according to a set of characteristics. According to V.O. Snetkov, the diagnostic process lies in establishing the essence of a particular object by comparing its nature with the nature of objects of a particular class, genus, species, which are established by science and experience [26, p. 4]. Diagnosing objects include reflection traces (handwritten text, casts, photographs, etc.), parts of objects, substances (bulk, liquid, gaseous), and mental images. In the diagnostic process, samples are used, primarily reference materials (tables, atlases) that contain the characteristics of the studied objects, their images, as well as collections of natural objects.

Diagnostics, like identification, is based on studying the features of objects. A diagnostic feature is a feature that can be used to judge on the properties of an object that was reflected in the trace, their changes over time,

and the conditions in which the interaction of objects took place. However, unlike identification, diagnostics focus on the mechanism and conditions of trace formation and reflection. A characteristic difference between diagnostics and identification is that upon identifying the object under verification, it always exists financially, whereas when diagnosing it, it may not exist (for example, the person is absent, but according to the scheme of the trace track that the investigator has at his or her disposal, one can determine the approximate height of the person who left these traces). Forensic diagnostics solves a set of tasks that are aimed at investigating the internal properties and states of an object, its external features (time, place, functioning), the mechanism of occurrence and development of processes (the nature of interaction of objects with each other). These tasks include:

a) establishment of the spatial structure of the situation of a criminal event (where, in what situation the criminal event occurred; what is the exact place of collision of the vehicle; which of the traces that take place relate to the crime committed, etc);

b) establishment of the mechanism of individual stages of the event (the direction and nature of breakage of obstacles; the relative location of vehicles at the time of collision; the location of the person who fired the shot, based on the place of detection of the corpse and gunshot injuries located on it; the method of manufacturing counterfeit banknotes, etc);

c) determination of the material structure of the situation at the scene of the incident (compliance of traces found at the scene, material evidence with the mechanism of the crime; the possibility of leaving traces on the criminal and his or her clothes by the instrument of the crime, etc);

d) determination of the spatial and temporal features of the criminal event (when it occurred; how long it could have taken to commit it; in what sequence the actions were committed; in what direction and by what means the suspect moved when leaving the crime scene; what was the sequence of movement of the suspect during the commission of apartment theft; what traces appeared earlier, and what – later; what injuries were on the victim's body before the crime, and what caused at the time of its commission, etc);

e) establishing the properties of interacting objects (how many persons took part in the commission of a crime; the role of each of them in the implementation of criminal intent; whether the person has criminal skills, etc.);

f) establishing causal relationships (what is the cause of the fire; the possibility of spontaneous firing without pulling the trigger, etc.).

Taking into account theoretical developments, it is advisable to distinguish the following areas (types) of forensic diagnostic studies:

1. Diagnostic studies of the properties and states of an object during its direct study:

– research of the properties of an object, including its compliance with certain features (specified standards) (for example, whether the object is a firearm).

– investigation of the actual condition of the object, the presence or absence of any deviations from its normal parameters (for example, whether the firearm is working properly and whether it is suitable for firing).

– establishment of the original state of the object (for example, what changes were made to the original text of the document under examination).

– determination of the causes and conditions for changing the properties (state) of an object (for example, what are the reasons for breaking the barrel bore of a hunting rifle).

2. Diagnostic study of the properties and states of the object based on its reflection.

– determination of the degree of information content of the trace (for example, whether there are hand prints on the bottle, and if so, whether they are suitable for identification).

– establishment of the properties and state of the object at the time of reflection (for example, what state the person was in at the time of writing the handwritten text).

– e) establishing the properties of movable objects based on traces of reflections (for example, how many persons took part in the commission of a crime; the role of each of them in the implementation of criminal intent; whether the person has criminal skills);

– determination of the reasons for changing the properties or state of an object (for example, this text has not been washed off, corrected, or etched).

3. Research of mechanisms, processes, and actions based on results (objects, reflections).

– *determination of the structure of the mechanism*:

– determination of the possibility of reproducing the mechanism and circumstances of the incident based on reflections (for example, what was the nature of the vehicle's movement (manoeuvre, braking) before hitting a pedestrian);

– determination of individual stages (fragments) of the event (for example, what, judging by the tracks on the road surface, was the direction of movement of the vehicle);

– establishment of the mechanism of the event in its dynamics (for example, what parts the vehicles were in contact with at the time of the collision);

– establishment of the possibility (impossibility) of performing certain actions under certain conditions (for example, whether it is possible to shoot a given hunting rifle when it falls to the floor from a meter height);

– establishment of compliance (non-compliance) of actions with special rules (for example, those that deviated from the special rules were allowed during the production of forms of this document);

– *determination of conditions (environment)*:

– establishment of the time (period) or chronological sequence of actions (for example, in what sequence, judging by the traces at the scene of the incident, the criminal acted);

– establishment of the location of the action (its localisation, boundaries), the position of the participants (for example, what was the relative location of the shooter and the victim at the time of the shot);

– *determination of causality*:

– determination of the reasons for the result (for example, what is the cause of the fire, what is the cause of

the lock malfunction).

– establishment of a causality between the actions and the consequences that occurred (for example, to what extent the actions of the driver of the vehicle caused the occurrence of an emergency).

4. Establishment of criminogenic factors.

– establishment of the causes and conditions of a criminal event (for example, what circumstances contributed to the commission of a crime; what shortcomings in the production of documents contributed to their forgery) [12, p. 113-115].

Forensic diagnostics is implemented in expert [24, p. 128-135; 27, p. 22-30; 28, p. 42-53; 29, p. 3-12] and investigative [25, p. 108-114] practice. The essence of expert diagnostic research is to identify deviations from a certain norm in the examined object, establish the cause of these changes and determine the degree of connection of this cause with the event (mechanism) of the crime. For this purpose, the result obtained is compared with some analogue.

The method of expert diagnostic research includes the following stages:

1. Preparatory stage: identification of objectives. Familiarisation with the object (situation); determination of the possibility of conducting research.

2. Main study: analysis of diagnostic signs; comparative study using analogues; synthesis of the obtained data.

3. Final stage: evaluation of the research results; formulation of conclusions, execution of the conclusion.

In turn, the investigator performs diagnostics of the following:

1) a criminal situation based on the study of the mechanism of the crime (the method of preparation, commission, concealment; actions of participants in the event) based on its reflections;

2) the investigative situation based on the analysis of the obtained evidence, the characteristics of the personality of participants in criminal proceedings in order to predict the prospects for its development;

3) involvement of a person in the committed crime due to the presence of elements of victim behaviour;

4) the position of the interrogated person being searched according to the nature of his or her behaviour, arbitrary and involuntary reactions to stimuli.

