

Національна академія правових наук України
Національний юридичний університет
імені Ярослава Мудрого



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ЗМІСТ

Вступне слово.....	15
ПЕТРИШИН О. В., ПЕТРИШИН О. О., ГИЛЯКА О. С. Проблеми невиконання рішень Європейського Суду з прав людини в Україні в контексті верховенства права (методологічний та порівняльний аспекти).....	17
КАРПАЧОВА Н. І. Сучасні виклики міжнародній безпеці та захисту прав людини (міжнародний та український контекст).....	25
КОРОЛЬЧУК О. Л. Національна резильєнтність в демократії: досвід України	34
МАКСИМОВ С. І., САТОХІНА Н. І. Верховенство права і надзвичайний стан: генезис проблеми.....	47
БУХАНЕВИЧ О. М., КУЗНІЧЕНКО С. О., МЕРНИК А. М. Зарубіжний досвід конституційно-правового регулювання обмеження прав людини в умовах надзвичайного та воєнного станів.....	55
ПИЛИПЧУК В. Г., БОГУЦЬКИЙ П. П., ДОРОНІН І. М. Теоретичні основи та пріоритети розвитку права національної безпеки.....	66
БЕЛАЙ С. В., КОБЗАР О. Ф., ЄВТУШЕНКО І. В., КОРНІЄНКО В. В., КОБА О. В. Правове регулювання службової та бойової діяльності сектору безпеки та оборони України в кризових ситуаціях	76
НЕПОМНЯЩИЙ О. М., МАРУШЕВА О. А., МЕДВЕДЧУК О. В., ЛАГУНОВА І. А., КІСЛОВ Д. В. Процеси децентралізації територіальної організації управління: проблеми та перспективи	86
ГЕТЬМАН Є. А., ПОЛІТАНСЬКИЙ В. С., СЕМЕНІХІН І. В. Практика впровадження електронних адміністративних послуг в Україні	93
МАКУШЕВ П. В., ХРИДОЧКІН А. В., БЛІНОВА Г. О., ТАЛДИКІН О. В. Сучасна модель державної виконавчої служби в системі органів державної влади України.....	105
КОТ О. О., МІЛОВСЬКА Н. В., ЄФІМЕНКО Л. В. Методологічні засади реформування юридичної освіти в Україні: наукова парадигма та сучасний контекст	114
ПАРХОМЕНКО Н., ПОДОРОЖНА Т. С., ТАРАХОНІЧ Т. І., АНДРУСІВ Л. М., МОЗОЛЮК-БОДНАР Л. М. Проблеми юридичної науки в контексті сучасних державотворчих процесів в Україні: виклики і завдання.....	123
СИЧ Т. В., КРИВЦОВА О. М., КАДУК Н. І., НЕСПРАВА М. В., ПАНЧЕНКО Г. О. Державне управління в системі освіти: теоретичні та методологічні підходи та практичні рекомендації	132
НОСІК В. В., ХОМЕНКО М. М., КРАСИЦЬКА Л. В. Парадигма реформування вищої юридичної освіти в Україні в контексті практичної підготовки студентів-практиків.....	140
МАЙДАНИК Р. А., МАЙДАНИК Н. І., ВЕЛИКАНОВА М. М. Відповідальність за шкоду, завдану використанням технологій штучного інтелекту.....	150
СТЕФАНЧУК Р. О., СТЕФАНЧУК М. О. Особливості правового регулювання дієздатності неповнолітніх та проблеми їхньої емансипації.....	160
БОРИСОВА В. І., КАРНАУХ Б. П. Стандарт доказування в загальному праві: математичне обґрунтування і доказове значення статистичних даних	171
БАНАСЕВИЧ І. І., ГЕЙНЦ Р. М., ЛОГВІНОВА М. В., ОЛІЙНИК О. С. Особливості правового становища суб'єктів цивільного права.....	181
ПАДАЛКА А. М., ГРИБІНЧА А., ЛЕСІК І. М., СЕМЕНДА О. В., БАРАБАШ О. О. Захист прав споживачів при купівлі товарів в мережі Інтернет	189

ЛУК'ЯНОВ Д. В., ХОФФМАНН Т., ШУМІЛЮ І. А. Перспективи рекодифікації міжнародного приватного права в Україні: чи потребують колізійні норми нового «прихистку»?.....	198
ЯРОШЕНКО О. М., ТОМАШЕВСЬКИЙ К. Л. Вплив COVID-19 на трудові і соціально-забезпечувальні відносини: нормотворчий досвід Білорусі та України	211
ІНШИН М. І., ВАВЖЕНЧУК С. Я., МОСКАЛЕНКО К. В. Профспілковий захист трудових прав в окремих пострадянських країнах	222
ШУЛЬГА М. В., КОРНІЄНКО Г. С., ЯКОВІЮК І. В. Правове забезпечення діяльності аграрних транснаціональних корпорацій в Україні.....	234
ТИМОШЕНКО В. І., МАКАРЕНКО Л. О., ТАРАСЕВИЧ Т. Ю., КОВАЛЬЧУК Ю. І., АТАМАНЧУК І. В. Правовий позитивізм у кримінальному праві та кримінології: ретроспективний аналіз.....	243
ЖУРАВЕЛЬ В. А., КОНОВАЛОВА В. О., АВДЄЄВА Г. К. Оцінка достовірності висновку судового експерта: світові практики та українські реалії	252
ДУХНЕВИЧ А. В., КАРПІНСЬКА Н. В., НОВОСАД І. В. Фітосанітарна експертиза: досвід України та міжнародні стандарти.....	262
КРАВЧУК О. В., АТАМАНЧУК В. М., ТУРОВЕЦЬ Ю. М., ВОЛКОТРУБ С. Г., ОСТАПЕНКО О. Є. Сутність поняття безпорадного стану особи, як важлива складова під час розслідування злочинів.....	269
КРИКЛИВЕЦЬ Д. Є, КЕРНЯКЕВИЧ-ГАНАСІЙЧУК Ю. В., ФІДРЯ Ю. О., МУЗИЧУК К. С., САСКО О. І. Процес помилування засуджених до довічного покарання і тривалих термінів позбавлення волі як критерій підвищення ліберальності судово-правової системи.....	277

CONTENTS

Editorial.....	15
PETRYSHYN O. V., PETRYSHYN O. O., HYLIKA O. S. The problem of non-implementation of judgements of the European Court of Human Rights in Ukraine in the context of the rule of law (methodological and comparanive aspects).....	17
KARPACHOVA N. I. Modern challenges to international security and protection of human rights (international and Ukrainian context)	25
KOROLCHUK O. L. National resilience in democracy: Ukrainian experience	34
MAKSYMOMV S. I., SATOKHINA N. I. Rule of law and state of exception: The genesis of the problem	47
BUKHANEVYCH O. M., KUZNICHENKO S. O., MERNYK A. M. Foreign experience in constitutional and legal regulation of restrictions on human rights in conditions of emergency and martial law	55
PYLYPCHUK V. G., BOHUTSKYI P. P., DORONIN I. M. Theoretical foundations and development priorities of national security rights.....	66
BIELAI S. V., KOBZAR O. F., YEVTUSHENKO I. V., KORNIENKO V. V., KOBA O. V. The legal regulation of service and combat activities of the security and defense sector of Ukraine in crisis situations	76
NEPOMNYASHCHYY O. M., MARUSHEVA O. A., MEDVEDCHUK O. V., LAHUNOVA I. A., KISLOV D. V. Processes of decentralization of territorial organization of government: Problems and prospects	86
HETMAN Y. A., POLITANSKYI V. S., SEMENIKHIN I. V. Implementation practice of electronic administrative services in Ukraine.....	93
MAKUSHEV P. V., KHRIDOCHKIN A. V., BLINOVA H. O., TALDYKIN O. V. Current model of the state executive service in the system of public authorities of Ukraine.....	105
KOT O. O., MILOVSKA N. V., YEFIMENKO L. V. Methodological foundations of legal education reform in Ukraine: Scientific paradigm and modern context.....	114
PARKHOMENKO N. M., PODOROZHNA T. S., TARAKHONYCH T. I., ANDRUSIV L. M., MOZOLIUK-BODNAR L. M. Problems of legal science in the context of modern state-building processes in Ukraine: Challenges and tasks	123
SYCH T. V., KRYVTSOVA O. M., KADUK N. I., NESPRAVA M. V., PANCHENKO G. O. Public administration in the education system: Theoretical and methodological approaches and practical recommendations.....	132
NOSIK V. V., KHOMENKO M. M., KRASYTSKA L. V. Paradigm of reforming higher legal education in Ukraine in the context of training practising students	140
MAYDANYK R. A., MAYDANYK N. I., VELYKANOVA M. M. Liability for damage caused using artificial intelligence technologies.....	150
STEFANCHUK R. O., STEFANCHUK M. O. Features of legal regulation of the legal capacity of minors and problems of their emancipation	160
BORYSOVA V. I., KARNAUKH B. P. Standard of proof in common law: Mathematical explication and probative value of statistical data	171
BANASEVYCH I. I., HEINTS R. M., LOHVINOVA M. V., OLIINYK O. S. Features of the legal status of subjects of civil law	181
PADALKA A. M., GRIBINCEA A., LESIK I. M., SEMENDA O. V., BARABASH O. O. Consumer protection when purchasing goods on the Internet.....	189

LUKIANOV D. V., HOFFMAN T., SHUMILO I. A.	
Prospects for recodification of private international law in Ukraine: Do conflict-of-laws rules require a new haven?	198
YAROSHENKO O. M., TOMASHEVSKI K. L.	
The impact of COVID-19 on labour and social security relations: Rule-making experience of Belarus and Ukraine.....	211
INSHYN M. I., VAVZHENCHUK S. YA., MOSKALENKO K. V.	
Protection of labour rights by trade unions in separate post-soviet countries	222
SHULGA M. V., KORNIYENKO G. S., YAKOVIYK I. V.	
Legal support for the activities of agricultural transnational corporations in Ukraine	234
TYMOSHENKO V. I., MAKARENKO L. O., TARASEVYCH T. YU., KOVALCHUK YU. I., ATAMANCHUK I. V.	
Legal positivism in criminal law and criminology: A retrospective analysis	243
ZHURAVEL V. A., KONOVALOVA V. E., AVDEYEVA G. K.	
Reliability evaluation of a forensic expert's opinion: World practices and Ukrainian realities	252
DUKHNEVYCH A. V., KARPINSKA N. V., NOVOSAD I. V.	
Phytosanitary examination: Ukraine experience and international standards	262
KRAVCHUK O. V., ATAMANCHUK V. M., TUROVETS YU. M., VOLKOTRUB S. H., OSTAPENKO O. YE.	
The essence of a helpless state of a person as an important component in the investigation of crimes.....	269
KRYKLYVETS D. YE., KERNIAKEVYCH-TANASIICHUK YU. V., FIDRIAYU. O., MUZYCHUK K. S., SASKO O. I.	
The process of pardoning those sentenced to life sentences and long terms of imprisonment as a criterion for increasing the liberality of the judicial system	277

ВСТУПНЕ СЛОВО

Вісник Національної академії правових наук України – це фаховий науково-практичний журнал, в якому понад 27 років поспіль знаходять своє відображення наукові та практичні розробки з актуальних загальнотеоретичних, галузевих правових проблем та правозастосовної практики, в тому числі 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 обґрунтування 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 та 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 повинні 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. В процесі входження України у правовий простір Європейського союзу загальноєвропейські правові конструкції, які до не давнього часу були маловідомими та малодослідженими у вітчизняних 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 Elsevier. 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.

З радістю 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. Пишаємося, що 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!

EDITORIAL

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.

We are pleased to 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.

We are proud that the "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.