Thus, diagnostics, i.e., recognition of an investigative situation that has developed at a certain stage of the investigation, as well as the construction of a predictive model for its probable development in the future, is based on the study and analysis of attributes (factors, conditions) that determine the establishment, functioning, and development of this situation. According to R. S. Belkin, these attributes (factors, conditions) can be divided into objective and subjective ones. Among the objective features (factors, conditions), the author refers to the following:

– the availability and nature of evidentiary and orienting information available to the investigator, which depends on the mechanism of the incident under investigation and the conditions of its traces in the environment;

– availability and constancy of the existence of yet unused sources of evidentiary information and reliable channels for receiving orientation information;

– the intensity of the processes of disappearance of evidence and the strength of the influence of certain factors on these processes;

– availability of the necessary forces, means, time, and the possibility of using them in an optimal way at the investigator's disposal at the given moment (availability of communications between the duty station and the operational investigation team, means of transmitting information from the accounting services of internal affairs bodies, etc.);

– the current criminal legal assessment of the event under investigation.

According to R.S. Belkin [12], the subjective attributes (factors, conditions) that influence the development of the investigative situation are as follows:

– psychological state of persons under investigation in the case;

– psychological state of the investigator, the level of his or her expertise and skills, practical experience, ability to perceive and implement decisions in extreme conditions;

– opposition to the establishment of the truth on the part of the criminal and his or her connections, and sometimes the victim and witnesses;

– favourable (conflict-free) course of investigation;

– the investigator's efforts aimed at changing the investigative situation in a way favourable for the investigation;

– consequences of erroneous actions of an investigator, operative employee, expert, witnesses;

– consequences of disclosure of pre-trial investigation data;

– unforeseen actions of the victim or persons not involved in the incident under investigation.

The combination and results of the influence of all these features (factors), according to R.S. Belkin, determine the individuality of the investigative situation at the time of investigation, its content, i.e., a specific set of conditions in which the investigator has to or will have to act [12, p. 135-137].

It follows from the above that in the process of diagnostic research (recognition), which is also considered as an element of pre-forecast procedures and the development of a prognostic conclusion [32, p. 200-212], it is necessary to strive to take into account as many attributes as possible that describe the diagnosed, and therefore the predicted object. This may be one of the main reasons for possible errors that occur when drawing up forensic forecasts, which can be minimised by identifying a system of relevant features, placing them in a hierarchical sequence according to the degree of significance and influence, mandatory consideration of the presence of these features for the most objective analysis of individual elements of the object of diagnosis or forecast (events, situations, actions, etc.).

Diagnostic procedures are also implemented in the mechanism of constructing forensic versions (investigative, forensic, expert, intelligence). Thus, Yu.H. Korukhov concludes that the organic connection of the hypothesis (version) with the attributes (facts) reflects the epistemological essence of the diagnostics. A hypothesis (version) is definitively created based on a certain number (complex)

of features (facts), it is justified and verified by them [16, p. 59]. V.O. Konovalova believes that the first stage of building a version is the analysis and generalisation of factual material necessary for the further development of knowledge about a single fact or set of facts [33, p. 16].

Recently, the forensic literature has been supplemented with proposals to expand the scope of diagnostic research and attract the achievements of forensic diagnostics for the development of forensic records (creation of file cabinets and collections containing diagnostic, indicative information), the construction of separate forensic methods of investigation based on the results of diagnostic analysis of certain criminal manifestations [11; 20]. In particular, O.A. Yudyntsev draws attention to the fact that, in economic information, diagnostics of signs and traces of non-return of funds in foreign currency from abroad can serve as a basis for building forensic versions and analysis of the investigative situation [21].

CONCLUSIONS

Forensic diagnostics is a method of recognising the state of objects, cognition of phenomena and processes related to the mechanism of crime and determined by the latter. This is a kind of tool at the disposal of an expert, investigator, detective, judge to cognise the event, phenomenon, object by its reflection. The theoretical and methodological framework of forensic diagnostics comprises the theory of reflection, information about the patterns of occurrence of objects studied by forensic science, their properties and features, data on typical models of reflection of events (actions, behaviour).

Forensic diagnostics is considered as a complex cognitive process, during which a whole range of tasks is solved that are aimed at studying the internal properties and states of an object, its external features (time, place, functioning), the nature of interaction of objects with each other. The significance of the diagnostic process lies in establishing the essence of a particular object by comparing its nature (state, properties) with the nature of objectively existing objects of a certain class, genus, or species established by science and experience. The objective of forensic diagnostics is to identify deviations from a certain norm in the examined object, establish the cause of these changes and determine the degree of connection of this cause with the event (mechanism) of the crime.

In cognitive terms, forensic diagnostics is considered in two aspects: as a theoretical concept that finds its implementation in a separate forensic science (theory) and as a means of solving specific expert and investigative tasks related to clarifying the circumstances of the crime event, proving the guilt of a certain person. Forensic diagnostics as a separate forensic teaching constitutes a system of theoretical provisions on the regularities of recognising objects (situations) according to their characteristics and properties, based on the analysis of changes that occurred in them under the influence of the circumstances of the crime event and the actions of its participants, establishing the causes of these changes and their connection with the event under investigation, in order to accomplish the proving in criminal proceedings and establish the truth in the case. In practical terms, forensic diagnostics should ensure the solution of both expert and investigative tasks, in particular, the establishment of the mechanism of crime, the spatial and temporal circumstances of a criminal event, the construction and verification of investigative versions, situational research of the scene.

Forensic diagnostics as a separate forensic teaching (theory) is at the stage of its development, constantly increasing its scientific potential and expanding the scope of practical implementation. Further development of the theory and practice of diagnostic research involves the systematisation and classification of diagnostic features and sets of features of objects, events, phenomena in accordance with the solution of diagnostic problems, the classification of typical situations that act as analogues in the diagnosis of the crime mechanism in general and its individual elements, the development of methods and techniques of diagnostic research and their effective implementation in investigative and expertpractice.

REFERENCES

[1] Shevchuk, V.M. (2020). Criminalistics innovation: Modern problems of formation and prospects for research. In *Perspectives of world science and education: materials of VIII International scientific and practical conference* (pp. 158-168). Osaka: CPN Publishing Group.

[2] Kuchynska, O., Kashyntseva, O., & Tsyganyuk, Y. (2019). *International cooperation in criminal proceedings involving assisted reproductive technologies*. Wiadomosci Lekarskie, 72(12)/2, 2531-2535.

[3] Cherniavskyi, S., Ortynskyy, V., Rohatiuk, I., Udalova, L., & Sirant, M. (2019). Investigation of crimes of an international character. *Journal of Legal, Ethical and Regulatory Issues*, 22(5). Retrieved from https://www.abacademies.org/articles/investigation-of-crimes-of-an-international-character-8702.html.

[4] Vapniarchuk, V.V., Zhuravel, V.A., Trofymenko, V.M., & Karpenko, M.O. (2020). The essence of the philosophical category "truth": Criminal procedural aspect. *Astra Salvensis*, 1, 273-290.

[5] Pervushina, N.A. (2019). A semiotic diagnostics of study kits in the era of neuropedagogy. *PRAXEMA*, 4(22), 194-205.

[6] Korshunova, O.V., & Shkalikov, E.V. (2019). Semiotic competence of the future teacher: Problem statement, diagnosis, development prospects. *Perspectives of Science and Education*, 5(41), 452-467.