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ПРОБЛЕМИ НЕВИКОНАННЯ РІШЕНЬ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ В УКРАЇНІ В КОНТЕКСТІ ВЕРХОВЕНСТВА ПРАВА (МЕТОДОЛОГІЧНИЙ ТА ПОРІВНЯЛЬНИЙ АСПЕКТИ)

Анотація. *Стаття присвячена проблемі невиконання рішень ЄСПЛ в Україні в контексті верховенства права. Актуальність тематики статті обґрунтовується критичною ситуацією щодо дотримання Україною своїх міжнародних зобов'язань. Мета дослідження полягає у формуванні набору принципів і політик, які необхідно реалізувати в Україні для підвищення рівня верховенства права (як одного з фундаментальних демократичних інститутів), в якості необхідного фактора для забезпечення прав людини в контексті відновлення нормальних міжнародних взаємин з ключовою європейською інституцією в сфері прав людини. Методологічну основу статті складає комплекс загальних і спеціальних методів дослідження, водночас філософські методи використовувались для забезпечення розуміння сутності, характеристик та особливостей досліджуваних явищ. Аналіз рівня досліджуваності проблематики показав, що на тлі загострення ситуації щодо невиконання рішень ЄСПЛ в Україні, існуючі роботи із зазначеної проблеми характеризуються більші точковими рекомендаціями, спрямованими на мінімізацію шкоди, ніж на глибинне рішення виниклої ситуації. Результатом дослідження стало формування набору тез, які демонструють глибину досліджуваної проблеми, яка проявляється через несвочасне та непослідоване нормативно-правове регулювання, відсутність матеріальних засобів захисту прав людини в Україні, аномальний підхід до прийняття та виконання міжнародних зобов'язань. Автори аргументують необхідність забезпечення трьох ключових аспектів імплементації верховенства права – гарантування послідовності державної політики та дій чиновників; формування стійкої системи адміністративного управління; забезпечення притягнення до відповідальності осіб, які приймають рішення. Практична актуальність дослідження реалізується через набір рекомендацій, включно зі створенням системи оцінки ефективності реформ з точки зору верховенства права; формуванням механізму реалізації відповідальності осіб, що приймають рішення; переглядом процедур прийняття правових актів; необхідністю перезапуску та завершення реформи системи юстиції, залучення НВО до процесів її формування; створення правил взаємодії між державою та елітами*

Ключові слова: *ЄСПЛ, СКПЛ, основні права людини, демократія, судове забезпечення*

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THE PROBLEM OF NON-IMPLEMENTATION OF JUDGEMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN UKRAINE IN THE CONTEXT OF THE RULE OF LAW (METHODOLOGICAL AND COMPARANIVE ASPECTS)

Abstract. *The article is devoted to the problem of non-implementation of the decisions of the ECtHR in Ukraine in the context of the rule of law. The relevance of the subject matter is substantiated by the critical situation regarding Ukraine's compliance with its international obligations. The objective of the study is to develop a set of principles and policies to be implemented in Ukraine to strengthen the rule of law (as a fundamental democratic institute), as an essential factor for ensuring human rights in the context of re-establishing a proper international cooperation with the key European institution in the field of human rights. According to the analysis of the degree of coverage of the issue, the existing papers on the mentioned problem are rather described by point-by-point recommendations aimed at "damage control", rather than at an in-depth resolution of the situation. The methodological basis of the research consists of the complex of general and special research methods, while philosophical methods were used to ensure the understanding of the essence, characteristics, and features of the phenomena under study. The research resulted in the development of a set of theses that demonstrate the depth of the problem under study that manifests through untimely and inconsistent normative-legal regulation, lack of tangible means of protection of human rights in Ukraine, inappropriate approach to the adoption and execution of international obligations. The authors argue in favour of the need to ensure three key aspects of the implementation of the rule of law – guaranteeing consistency of state policies and actions of officials; the formation of a stable system of administrative management; accountability, and responsibility of decision-makers. The practical relevance of the study is manifested through a set of recommendations, including the creation of a system to assess the effectiveness of reforms in terms of the rule of law; the formation of a mechanism for implementing the responsibility of decision-makers; the revision of procedures for the adoption of legal acts; the need to restart and complete the reform of the justice system, to involve NGOs in the processes of forming such; to create rules of cooperation between the state and the elites*

Keywords: *ECtHR, ECHR, basic human rights, democracy, judicial enforcement*

INTRODUCTION

The problem of non-enforcement of ECtHR judgements has remained significant since the end of 2009 when the Court handed down its pilot judgement in the case No. 40450/04 “Yuriy Nikolayevich Ivanov v. Ukraine”¹. Ukrainian academics have addressed this problem mostly in the context of the Court's protection of the rights enshrined in Article 6 of the ECHR and the consequences that this decision entailed (followed by the judgement “Burmych and others v. Ukraine” app. nos. 46852/13 et al.²). However, revisiting this problem in 2021 makes it possible to conclude not only the failure of Ukraine to respond appropriately, and the undue implementation of its obligations under the Plan of Action [1], but also the aggravation of the situation in the light of other articles.

The non-execution of the decisions of domestic courts led to further reaction of the ECtHR, and the non-capture of the general situation concerning the problems of interaction between Ukraine and the Court gave rise to several new problems in ensuring the rights set out in other articles of the Convention (the cases “Nevmerzhytskyi/Sukachov v. Ukraine” (Article 3)³, “Zelenchuk and Tsytsyura v. Ukraine” (Article 1 of the First Protocol)⁴. Parliamentary Assembly of the Council of Europe’s Resolution 2075 (2015) “Implementation of judgements of the European Court of Human Rights” dated September 30, 2015⁵, the Court’s public statements and forced measures on the strike-out and transmission to the Committee of Ministers of more than 12,000 Ukrainian cases fully reflect the lack of progress in solving this issue. Separately, it is worth recalling the significant delays in the implementation of ECtHR judgements, which in the case of Ukraine (the average period of implementation of a judgement reaches 7 years) is effectively reduced to its non-implementation.

Such interaction between Ukraine and the ECtHR cannot be considered appropriate for two reasons. Firstly, the adoption of Ukrainian constitutional amendments on February 7, 2019 [2], which enshrine the Euro-integration and Euro-Atlantic course. Secondly, the strengthening of mutual cooperation with the EU in the framework of the Association Agreement, both lose their practical meaning and potential when it is not only impossible to ensure implementation of international obligations in Ukraine under the Convention but also to meet the political eligibility established by the Madrid criteria in the context of ensuring the necessary level of democracy and the rule of

law of a candidate country. The inconsistency of Ukrainian policy on this issue with the deterioration of the situation with human rights provides the relevance of this study.

Ukrainian scholars, such as P. Pushkar, S. Chorna, and A. Romanova have conducted comparative studies of the implementation of ECtHR judgements in European countries, attention was also paid to the procedural aspects of such a process. This problem was brought up in the aspect of the subjectively unsuccessful Ukrainian judicial reform of 2016 (although subjective, this view is supported by the events of the so-called constitutional crisis in Ukraine of 2021 [3] and the President's statements about the urge to revive the reform [4]). However, the issue of ensuring an appropriate level of the rule of law and democracy in the framework of the implementation of the state's European integration course has been not given sufficient coverage.

In addition, the third nationwide survey “What Ukrainians Know and Think about Human Rights” [5] was conducted in 2020 to demonstrate how perceptions of human rights have changed in Ukraine over the past four years. The results of the survey confirm the demand and need of Ukrainians for human rights protection, but also give mixed results regarding their attitude toward the effectiveness of judicial protection, as the top 3 effective mechanisms include appealing to the media (23.3%, 2020), the ECtHR (19.6%, 2020) and state courts (20.9%, 2020).

Moreover, the consequences of the Constitutional crisis demonstrate that it is public attention and manual control of the situation (in violation of the established legal procedures) that is most effective. Thus, the established low level of confidence of the population with the failure to implement the rule of law negatively affects the state system, reduces its international credibility, and destabilises the mechanisms of engagement with the population, which has expressed unequivocal support for the new president and the government. However, it should be noted that the problems addressed in the article concern a prolonged process of deterioration of the situation and are not limited to the current formation of parliament or government, which does not negate its relevance in the absence of positive change.

The purpose of the study was to develop a set of principles and policies to be implemented in Ukraine to strengthen the rule of law (as a fundamental democratic institute), as an essential factor for ensuring human rights in the context of re-establishing a proper international

1. HUDOC. Case of Yuriy Nikolayevich Ivanov v. Ukraine (Application no. 40450/04). (2009, October). Retrieved from <http://hudoc.echr.coe.int/fre?i=001-95032>.

2. HUDOC. Case of Burmych and others v. Ukraine (Applications nos. 46852/13 et al.). (2017, October). Retrieved from <http://hudoc.echr.coe.int/fre?i=001-178082>.

3. HUDOC. Case of Sukachov v. Ukraine (Application no. 14057/17). (2020, January). Retrieved from <http://hudoc.echr.coe.int/spa?i=001-200448>.

4. HUDOC. Case of Zelenchuk and Tsytsyura v. Ukraine (Applications nos. 846/16 and 1075/16). (2018, May). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-183128>.

5. Resolution of the Parliamentary Assembly of the Council of Europe 2075 “Implementation of judgements of the European Court of Human Rights”. (2015, September). Retrieved from <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22197&lang=en>.

cooperation with a key European institution in the field of human rights.

In contemporary legal science, certain theoretical and legal aspects of ensuring human rights and problems of establishing the due level of the rule of law in Ukraine have been addressed by S.V. Bobrovnyk [6], P.M. Rabinovych [7], M.V. Buromenskyi [8], M.I. Koziubra [9], V.P. Kolisnyk [10], V.V. Lemak [11], S.V. Shevchuk [12], D.O. Vovk [13], O.R. Dashkovska [14], V.S. Smorodynskyi [15], O.O. Uvarova [16] and others. However, according to the analysis of the degree of coverage of the issue, the existing papers on the mentioned problem are rather described by point-by-point recommendations aimed at “damage control”, rather than at an in-depth resolution of the situation. Nonetheless, the theoretical developments and practical activities of the above authors, including work in the European Court of Human Rights, the Constitutional Court of Ukraine, formed the substantive and informational base of this study.

1. MATERIALS AND METHODS

The subject of the study was defined as the principle of the rule of law in its totality. In its framework, the features of the subject of research, i.e., the interaction of its elements: access to justice in independent and impartial courts and respect for human rights, determined its methodological basis, represented by the combination of methodological approaches, philosophical (attitudinal), general scientific and special scientific methods.

In particular, methodological approaches (phenomenological, hermeneutic, axiological, systemic) were applied in the process of scientific cognition of the nature, structure, and functional purpose of the state as the guarantor of human rights, and in their totality contributed to the definition of its role in the formation of an appropriate system of domestic protection and international interaction in this sphere. Philosophical methods formed the foundation of the study. The dialectical method was used in the process of substantiation of the stages of development of ideas and concepts of human rights in independent Ukraine, as well as the corresponding legislative consolidation; the idealistic method provided the formation of the idea of the importance of generally recognised legal ideas and concepts of human rights in modern democratic states; axiological method provided the characterisation of the studied categories as political and legal values.

Using the historical-legal method, the authors suggested a periodisation of the history of the formation of the modern system of judicial protection of human rights in Ukraine; using the formal-logical method, the authors summarised doctrinal approaches to the understanding of ideas, theories, concepts in the sphere of human rights protection and clarified their content; the systematic and functional method was applied to clarify the functional purpose of intrastate judicial mechanisms of human rights

protection and European Court of Human Rights involvement; the prognostic method allowed accumulating recommendations to improve the situation or, in the worst case, to halt the process of aggravation of the problem. The preparation of this study involved a research on contemporary articles of Ukrainian scientists on related issues, monographic publications, international agreements, legal opinions of the European Court of Human Rights on relevant cases, as well as official communiqués of the Council of Europe’s institutions on the subject matter. Additionally, the analysis of programmes and Action Plans of the Ukrainian government and the operations of the Government Commissioner for the European Court of Human Rights in Ukraine was conducted, modern research of public opinion on ensuring human rights and their protection was addressed, a scientific assessment of current developments in the functioning of the Ukrainian judicial system was carried out.

2. RESULTS AND DISCUSSION

Proceeding from the position of the authors of this study, it is important to view the ECtHR judgement not as a penalty for the state (as opposed to the practice of the Russian Federation), but as an indication of how systemic problems that exist in states and consequently have an impact on the overall level of human rights enforcement should be resolved. That is why the implementation of a judgement in most cases virtually does not require enforcement procedures in European countries, since such enforcement directly affects interstate political relations. In her turn, N.Ye. Blazhivska notes that detailed regulation of the procedure of execution of ECtHR judgements in Western European countries is usually not required in practice, since a sufficiently high level of legal and political culture in the respective states (for instance, Germany and Austria) creates the necessary basis for the states' unconditional execution of ECtHR judgements without the need to apply coercive legal mechanisms and procedures [17, p. 84]. It does not, however, bring up the general level of the rule of law, without which the sole existence of any legislative procedure is incapable of such enforcement.