[7] Kaplina, A.V. (2014). Strategic diagnostics of financing system for the cluster initiatives in the South Russian regions. *Sustainable Development of Mountain Territories*, 4(22). Retrieved from http://naukagor.ru/en-gb/Articles/ArtMID/2518/ArticleID/1224/STRATEGIC-DIAGNOSTICS-OF-FINANCING-SYSTEM-FOR-THE-CLUSTER-INITIATIVES-IN-THE-SOUTH-RUSSIAN-REGIONS.

[8] Zavadenko, N.N. (2016). Speech disorders in children: Early diagnosis and treatment. *S.S. Korsakov Journal of Neurology and Psychiatry*, 116(12), 119-125.
[9] Sobkin, V.S., Lykova, T.A., & Sobkina, A.V. (2018). Diagnostics of structural features of personality changes in theatre college students at different stages of training. *Counseling Psychology and Psychotherapy*, 26(4), 83-100.
[10] Averyanova, T.V., Belkin, R.S., Korukhov, Yu.H., & Rossinskaya, E.R. (2001). *Criminalistics*. Moscow: NORMA.
[11] Andronikova, E.Yu. (2006). *Criminalistics diagnostics of legalization (laundering) cash or other property on the basis of economic information* (Candidate thesis, Nizhny Novgorod Academy of Law, Nizhny Novgorod, Russia).
[12] Belkin, R.S. (1997). *Course of criminalistics: Criminalistics tools, moves and recommendations* (Vol. 3). Moscow: Jurist.
[13] Vilks, A., & Kipane, A. (2018). Cognitive aspects of criminal justice policy. *Journal of Advanced Research in Law and Economics*, 9(5), 1798-1805.
[14] Winberg, A.I. (1978). Identification, diagnostic and situational criminalistics expertise. *Soviet State and Law*, 9, 71-75.
[15] Dubrovin, S.V. (2005). *Fundamentals of the theory of criminalistics diagnostics* (Doctoral dissertation, International Law Institute Ministry of Justice of the Russian Federation, Moscow, Russian Federation).
[16] Korukhov, Yu.G. (1998). *Criminalistics diagnostics in crimes' investigation*. Moscow: NORMA.
[17] Korukhov, Yu.G., Maylis, N.P., & Orlova, V.F. (2003). *Criminalistics expert diagnostics.* Moscow: RFCFS.
[18] Selivanov, N.A. (1988). Does criminalistics need such a "diagnostics". *Socialist Legality*, 6, 58-60.
[19] Snetkov, V.A. (1972). Problems of criminalistics' diagnostics. *Works of the All-Russian Research Institute of the Ministry of Internal Affairs of the Russia*, 23, 103-106.
[20] Timchenko, V.A. (2001). *The concept of criminalistics diagnosis of crimes based on accounting information* (Doctoral dissertation, Nizhny Novgorod Academy of Ministry of Internal Affairs of Russia, Nizhny Novgorod, Russian Federation).
[21] Yudintsev, A.A. (2001). *Criminalistics diagnosis of crimes in the field of foreign economic activity on the basis of economic information* (Candidate dissertation, Nizhny Novgorod Academy of Ministry of Internal Affairs of Russian Federation, Nizhny Novgorod, Russian Federation).
[22] Dubrovin, S.V. (1989). *Criminalistics' diagnostics*. Moscow: Moscow special middle militia school of the Ministry of Internal Affairs of the USSR.
[23] Dubrovin, S.V. (2002). *Methodological aspects of criminalistics' diagnostics*. Moscow: Zakon i Pravo.
[24] Dubrovin, S.V. (1988). Problems of criminalistics diagnostics in the expert research. In *Problems of optimization of the initial stage of crime investigation* (pp. 128-135). Yekaterinburg: USLU.
[25] Dubrovin, S.V. (1990). The importance of criminalistics diagnostics for the construction of versions and the production of investigative actions in order to study the personality of the offender. In *Current issues of using the achievements of science and technique in the investigation of crimes by law enforcement bodies (criminalistics' issues)* (pp. 108-114). Moscow: Works of Academy of the Ministry of Internal Affairs of the USSR.
[26] Snetkov, V.A. (1997). Criminalistics diagnostics: Controversial issues. In *Criminalistics' questions and expert-criminalistics problems* (pp. 3-21). Moscow: ECC of the Ministry of Internal Affairs of the Russian Federation.
[27] Snetkov, V.A. (1981). Diagnostics in the production of criminalistics examinations. In *Modern issues of criminalistics expertise* (pp. 22-30). Volgograd: Volgograd Academy of the Ministry of Internal Affairs of the Russian Federation.
[28] Snetkov, V.A. (1983). Diagnostics in the production of criminalistics expertise. In *Investigative actions (criminalistics and procedural aspects)* (pp. 42-53). Sverdlovsk.
[29] Snetkov, V.A. (1984). Expert criminalistics diagnostics. In *Diagnosis during criminalistics examinations production* (pp. 3-12). Moscow: All-Russian Research Institute of the Ministry of Internal Affairs of Russia.
[30] Sedykh-Bondarenko, Yu.P. (1973). *Criminalistics non-identification expertise: A training manual*. Moscow: Izdatelstvo VSH MVD SSSR.
[31] Tatsiy, V.Y., Zhuravel, V.A., & Avdeeva, G.K. (2019). Independent forensic medical examination as a mean of proving the facts of a torture usage. *Wiadomosci Lekarskie*, 72(12)/2, 2596-2601.
[32] Zhuravel, V.A. (1999). *Problems of theory and methodology of forensic forecasting*. Kharkiv: Pravo.
[33] Konovalova, V.E. (2000). *Version: Concept and functions in justice*. Kharkiv: Consum.

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ПРОБЛЕМИ КРИМІНАЛІСТИЧНОЇ ІДЕНТИФІКАЦІЇ ПОЧЕРКУ У СУДОВІЙ ЕКСПЕРТИЗІ

Анотація. *Власноручний підпис як характеристика аутентифікації була юридично і суспільно визнана протягом століть і вже багато десятиліть використовується в криміналістичній області для ідентифікації автора. Підходи до біометричної аутентифікації користувача, розроблені в останні роки, також частково засновані на характеристиках почерку, таких як автоматична перевірка підпису. У цій статті систематично виявляються особливості почерку, опубліковані в галузі криміналістики, і аналізується, які з цих властивостей можуть бути адаптовані у вигляді біометричних ознак для перевірки користувача. Представлена процедура перевірки користувача, заснована на наборі з 14 характеристик криміналістики, яка інтегрується в процедуру біометричної перевірки. Результати перевірки цих криміналістичних ознак зіставляються в детальних тестах з ознаками не криміналістично обґрунтованих даних, і показано, що значні поліпшення в показниках помилкового виявлення досяжні шляхом включення криміналістики. Протягом сотень років власноручний підпис був юридично і соціально визнаним в якості аутентифікації. Причиною цього є унікальність почерку людини. Хоча фальсифікатор з деякою практикою може візуально імітувати текст або підпис іншої людини, типові сліди, що виникають з (вивченої) поведінки жертви підробки, важко скопіювати. Для перевірки запису використовується сила тиску всіх точок накладення за допомогою пера на початку або всередині слова, написаних букв у висячому положенні. Крім того, те, як письменник несвідомо або навіть свідомо пов'язує слова, літери або частини букв один з одним, є специфічною рисою для цієї людини. У судову експертизу фахівці досліджують ці та інші ознаки, щоб довести або спростувати справжність підписів або документів. В області наукового криміналістичного дослідження писемності існує безліч процедур, пропонованих на основі фізичних зразків почерку для визначення письменника*

Ключові слова: *ідентифікація, почерк, писемність, криміналістика, підписи*

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PROBLEMS OF FORENSIC IDENTIFICATION OF HANDWRITING IN FORENSIC EXAMINATION

Abstract. *The handwritten signature as a characteristic of authentication has been legally and publicly recognised for centuries and has been used in the forensic field for many decades to identify an author. Approaches to biometric user authentication developed in recent years are also based in part on handwriting characteristics, such as automatic signature verification. This article systematically identifies handwriting features published in forensics and analyses which of these properties can be adapted as biometrics to verify the user. A user verification procedure based on a set of 14 forensic characteristics is presented, which is integrated into the biometric verification procedure. The results of the verification of these forensic features are compared in detailed tests with the features of non-forensic data, and it is shown that significant improvements in false detection rates can be achieved by including forensics. For hundreds of years, handwritten signatures have been legally and socially recognised as authentication. The reason for this is the uniqueness of human handwriting. Although a forger with some practice may visually imitate another person's text or signature, the typical traces resulting from the (studied) behaviour of a victim of forgery are difficult to copy. To check the record, the pressure force of all overlay points with a pen at the beginning or inside the word, written letters on the weight are used. In addition, the way a writer unconsciously or even consciously connects words, letters, or parts of letters to each other is a specific trait for that person. In a forensic examination, experts examine these and other features to prove or disprove the authenticity of signatures or documents. In the field of forensic science, there are many procedures offered based on physical handwriting samples to determine a writer*

Keywords: *identification, handwriting, writing, criminology, signatures*

INTRODUCTION

Today, most modern scientists consider forensic identification in three aspects: as a private-scientific forensic theory (a separate method of cognition) – the doctrine of the general laws of establishing the identity of material objects to themselves in different periods of time. Forensic identification includes the doctrine of general principles and methods of identification of material objects as a way to establish the truth in a criminal, civil, administrative, economic case, or as a way to obtain individual evidence; as a research process that allows establishing the presence or absence of an identity of an object to itself by certain reflections in the external world, that is, to establish a single object associated with a crime. In this case, forensic identification is understood as a system of actions

performed in a certain sequence; as a goal or result is the establishment of the fact of the presence or absence of an identity, which can be evidence in criminal proceedings.

Given the diversity of views of scientists on the nature and significance of forensic identification, its tasks are also interpreted differently. Thus, scientists determined the task of forensic identification to obtain forensic proof of identity [1], considered the task of forensic identification in establishing the fact of identity or obtaining proof of identity, analysed the task of identification in obtaining evidence confirming or denying identity [2], forensic identification in the establishment of a separate material object, it was proposed to consider the tasks of forensic identification as the determination of the identification set of features necessary to deduce the identity and authenticity of physical evidence and the like [3].

Given the differences in the views of scholars on the problem of forensic identification, it is appropriate, in the authors' opinion, the view of the close relationship of the problem of forensic identification as a structural element of the evidentiary process with the problem of criminal justice in general [4]. If to consider forensic identification as a relatively independent complex organised system of cognitive actions in the field of criminal proceedings, it is appropriate to distinguish its general and individual tasks. At the same time, existing research in the field of forensic identification allows considering it as a structural element of a more complex system of cognitive actions – evidence and criminal proceedings in general, where forensic identification is one of the individual tasks, which contributes to the overall goal of proof.

The founder of the scientific doctrine of forensic identification S.M. Potapov [5], noted that the main task and goal of all forensic methods (technical and tactical) is to obtain forensic proof of identity as a result of a study called identification. So, S.M. Potapov limited the tasks of forensic identification to the framework of judicial proceedings, scientist understood its tasks in establishing a specific individual object in its various states and manifestations, not limited to the framework of judicial proceedings, but narrowing the objects of identification – things, faces, animals [6]. Disclosing the tasks of forensic identification as a means of cognition of objective reality, one cannot ignore its tasks as an element of a general scientific epistemological means – a comparative analysis aimed at establishing the presence or absence of identity.

A specific feature of forensic identification is that it is not only a means of knowledge, but also a means of proof, which determines not only the special scope of its implementation, as well as the specifics of its objects, subjects and the like. Regarding this understanding of the nature of forensic identification, the authors agree with the opinion [7], who noted that since general scientific identification is a means of identification-distinction, its purpose is to resolve issues of identity, i.e. to establish its presence or absence. And since forensic identification is also a means of solving problems in the field of judicial proceedings, its purpose follows from the purpose of the activities in which it is carried out. And if the activity in the field of criminal proceedings is one of the forms of realisation of legal relations by proving, then forensic identification is a means of their realisation (that is, a means of proof), and therefore its purpose should be aimed at the realisation of such legal relations. In this case, the main forensic task is not to obtain judicial proof of identity, but a procedural solution to the issue of identity, which involves either obtaining proof of its existence or obtaining proof of its absence.

The traditional assertion that the modern understanding of forensic identification no longer fully meets scientific as well as practical needs is a well-founded number of factors and scientific positions. This concerns, first of all, the need to clarify and determine the place of identification by mental (ideal) images among other types of forensic identification. Characterising the identification of mental images in the system of forensic identification actions, there is a need to shed light on its concept and essence as a legal phenomenon existing in the legal system. Identification by mental (ideal) images is a scientific concept that is a form of human thinking. The concept provides a basis for understanding and cognition of the essence of a phenomenon or process. It is with the help of the concept in the form of abstract thinking that the essential features of the object of study were generalised.

In the scientific literature, the word "concept" is interpreted as a thought that reflects in a generalised and abstract form objects, phenomena and the relationship between them by fixing the general and special features – the properties of objects and phenomena [8]. That is, the scientific concept should be understood as a certain form of thinking (thought, position, recommendation), which reflects the common essential properties of a phenomenon of objective reality, the general relationship between them as a holistic set of features, and the essence is the content of the phenomenon, external manifestation which is only a certain aspect of its essence, cognition of which is carried out by analysis and synthesis, directed to the depth of the phenomenon, from phenomenon to essence, from the essence of the first order to the essence of the next order, and so on to infinity [9]. In the philosophical sense, essence is a category of dialectics that reflects the patterns that occur in the phenomenon and represent a set of its internal connections [10]. Therefore, such phenomena as "concepts" and "essence" are complementary and interconnected terms in the study of concepts, features and features of identification by imaginary images.

It should be noted that the concept is a phenomenon of objective reality, which is perceived based on its features, and the essence of the latter can be revealed through in-depth research. First of all, it concerns the understanding of the phenomenon that is being studied. After all, identification by mental images can be most fully characterised through the concepts, features and forms of forensic identification, in particular when conducting expert research. The effective operation of pre-trial investigation bodies depends not only on the proper performance of their tasks, within their competence, but also on the quality of application of both the rules of criminal procedure and the provisions of criminology. This applies, in particular, to such a specific method as forensic identification, the essence of which is

the ability to perform narrow identification tasks to establish the identity of a particular object that has a stable external form.