In December 2020 a hearing of the Legal Policy Committee was held in the framework of the Verkhovna Rada of Ukraine, where the problems of implementation of ECtHR judgements by Ukraine were addressed. In particular, the Head of the Department for Enforcement of Judgements of the European Court of Human Rights drew attention to the fact that the institutional system of reaction to the ECtHR judgements is built on the ideas of the 2006 law¹, so the application of the ECtHR practice in modern conditions and, given the modern challenges, virtually no longer operates. The main systemic and structural problems, which should be dealt with through measures of a general nature, have not been resolved over a long period of time. This, in fact, blocks the implementation of individual

1. Law of Ukraine No. 3477-IV “On the Implementation of Judgements and the Application of the Practice of the European Court of Human Rights”. (2006, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/3477-15#Text>.

measures. The result of the session was the development of legislative initiatives and changes aimed at solving the issue. This is not effectively a solution to the problem at hand, because the existence of statutory regulation is often levelled by the impossibility or problematic nature of its enforcement in practice.

It is necessary to take into account the context of the current situation. For Ukraine, an important event was the ratification of Protocol 14 to the Convention¹ containing a new provision (Article 16 amending Article 46 of the ECHR), according to which the role of the Committee of Ministers of the Council of Europe in the field of monitoring the implementation of ECtHR decisions has increased. Now, if the Committee considers that a participating State is refusing to comply with a final judgement in a case to which it is a party, it may address the ECtHR with the question of that State's compliance with its obligation. If the Court finds such a violation, it will refer the case to the Committee for the purpose of determining the measures to be taken. These may be political sanctions, such as loss of voting rights or termination of membership. In the current political situation, engaging in negative relations with an established international organisation in the field of human rights protection will not play into Ukraine's hands, especially taking into account the fact that the Council of Europe has already had the experience of applying harsh restrictive measures against the Russian Federation (without taking into account their effectiveness and consequences).

In order to better understand the problem that has arisen around the provision of human rights in Ukraine, it is necessary to proceed from the periodisation of the constitutional regulation of human rights, which has been developed by us in the publication "Reforming Ukraine: Problems of Constitutional Regulation and Implementation of Human Rights" [18, p. 70]. Conclusions of the mentioned article laid the foundation for the current study, as partially revealed the problem of non-implementation of constitutional provisions and norms of legislation, bringing forward as causes the problems of low level of legal culture, low level of the rule of law, and a number of economic difficulties in the state. Operating within the framework of the rule of law, it is necessary to highlight a number of major challenges, the failure to address which has led to the current situation around the implementation of the ECtHR judgements and the enforcement of human rights in Ukraine in general.

Firstly, the statutory consolidation fails to catch up with the public demand for the regulation of the corresponding relations. Within the established legal system, which implies preventive regulation of possible situations, this approach directly hinders Ukraine's development as a democratic European state, reduces its international credibility, and diminishes its European integration prospects. In addition, an important aspect of this problem lies in the

lack of will or the deliberate blocking of legislative initiatives by the current political elites in pursuit of their interests. Despite the economic nature of such an impact, it cannot but affect the overall level of the rule of law in the country, and only time and a renewal of the elites can solve this problem.

Secondly, the lack of tangible guarantees of protection and restoration of violated rights within the state. This problem is multidimensional by nature. Acclaimed scholars A.M. Kolodii and O.V. Batanov through public speaking at scientific events have attributed to this issue not only the problems of formation of a capable judicial system, corruption, economic factors, but also a socio-cultural element, which is manifested in the relatively young nature of Ukraine as an independent state, as well as in a certain "Soviet legacy". Perfectly understanding the consequences of the prioritisation of the state over a person and his/her rights, the collective over the individual within the Soviet Union, as well as the situation in which a large layer of civil legal relations was effectively prohibited, it should be noted that several post-Soviet states in the Baltic region have demonstrated by example the dubiousness of such an argument (including in the context of interaction with the ECtHR).

Thirdly, the authors addressed the misunderstanding of international integration processes, and, as a consequence, the imperfect treatment of the implementation of international obligations in Ukraine. Based on the above opinion of the authors, it is necessary to emphasise the lack of understanding by the leaders of the state of the seriousness of the problem and the need for a rapid response to the situation. Voluntarily assumed obligations to ensure human rights and taking measures to eliminate systematic violations should be motivated not only by maintaining the image of a democratic state but by a direct manifestation of the will of responsible persons by taking actions aimed primarily at solving the critical situation around human rights that has formed in Ukraine. The decline in human rights that was outlined in the introduction to this article has permeated all political processes in Ukraine for more than a decade, regardless of the present political agenda or the leading political forces.

Thus, there are grounds to assume that the problem is more profound and is not solely the result of the negative impact of the described systemic problems, new challenges, economic difficulties, and international conflicts. Therefore, the purpose of this study was determined by the need to demonstrate the role of the rule of law as the foundation of state-building in general. At the same time, it is necessary to note the flipside of the process, i.e., the actual impact of the established course on the decline of the rule of law.

Consequently, by combining the above issues, one key can be singled out – **inconsistency**. Despite the slightly different context of the study, to argue this point, it is

1. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention. (2004, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_527#Text.

worth quoting Dr. Cristina Gherasimov and Dr. Iryna Solonenko in their 2020 paper “Rule of Law Reform after Zelenskyi's First Year”, – *“reforming the rule of law is a complex endeavour that needs to be backed by bold political leadership and strong administrative capacity. For such reforms to consolidate, it takes decades, multiple governments, coordinated effort, and a widespread pro-reform consensus among major stakeholders”* [19]. Unfortunately, the historical and political process in Ukraine is described by a high level of inconsistency in actions and reforms. The 2000s constitutional amendments alone demonstrate the motives behind such changes, which were far from advancing the course of reforms, but rather were aimed at redistributing powers and spheres of influence. Subsequently, the establishment of a European integration course and the contraction of cooperation with the Russian Federation (and the CIS in general), laid the general appropriate course of development, however, with a number of national peculiarities.

The reforms of the previous administration (2014-2019) were partially sustained by the current administration, which indicates a certain continuity, but still insufficient. For example, the most successful decentralisation reform, for the moment, has lost momentum, although, based on the above public survey, the population still does not see any connection between ensuring their rights and the local self-government. The judicial reform as such was found to be unsuccessful because part of its goal was to consolidate influence in this sphere, rather than to improve its overall state (which led to the blocking of the work of a number of important state institutions and the inability to ensure the proper functioning of the system itself). Police reform has shown a certain level of effectiveness due in large part to the involvement of international partners. Despite the relative success of the latter, it is the consequences of its continuation in the context of consistency that determine its outcome.

In many respects, the problem of inconsistent operation lies in the lack of understanding of the goal-setting, processes, and results of reforms. On the one hand, the authorities elected in democratic elections are primarily trying to strengthen their positions in order to guarantee their re-election. On the other hand, the Ukrainian people, partly saturated with the successful experience of other states in the globalised world, demonstrate insufficient awareness and are not always able to properly assess the established course and ongoing reforms. Thus, by pursuing political goals by eroding the existing level of the rule of law, decision-makers form the rejection of reforms and changes by the population, which leads to a rapid loss of trust and support, resulting in a radical change of course by electing new representatives through the next democratic elections.

Following upon this thesis, two key points can be formed – **stability and accountability**. Both of these should be the basis for establishing the proper level of the rule of law, and their absence has a negative impact on it. After all, according to the natural law theory, the rule of law requires that all regulations (including the Constitution and laws) and all activities of state power are devoted to the protection of human dignity, freedom, and rights. In

this context, the problem of the so-called “Soviet legacy” is nevertheless traceable. When, on the one hand, the population does not feel responsible for their elected representatives and, on the other hand, the representatives do not feel any consequences for the decisions made within their cadence. Thus, the authors argue their thesis regarding the necessity of ensuring stability, which is ensured by the rule of law. Creating a proper system for the functioning of the state must ensure consistency by imposing limits and accountability on decision-makers, and must, among other things, create awareness among the population of the importance of their votes.

Thus, today the Ukrainian society faces a situation of consistent weakening of the processes of state-legal regulation in all spheres, which leads to the deterioration of the state of human rights protection and enforcement, which manifests itself, among other things, through the failure to perform international obligations regarding the implementation of the decisions of the European Court of Human Rights. Arguing that the problem is more complex, and one that is directly related to the mutual process of influence of the reduction of the level of the rule of law on the general state processes (non-execution of the social function of the state as the guarantor of human rights), including in their international manifestation (non-implementation of ECHR decisions), conclusions of this article will focus on more tangible and palpable measures aimed to solve the specific problem, in order to avoid going beyond the subject of research.

CONCLUSIONS

To restore the proper functioning of the state in general, including the performance of its main function – to ensure the adequate level of life of its population, the ability to exercise, protect and restore their rights (within the state and at the international level) Ukraine today needs to implement above all the changes associated with the establishment of a stable and coherent system of state institutions. In other words, priority should be given to the processes of administrative conduct by individuals performing the functions of the state. The presence of appropriate regulation based on the best practices of European states (the EU members) should ensure the imminence of accountability (at least political at this stage) for the decisions made in order to induce such persons to act primarily in the interests of the state and the people they were elected to serve. In addition, despite the successes of some of the reforms discussed in this study, a clear balance must be struck between pursuing national interests and the proper implementation of the international obligations undertaken. The Ukrainian nation and the Ukrainian people as such, already demonstrate the demand for implementation of such practices, but still do not realise the responsibility for the exercise of their electoral rights, including, in a situation of lack of proper communication with the state cannot properly form an opinion regarding the assessment of the reforms and changes implemented (which largely leads to the strengthening of immigration processes). Foreign partners are capable only of assisting within the framework of international law and are not in a position to fundamentally

change the mechanisms of interaction between the state and the population. Thus, having developed a policy of paramount importance of the national interest, and implementing it on the basis of the rule of law and respect for human rights, while ensuring consistency in the implementation of European integration processes, Ukraine in the near future may potentially qualify for deepening cooperation, and perhaps for accession to the European Union. At this stage, based on the importance and depth of the subject matter, such prospects seem vague.

RECOMMENDATIONS

To ensure the practical value of this paper, it is appropriate to provide a number of specific steps required to achieve the result, the outlook for which has been outlined above. The primary step is to establish a system of effective assessment of the ongoing reforms in the area of the rule of law. That is, the reforms that have been actually carried out and planned must first and foremost follow the principle of ensuring the rule of law. To achieve this goal, it is necessary to increase the level of involvement of representatives of the scientific community in the process of assessment, preparation, and adoption of legislation. Such participation includes the engagement of international experts, but the nature of “taking into account the recommendations” (by the example of the Venice Commission) is insufficient.

Further, among other things, in order to combat corruption, the level of perception of which, admittedly (based on authoritative studies), is extremely high by European standards, an independent and effective system for ensuring accountability must be created. Again, at this stage, given the obvious inability of the judicial system to respond to such manifestations and to avoid the politicisation of the administration of justice, it seems sufficient to revise and strengthen the institute of political responsibility. However, it is necessary to ensure the proper level of public insight and involvement, so that unpopular but justified reforms do not lead anew to a situation in which, due to lack of comprehension, they cannot be completed, and a change of the state course every 5 years effectively leads to a standstill.

Third, the process of decision-making, including the drafting of legal acts, must be reformed based on new principles of administrative management, and primarily

based on the realisation of national interests [20]. Decisions should not be taken under pressure from the international community, but to avoid involvement in negative relations as such. Again, international obligations (especially in the area of human rights) should not be a burden on the state, but rather an incentive to develop and improve intra-state systems and policies.

Fourth, sustained justice reform must be undertaken and continued by successive political powers based on the principles outlined above, rather than for the purpose of consolidating political influence. An important factor for the success of such reform is the following point of recommendations. Involvement of non-governmental organisations in the decision-making process. Lately, in Ukraine, the involvement of such subjects in the sphere of human rights protection has increased significantly, which has also been reflected in scientific research on this topic. Despite the legislative consolidation of the involvement of such subjects in the process of forming the bodies of justice, today one can observe merely the formal character of such involvement.

The last, but not the least important recommendation is to strengthen the fight against corruption at the highest and local levels. At the moment in Ukraine, there is a strong influence on the national processes of the so-called representatives of the elites, whose activity in Ukraine is more characterised as an oligarchic influence. In this context, the authors do not refer to the elimination such influence by illegal means, but rather to creation of rules of conduct and interaction between the authorities and interest groups (again, with a focus on ensuring state interests and the interests of the population).