1. MATERIALS AND METHODS

The identification of an object by its mappings occurs in those cases when, along with the predominant coincidences, insignificant differences are also noted. However, clearly defined differences, showing a dissimilarity in the main, are the basis for differentiation (the principle of the opposite phenomenon of identification). If it is impossible to find out the nature of the differences, and then classify them as significant or insignificant, it is necessary to conclude that it is impossible to identify. Criminal procedural evidence is defined as the activity of the relevant bodies and persons carried out in procedural forms and consists in the collection, verification and evaluation of evidence in order to establish the circumstances relevant to the criminal proceedings. The authors studied that forensic identification acts as one of the important tools of the process of proof, based on which it is possible to find out the essence of identification as a way of equating material objects by their mappings.

In criminology, the position on the essence of identification is deeply researched and theoretically explained. A separate theory of forensic identification has been developed, which is of great practical importance in criminal proceedings. Therefore, when establishing the place of identification with mental images among other types of forensic identification, it is appropriate to take as a basis the essential understanding of forensic identification and the classification of identification actions. The essence of forensic identification as a general scientific category is to identify the object (person, thing) by separating it from similar objects to solve the problems of criminal proceedings. Forensic identification is not only a specific method, the purpose of cognition, but also a cognitive process, which is realised through instrumental research, investigative (investigative) actions or operational and investigative measures. In modern forensic science, forensic identification is understood as a method of establishing relative or absolute truth in criminal proceedings. It, in turn, means the establishment of the coincidence of the characteristics of an object or person in a set of certain general and individual features [11].

The purpose of criminal proceedings is to establish the truth (falsity) only of those circumstances of criminal proceedings that have legal significance, and not to establish the truth in criminal proceedings as a whole. At the same time, the goal of forensic identification by imaginary images is somewhat different, because in its essence it consists in finding the truth in the process of criminal proceedings directly during identification, since it is aimed at individual identification, that is, at establishing the complete coincidence of the features of a particular object. Based on the foregoing, determining the place of identification with mental images among other types of forensic identification, it is possible to conclude that these concepts of classification of identification actions have become the basis for distinguishing two main forms of reflection in the modern science of forensic science, namely: materially fixed and ideal (in separate sources – psychophysiological, mental, imaginary). The ideal form of reflection, in turn, is subjective and consists in fixing a mental image of an object in the memory of a particular person.

2. RESULTS AND DISCUSSION

In the forensic literature, the issue of classification of identification actions has traditionally been covered by the concept of "types and forms of forensic identification". At the same time, the concepts "types" and "forms" are interpreted as synonyms, which is also incorrect from a methodological point of view. This is due to the fact that, when characterising the forms and types of forensic identification, one should first of all proceed from the fact that when classifying any objects (including identification actions), it is about their ordering by dividing them into groups according to certain criteria. As for the concept of "form", it comes from the Latin "forma" and is traditionally interpreted as the appearance of a certain object. However, for example, Hegel distinguished both external and internal forms, which from the standpoint of the modern understanding of these problems is not entirely correct, since the concept of "internal form" is more precisely covered by the concept of "structure" of an object. That is why, when classifying forensic actions, which are the basis for determining the place of identification with mental images among other types of forensic identification, the form is one of the grounds for separating them into a separate group (type) [9].

It should be borne in mind that forensic identification, which develops from the practical needs of using the methods of natural and technical sciences in the investigation of crimes, is one of the varieties of general scientific identification and, from an epistemological standpoint, is a special case of pattern recognition [12]. That is why, when determining the value of identification with mental images, one should take into account, on the one hand, general scientific foundations, and on the other, specific (actually forensic) features of the types and forms of forensic identification. This is explained by the fact that identification studies are primarily a means of cognition, and in legal proceedings they also perform the function of a means of proof, which is the basis for identifying their procedural and non-procedural forms. In the theory of forensic science, as the identification of a person by mental images, its identification by signs of appearance is considered. The doctrine of forensic habitology is a set of theoretical provisions on the features of a person's appearance, methods of identifying, studying and using them in order to solve the problems of criminal proceedings.

Signs of a person's appearance can be divided into two groups: own signs and accompanying ones. First of all, self-signs are those signs that belong to a person from birth or are naturally acquired in the process of life. This concerns the structure of a body, a face, the organic properties of his appearance, which are integral to him. So, for example, the structure of the skeleton of a face, which grows and changes throughout lifetime, but this process is characteristic of the internal life processes of a human body. For these reasons,

in the theories of criminalistics identification and criminal procedure, a controversial problem has been formed about the existence of the evidentiary value of carrying out the identification of an object on other grounds. Modern scientists studying this issue believe that the identification of the essence of presentation for identification as an investigative (search) action, during which participants in criminal proceedings face for identification objects of the material world previously perceived by them or carriers of objective representations of these objects, causally related to the event of a crime in order to establish identity, group affiliation or distinction. Identification parade is based on the process of comparative analysis of an object displayed in a person's memory and an object presented for research [13].

During identification by mental images in the process of presentation for identification, a person who recognises compares the signs and properties of the proposed objects with the mental (ideal) image preserved in the memory of the person due to the previously perceived object. As a consequence, the person who recognises makes a conclusion about identity, similarity, or difference. Therefore, the psychological content of perception should be considered a feature of identification by mental images during identification. So, distinguish between successive and sympathetic recognition. In the case of a successive identification of an object according to imaginary images, a sequential comparison of the features of the image previously perceived by a subject with a presented object is carried out. Simulative identification of an object by mental images during identification is carried out simultaneously due to the identification of a well-known object. In the forensic literature, the opinion is expressed that the propensity for simulative or successive identification by mental images depends on the individual mental characteristics of a person. The identification performance is influenced by the social experience of the identifier, his volitional activity, the type of memory, the time elapsed from the moment the object was perceived to the moment it was presented for recognition, and other conditions [2]. However, in the indicated context, it should be agreed that the characteristics of these two types of perception are rarely met in their pure form. They usually complement each other, since the most productive perception is based on the positive characteristics of both types. This perception combines elements of synthetic and analytical thinking [14].

Based on the foregoing, it can be concluded that the psychological properties of a subject that recognises must also include the features of identification with mental images. This is due to the fact that the choice of the type of psychological identification (recognisability behind mental images) depends not only on the type of memory of a person who recognises but also on the characteristics of the previous interaction of such a person with an object that is being identified. The authors found confirmation of the above in the materials of investigative (operational) practice, where there was identification of a person by mental images when presented for identification of a living person by functional, dynamic features, such as speech, gait, voice, facial expressions. So, according to the materials of the investigative practice, in the case of theft in the hostel, the tape recorder was stolen from the victim A., where three other guys lived with him in the room. A neighbour from another room, B. (the witness) heard in the victim's room a conversation between the accused and a stranger, but did not see his face. An investigator carried out an investigative (search) action of presentation for identification by voice [6]. In this case, witness B, of course, could not single out individual functional features of a subject, but he perceived a subject of identification as a whole, that is, there was a simultative identification of a subject in mental images.