It is necessary to understand that the above recommendations are not revolutionary, but they are of critical importance for modern Ukraine. By opting for the rule of law at all levels, starting from the highest one, through lengthy and unpopular reforms over time it is possible to achieve a proper level of state functioning, which in turn will manifest itself in ensuring human rights, solving problems with non-execution of local court decisions, and normalising relations with the ECtHR regarding the performance of the obligations undertaken to implement its decisions.

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СУЧАСНІ ВИКЛИКИ МІЖНАРОДНІЙ БЕЗПЕЦІ ТА ЗАХИСТУ ПРАВ ЛЮДИНИ (МІЖНАРОДНИЙ ТА УКРАЇНСЬКИЙ КОНТЕКСТ)

Анотація. На сьогодні в Україні можна виділити два механізми захисту прав людини: звернення до Європейського суду з прав людини на міжнародному рівні та звернення до Уповноваженого з прав людини на національному рівні. При цьому діяльність омбудсмена спрямована на виконання державою прийнятих на себе зобов'язань на міжнародному рівні щодо забезпечення національного механізму захисту прав людини. В Україні омбудсмен діє за зразком класичного парламентського Уповноваженого з прав людини. Крім того, поряд з парламентським Уповноваженим з прав людини, який має конституційний статус, в Україні діє ряд урядових уповноважених («квазі-омбудсмени»), діяльність яких не має спеціального статусу і може бути припинена за волею уряду в будь-який час. Враховуючи вищевикладене, мета цього дослідження полягає у всебічному аналізі сучасних викликів міжнародній безпеці та впливу цих факторів на дотримання прав людини в Україні (з використанням методів як міжнародного права, так і класичної правової методології), а також вивчення ролі омбудсмена в цьому процесі. Проведений аналіз дозволив зробити висновок, що причини порушень прав людини криються не лише у власних проблемах країни, але й є наслідками глобальних процесів. Величезним викликом правам і свободам в Україні є поглиблювана бідність населення, що саме по собі є порушенням прав людини і не дозволяє реалізовувати всі інші права. Крім того, бойові дії в районі Донбасу призвели до грубих, масових і систематичних порушень прав людини: жителі прифронтових територій стикалися одразу з двома викликами – небезпекою, яка виникає через неможливість забезпечення безпеки безпосередньо поблизу зони бойових дій та одночасно зростаючі ризики бідності

Ключові слова: виклики правам людини, захист прав людини, омбудсмен, Європейський суд з прав людини, міжнародна безпека

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MODERN CHALLENGES TO INTERNATIONAL SECURITY AND PROTECTION OF HUMAN RIGHTS (INTERNATIONAL AND UKRAINIAN CONTEXT)

Abstract. *At the moment, two mechanisms for protecting human rights can be distinguished in Ukraine: an appeal to the European Court of Human Rights at the international level and an appeal to the Commissioner for Human Rights at the national level. Therewith, the activity of the ombudsman constitutes the state's performance of its obligations at the international level to ensure the national mechanism for the protection of human rights. In Ukraine, the Ombudsman acts according to the model of the classic parliamentary Commissioner for Human Rights. In addition, along with the parliamentary Commissioner for Human Rights, which has a constitutional status, there are government commissioners ("quasi-ombudsmen") in Ukraine, whose activities do not have a special status and can be terminated at the will of the government at any time. Considering the above, the purpose of this study lies in a comprehensive analysis of modern challenges to international security and the impact of these factors on the observance of human rights in Ukraine (using the methods of both international law and classical legal methodology), as well as studying the role of the ombudsman in this process. The analysis allowed to conclude that the causes of human rights violations lie not only in the country's problems, but are also the consequences of global processes. A huge challenge to the rights and freedoms in Ukraine is the intensifying poverty of the population, which in itself is a violation of human rights and allows to exercise all other rights. Furthermore, the hostilities in the Donbas region led to gross, massive, and systematic violations of human rights: residents of the front-line territories were faced with two challenges at once – the danger that arises due to the impossibility of ensuring security in the immediate vicinity of the war zone and the increasing risks of poverty*

Keywords: *challenges to human rights, protection of human rights, ombudsman, European Court of Human Rights, international security*

INTRODUCTION

Human rights can be viewed in an international and national context. International and national human rights law constantly interact. Therewith, in Ukraine, historically, a situation has developed when the fundamental human rights and the mechanism for their protection were assumed by the country in the form of international obligations, and then implemented into national law. Sovereign states are free to join international organisations, sign bilateral and multilateral agreements. State sovereignty is a key issue in the implementation of international treaties. States have broad freedom to choose the means and methods of performing their obligations under international law. However, such a procedure almost always requires the involvement of a government body charged with the task of enacting legislation: the national legislature. At the same time, in case the state violates its obligations, there is usually no possibility of contacting international law enforcement agencies. Therewith, the state cannot ignore its obligations and is often responsible before international tribunals, which are not law enforcement, but a kind of judicial body.

Vivek Sehrawat, studying the fundamental dichotomy in the conclusion of international treaties and approaches to this issue at the level of national constitutional law on the example of India, notes the great role of the courts in the implementation of international treaties [1].

Dedefo Bedaso addressed the fact that international law comprises unique rules, principles, and procedures for its application in relations between states. The relationship between the national laws of the state and international laws is developing based on monistic and dualistic theories. These theories were developed mainly to determine the interrelation between domestic and international law [2]. The theory of monism assumes that both law systems are separate components of the body of legal knowledge or a single legal system. This theory follows the unitary principle that domestic and international law must coexist and form part of the same universal legal order. Furthermore, international law and human rights are at the top and prevail over the national laws of states.

The second approach to the study of the interrelations between national and international law is based on a dualistic or pluralistic theory. According to this theory, national and international provisions do not have a direct or automatic impact on each other, do not have the superiority of one system over another, do not change or challenge each other's rules, and do not function as a dual legal system. International law applies only between sovereign states and depends on the common will of these contracting states. International law becomes binding and enforceable if it is directly incorporated into the national legal system of

states. Whenever national law and international law conflict, national law should take precedence in court. At present, at the statutory level, the focus is still on the monistic theory, since the general rule for the implementation of international treaties stipulates that a state that has violated a rule of international law cannot justify itself by referring to its national law. Article 27 of the 1969 Vienna Convention on the Law of Treaties¹ clearly states this principle. In accordance with the principle “treaties must be executed”, the state is obliged to comply with its international obligations, even if this means a change in national legislation.