The above gives grounds for the conclusion that forensic identification by imaginary images should be understood as a process in which various subjects participate (subjects of proof and subjects of identification); in the form of expression by a procedural identification action, it is carried out in the field of procedural activities in order to obtain judicial evidence of identity by using the cognitive capabilities of a subject of identification, which is a source of information about facts. The purpose of forensic identification is individual identification, that is, establishing the coincidence of the features of a particular object and the search for truth directly during identification. Although in science forensic identification is characterised by various criteria, the most informative of them in characterising identification with mental images are: its belonging to procedural identification actions; the special nature of knowledge that is used in the identification process; the goal and tasks that determine its implementation (for the purpose of individual identification, that is, establishing the complete coincidence of the features of a particular object; in order to search for the truth directly during identification).

With computers and equipment such as tablets, pressure-sensitive displays in personal digital assistants (PDAs) or tablet PCs, there are many possibilities today for capturing and manipulating digital ink. With computer capture from manuscripts, it is possible to register dynamic characteristics already during handwriting recording, which must be evaluated or measured accurately enough in a forensic medical examination. In connection with these new ways of recording both the writing process and the resulting font, the discipline of dynamic biometric handwriting recognition has been traced for about two decades, which can find application, for example, in the field of electronic signatures [1; 6; 11]. Here, from the recorded physical measurements of the recording process, characteristics are determined based, for example, on the speed, pressure, or change in an angle of a pen during recording. There are many biometric methods for verifying a writer today, a full overview can be found [2; 3; 14; 16]. Although the scientific disciplines of writing forensics and handwriting biometrics suggest a close relationship due to their nature, there are several cross-disciplinary approaches to authorship verification.

Thus, studies of biometric-based writer's forensic verification can be found in full font such as letter [3]. However, no approaches to the safety of authorship have been found. This study aims to show the extent to which

the approaches and methods of forensic font research can be transferred to computer biometric user authentication. In addition to the results of quantitative research, such as the adaptation of established research methods from forensic science to biometrics and the study of their suitability in the experiment, the authors also focus on the qualitative aspects. These qualitative considerations made it possible to compare scores from both disciplines that can be useful in non-technical evaluations of biometric systems. The authors' contribution is divided as follows: first, an overview of the objectives of forensic writing and presentation of the important core components of forensic analysis. The authors briefly stop on the formation of features based on online manuscripts, in order to then present and qualitatively discuss the comparison of forensic and biometric characteristics. The authors present the current test results for the selected characteristics presented, and in the conclusion we will summarise the message and give an idea of future work.

Forensic handwriting examination studies the authenticity of handwriting by hand or in the signature of documents. Such documents include, for example, contracts, receipts or anonymous letters. Important features of font of components when examining handwriting in words or numbers with a signature. In doing so, it can be checked whether the three values belong to the same person, whether the signature belongs to an account owner, or individual data (for example, the amount) has been changed. Obviously, it is not always necessary to check all possible combinations. Thus, in the event of a dispute over a specified amount of money in a handwritten contractual document, it is sufficient to simply examine it for possible manipulation [12; 15]. At the same time, there is no need to check the signatures on this document if the disputing parties do not doubt its authenticity. Also, forensic handwritten examination is engaged in determining the time sequence of the creation of both several documents and several parts of a text of a document. These techniques help to verify the true authorship of a document. For the systematic analysis of manuscripts in forensic science, basic expressions are used. When studying the stroke as the main component of the font, material and technical conditions play an important role. The texture of a line depends not only on a writer but also on the writing instrument, the medium of font, and the writing surface. To assess the texture of a line, in most cases it is necessary to increase the material to detect and evaluate even the smallest features. Examples of this are the difference in movement of a pen while writing, as shown in Figure 1. These are the smallest strokes that occur when a pen is pressed and released and is very specific.

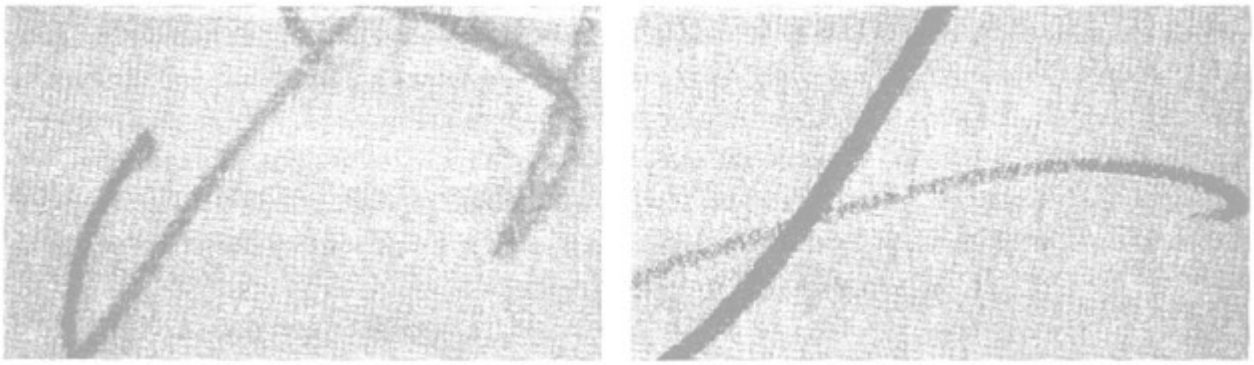

***Figure 1**. Continuous and intermittent movement of a pen*

The print evaluation examines how hard the writing instrument has been pressed against the type medium. Print marks on paper vary by author, writing instrument and writing surface. The exact writing pressure can only be established while writing with special devices. For example, for a ready-made font, the print can be judged by the depth of the grooves for printing on paper. It should be borne in mind that a softer board can also lead to a deeper groove like a complex writing device (e.g. pencil). Other indications when studying pressure are line width, degree of colour. In movement flow, aspects of speed or timing are evaluated, as well as the degree of cohesion or binding of letters.

The motion may flow (walk) continuously during recording, or it is frequently interrupted and this slows down the recording speed. The tempo characteristics of recording performance can only be measured when provided. Otherwise, they must be evaluated by an expert. This basic graphics component deals with posing the question of how an author handled and applied the school pattern that he learned to write from. Which parts were taken from him, and which were adapted to his personal manner of writing. The elementary written movements of each school template consist of a line (straight), an arc (circular) guiding movement, and the resulting blended shapes, as shown in Figure 2 [16; 17]. Since angular movements occur when moving along the line of change of direction, they are also called angular.

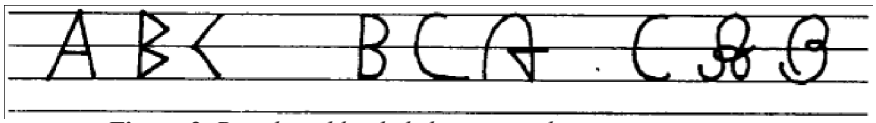

***Figure 2**. Pure line, blended shape, angular movements*

The main component "direction of movement" is summarised as the development of a movement in the four recording directions. These include the ratio of the angles of a character to a baseline, all text to paper, or each letter, as well as the order in which the constituent parts of a letter or word were written. Figure 3 shows the different movements when writing a letter.

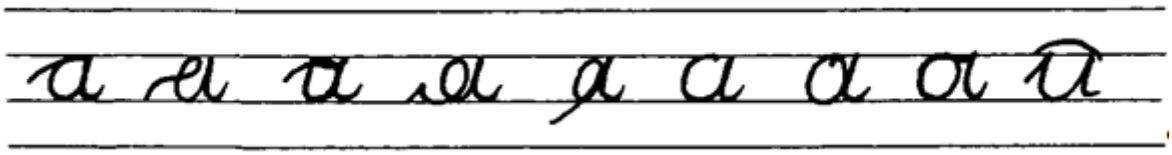

Figure 3. *Different sequence of movement with the same basic spelling*

The vertical extent determines the size and aspect ratio of the font size. Thus, it may be typical for a person that, regardless of the space available, he always writes his signature in the same size. However, if a signature on a form matches a default size, it could indicate a forgery. Horizontal expansion considers the primary width (letter width) and secondary distance (letter distance). In this case, the ratio of the font width to its size matters. When studying horizontal expansion, one should pay attention, first of all, to stretch marks and pressings inside and between letters. It is important to note whether they are attached to the same characters or the same letters, letter connections, or specific positions, or show the same irregular variation. This basic graphics component describes how the write performance has been blended into the accessible area in terms of horizontal font. Depending on the original media requirements of font and write performance, the writing ability of font can vary greatly.

Greatest writing possibilities offers a blank non-linear sheet without specifying what a person should write. However, if a signature is required, which must be done in a small rectangle in a form, the writer's expandability is severely limited. In addition, other anomalies should be considered when comparing fonts. Spelling, punctuation, or other personality traits such as abbreviations or dates are important features here. Other examples of anomalies include fall-back strokes in totals, underscores, or strike-throughs. Next, there is a fundamental overview of the characteristics that can be derived from capturing the dynamics of handwriting during recording and used for biometric user authentication. In addition to functional and structural assessments, there is the possibility of statistical analysis of those quantities on which the authors will focus. These values are determined based on statistical estimates of the signals recorded during writing [18; 19].

Modern digitisation of a tablet makes it possible to record up to five independent signals: x(t): signal of the horizontal position of the pin y(t): the vertical signal of the position of the pin; p(t): pressure gradient signal applied to the pen tip; Φ(t): angle of the pen height above the tray; Θ(t): side angle of the pen above the tray. Based on these physical measurements, various statistics can be mathematically determined for the recorded handwritten inputs. Figure 4 shows the physical measurements as well as the feature extraction process. Examples of statistics are total recording time Total, average writing speed in the horizontal direction (Vx) or in the vertical direction (Vy). Statistical evaluation of the measuring signals allows determining various quantities, which in the context of the research work of the authors was identified and implemented in the evaluation system of 69 different characteristics [20].

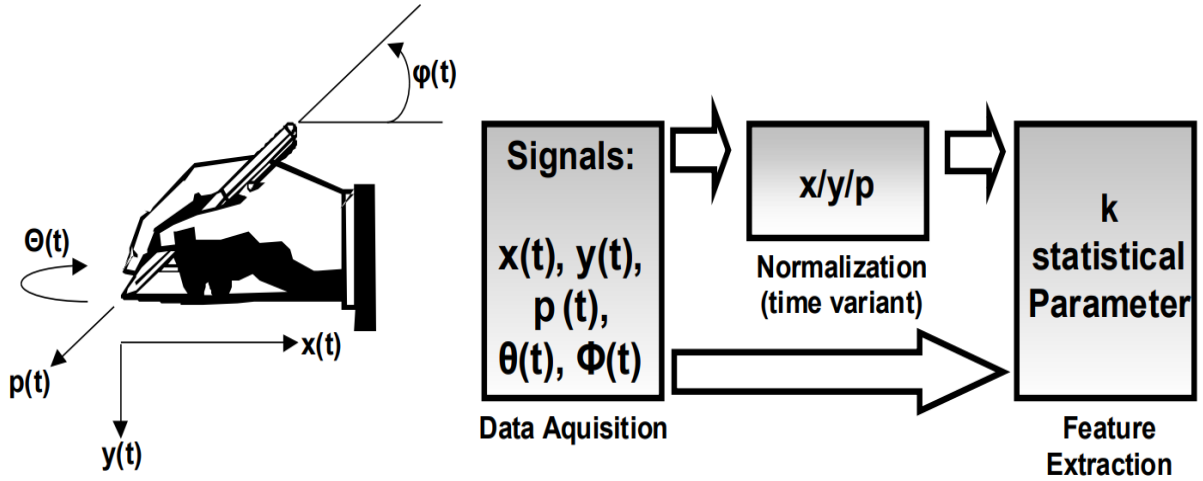

Figure 4. *Extraction of statistical characteristics from writing signals*

Source: *[13]*

The transfer of forensic signs of writing to biometric handwriting recognition is discussed in more detail below. As mentioned earlier, when photographing manuscripts using a computer and appropriate equipment, important values can be recorded. These include the position (X, Y coordinates), pressure and angle of a pen at a specific time. From these values, it is possible to calculate other dynamic quantities, such as writing speed or acceleration [21; 22]. Portability of forensic signs to biometric is not possible for any size to use for user authentication. For example, characteristics

that require a school template may be excluded. This is the case where writing performance needs to be checked for deviations against the school pattern [23].

The force of pressure while writing is part of a test. It indicates how hard the nib was pressed against the font mat while writing. First, the pressure with which the writing is made is considered. For this, the average pressure of all overlap points is calculated. Overlap points are exactly those points that occur when a pen is pressed against the medium of the font, in this case, the digitising tablet, at the beginning of writing performance or after writing inside letters or words. Another component of the pressure force is the release pressure, that is, the pressure that is at the last point before termination [24; 25].

The angle of the font in relation to a specific line is called the line guide. It is studied in forensics while considering direction of travel. To determine them, the base angle of the font is analysed. The baseline is the main horizontal direction of propagation of the sample font, where the angle of deviation from the horizontal is used as the dimension size, as shown in Figure 5. Mathematically, this size can be determined by direct regression on the number of x/y points occurring during writing, but this assumes heights/sides of font image that is well below one.

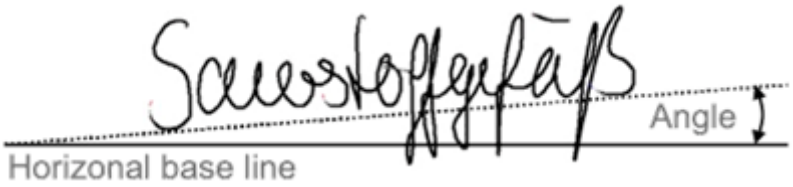

***Figure 5**. Basic angle definition*

A person's font size can be different in different font samples. However, most often the size ratios are very consistent. Size proportion is one of the features of vertical expansion. To determine the proportions, the font sample is divided into three equal horizontal regions. The points are then determined in these areas and the percentage of the total points is calculated. These three values then go into the font sample score as one feature at a time. Horizontal proportions of size. This characteristic was not directly derived from the graphic components of the forensic study of writing. The role model is the vertical proportion of size, as described above. However, with horizontal size proportions, the font sample is split perpendicularly into two areas of equal size [26]. A score is then determined for each area. Again, the ratio of the scores of the two intervals to the total score is indicated as a percentage. Secondary spacing indicates letter spacing in forensic handwritten research.

Since there is currently no way to extract letters in the foundation behind this article, individual segments are being studied. The evaluation of the detected font features was determined using a specific biometric verification method (bio-hash), which, from a set of vector features of a fixed value n, determines the biometric hash value, also with the dimension N. Detailed information on the algorithm used can be found in [8]. The aim of the study is to identify the influence of the use of forensically grounded quantitative features in comparison with forensically not grounded values for the verification algorithm. For this, two sets of characteristics were used, shown in Table 1.

***Table 1**. Forensic and non-forensic characteristics*

Forensic characteristics			**Non-forensic characteristics**	
No.	**Description**		**No.**	**Description**
1	average standardised changeover pressure		1	total number of writing points
2	standardised mean steady pressure		2	average writing speed
3	the angle between the direction of propagation of font and a horizontal line		3	number of segments
4	number of points in the zone in percent		4	lowest absolute X-writing speed
5	number of points in the central zone in percentage		5	lowest absolute Y writing speed
6	number of points in the upper zone in percent		6	center of gravity of the horizontal position of a pen in relation to the total horizontal font width
7	number of dots on the left side as a percentage		7	center of gravity of the vertical position of a pen in relation to the total vertical
8	number of dots to the right, in percent		8	font heights
9	ratio between the area of a convex hull and a surface that limits writing		9	normalised center of gravity distance from origin
10	the ratio between the area of the convexity of a character and the area of the convexity of a common font		10	normalised horizontal elevation of the center of gravity to the origin

The test base is an online handwriting test scoring system presented in [8], which is briefly summarised here. The database contains samples of fonts recorded with various digitising tablets. Overall, in most cases studied, there is a significant improvement in detection rate. The absolute value of the error seems to be very high at the level of 23-54%, however, when interpreting it, it should be noted that the examination was carried out everywhere and the optimisation of procedural parameters was not included in the study.

CONCLUSIONS

In general, this work has shown that forensic and biometric characteristics can, in principle, complement each other when solving the problem of automatic biometric user authentication. Despite the fact that not all aspects arising from the forensic study of writing can be simultaneously implemented for biometric verification of writing, the authors were able to determine a forensic set of features for use in biometrics and compare it with features based on non-forensic characteristics.

The experimental results suggest that, although the frequency of detecting errors in recognition has been improved for all classes of semantics, they are especially pronounced for the most common category – signatures. However, it should be borne in mind that the first authors' study initially examined the global impact on biometric verification without going into the specific effects of physically different input devices. In the future, it is recommended to use approaches that take into account hardware dependencies. In addition, comparison with additional, non-forensic features is necessary.

REFERENCES

[1] Baoguo, F. (2012). Distortion and prevent of scientific evidence. *Journal of Lanzhou University*, 40, 107-113.
[2] Harrison, W. (1981). *Suspect documents: Their scientific examination*. Chicago: Nelson-Hall.
[3] Koppenhaver, K.M. (2007). *Forensic document examination: Principles and practice*. Totowa: Humana Press.
[4] Bing, L. (2015). Comparative studies on quality control of documentary forensic professionals. *Evid Science*, 23, 350-358.
[5] Potapow, S.M. (1927). *Slovar' žargona prestupnikov: (Blatnaâ muzyka)*. Moscow: THO «MALM».
[6] Bird, C., Found, B., & Rogers, D. (2010). Forensic document examiners' skill in distinguishing between natural and disguised handwriting behaviors. *Journal of Forensic Sciences*, 55, 1291-1295.
[7] Found, B., & Rodgers, D. (1998). A consideration of the theoretical basis of forensic handwriting examination. *International Journal of Safety and Security Engineering*, 4, 109-118.
[8] Osborn, A. (1929). *Questioned documents*. Chicago: Nelson-Hall.
[9] Levinson, J. (2001). *Questioned documents: A lawyer's handbook*. London: Academic Press.
[10] Yanru, W., Xiangchen, W., & Bin, Y. (2014). Design and collection of experimental samples for signature quantitative test. *Evid Science*, 22, 632-641.
[11] Sita, J., Found, B., & Rogers, D.K. (2002). Forensic handwriting examiners' expertise for signature comparison. *Journal of Forensic Sciences*, 47, 1117-1124.
[12] Lin, W.L. (2011). Discuss about the standard of handwriting identification conclusions. *Technology Management*, 10, 24-36.
[13] Morris, R.N. (2000). *Forensic handwriting identification: Fundamental concepts and principles*. San Diego: Academic Press.
[14] Ellen, D. (2006). *Scientific examination of documents: methods and techniques*. Boca Raton: CRC Press.
[15] Zebo, S., & Na, L. (2005). Evaluate and analyse of guidelines for forensic document examination. *Police Science and Technology*, 4, 63-65.
[16] McAlexander, T.V. (1997). Assigning weight to handwriting differences for elimination purposes. *Journal of Forensic Document Examination*, 3(9), 4-7.
[17] Yanan, W. (2009). On evidentiary effectiveness of handwriting identification in the view of handwriting identification in the case of fighting for the century heritage. *Chinese Journal of Forensic Sciences*, 6, 49-53.
[18] Min, Y., & Lee, H.C. (2013). The application and development of scientific evidence in the United States. *Journal of Political Science, Law and International Relations*, 30(7), 96-106.
[19] Nosov, O.Yu., & Chernychko, T.V. (2019). Normative-legal regulation of clustering in Ukraine. *Scientific Bulletin of Mukachevo State University. Series "Economy"*, 1(11), 21-27.
[20] Gergely, H. (2020). Verbs of reporting in academic writing. *Scientific Bulletin of Mukachevo State University. Series "Pedagogy and Psychology"*, 1(11), 180-183.
[21] Huber, R.A., & Headrick, A.M. (1999). *Handwriting identification: Facts and fundamentals*. Boca Raton: CRC Press.
[22] Solomina, A.V. (2018). Forensic is an enterprise activity financial investigation tool. *Scientific Bulletin of Mukachevo State University. Series "Economy"*, 2(10), 144-149.
[23] Kostruba, A.V. (2018). Right deprivation in the legal regulation mechanism of civil property relations. *Journal of Legal, Ethical and Regulatory Issues,* 21(Special Issue 1), 1-15.
[24] Simner, M.L. (1998). The origin of class characteristics: An empirical investigation of a major principle in forensic document examination. *Journal of Forensic Document Examination*, 11, 39-50.
[25] Shtifurakh, V. (2019). Psychological determinants of health in the value system of future lawyers. *Bulletin of Mukachevo State University. Series "Pedagogy and Psychology"*, 2(10), 111-115.
[26] Xiaonan, L. (2008). *A comparative study of Chinese and English handwriting identification methods (D).* Chongqing: Southwest University of Political Science and Law.

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