Paola Gaeta points out the difficulties in regulating state responsibility. The author investigated the circumstances precluding wrongfulness and the consequences of an internationally wrongful act (with particular emphasis on the obligation to provide reparation). The researcher also stressed the importance of ensuring compliance with international law by states acting individually, that is, decentralised enforcement, including by their courts, and also through retortion or countermeasures (once called reprisals). This is a typical form of enforcement under conventional international law [3]. At the same time, enforcement can be carried out through measures taken by states acting collectively, that is, through mechanisms that include the use of collective measures, such as measures taken at the UN (or other international organisations) level, which may lead to sanctions. The author pointed out that at the international level there is a ban on the use of armed force in international relations; therefore, all coercive measures taken by states on an individual basis must be peaceful [3].

Deplano pointed out the complexities of doing research in international law. After all, performing such a study is neither a fixed nor a standardised activity. This requires several skills and experience of the researcher. In addition to studying authoritative sources: international agreements, international litigation, diplomatic practice, it is necessary to analyse the effectiveness of international law in the national system of law, which is a rather complicated procedure. Indeed, in this case, the competence of a researcher in a foreign jurisdiction is required, including a foreign language, related skills and abilities, as well as a deep understanding of the legal culture of another country [4].

Based on the above, the problem of protecting human rights and international security today is in many ways a key issue for the national legislation of Ukraine. With an in-depth study of this subject, various mechanisms for the implementation of the obligations assumed, both at the legislative level and at the level of law enforcement practice, are of particular importance.

Considering the above, the purpose of this study is a comprehensive analysis of modern challenges to international security and the impact of these factors on the

observance of human rights in Ukraine (using the methods of both international law and classical legal methodology), as well as studying the role of the ombudsman institution in this process.

1. LITERATURE REVIEW

The protection of human rights in Ukraine is based both on the provisions of the Constitution and laws of Ukraine, and on international acts, among which the European Convention on Human Rights and Fundamental Freedoms² occupies a special place. In this regard, in Ukraine, the protection of human rights is carried out both at the national and international levels. Among international mechanisms, the main role belongs to the European Court of Human Rights. This body was established in accordance with the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950 and entered into force on September 3, 1953. The Court has jurisdiction in the field of human rights over states that have ratified the Convention not only in relation to administrative and executive acts, but also to acts of the judicial and legislative authorities. The court comprises a number of judges equal to the number of members of the Council of Europe. The jurisdiction of the court is limited by the fundamental provisions of the Convention. The jurisdiction of the court extends to all matters concerning the interpretation and application of the Convention which the contracting states or the commission may refer to it. The court is also competent to decide on the application of the additional protocols to the convention.

Peter Hilpold pointed out that the signed European Convention on Human Rights (ECHR) in Rome in 1950 was an overtly revolutionary document. The human rights standards proclaimed by the Convention have become the gold standard around the world. At the same time, the problem of this court is a large percentage of the complaints rendered inadmissible and a very long time for the consideration of cases. The author also pointed to very different statistics on the number of complaints from different countries. For example, in 2019 only 198 complaints from Austria were submitted to this court, 182 of them were declared inadmissible, and only 5 were satisfied [5]. For comparison, in relation to Ukraine, the ECHR is considering 8,833 cases.

Marijana Mojsilović pointed out that the European Court of Human Rights is the crown of the international human rights protection system. In recent years, the Court has been a victim of its own success. In response to a growing number of complaints, the Council of Europe over the past five years has considered numerous proposals for restructuring the European human rights regime and reorganising the European Convention on Human Rights [6].

Bardarova pointed out that the European Court of

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.

2. European Convention on Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://www.echr.coe.int/documents/convention_eng.pdf.

Human Rights is competent to decide on the application and interpretation of the European Convention on Human Rights only in cases where any of the guaranteed rights is violated by a member state of the Council of Europe that has ratified the Convention. In fact, a member state that has ratified the European Convention on Human Rights undertakes to integrate guaranteed rights into the national legal system and to ensure their legal protection [7]. At the same time, Patricia Popelier sharply criticised the current system of the European Court of Human Rights due to the review procedure being too lengthy and other organisational issues [8].

Therewith, as pointed out by Paulo Sergio Pinheiro, state strategies in the field of human rights are critical for their protection and enforcement. Since states work to become responsible members of the international community, the design and implementation of these strategies is essential to perform the undertaken obligations to protect the human rights of those living within the borders of such states. One of the main tools used in defining these government strategies is the establishment of human rights institutions at the national level [9].

Zemskova, analysing the specific features of the Ombudsman's status, noted that the main goal of the Ombudsman is to protect the rights of citizens in case of their violation by the executive authorities. The ombudsman's activities are a priority in almost all countries of the world. The author identified three models of the functioning of the ombudsman: 1) an executive ombudsman ("quasi-ombudsman") is an official whose activities are subordinate to the president or the government, 2) an independent ombudsman working outside the system of three branches of government, 3) a parliamentary ombudsman who is elected by the lower house of parliament, and is subordinate to it. In this case, the institution is built as a parliamentary body, but with broad powers that determine the distance from the legislative branch of government and independence from it [10].

Also, as Nikolaos Sitaropoulos pointed out, for the protection of human rights in the European Union, the European Commissioner for Human Rights works as a separate body with a special status [11].

Réka Friedery concluded that the founding of a European Ombudsman office was the result of a long journey shaped by many positions in the European Parliament and its Petitions Committee. The office of the European Ombudsman can be considered as an extension of the parliamentary branch of government. However, this additional function does not imply a dependent role of the ombudsman, but symbolises a coordination relationship, which, among other things, mainly reinforces the fact that in most European countries the ombudsman's mandate also extends to parliament [12].

C. Lacatus analysed the right to peaceful assembly

from a human rights perspective. The researcher pointed out the exceptional importance of this right, not least because citizens use this right as the most effective means of expressing dissatisfaction with their position, status or specific actions of the government. The implementation of this right entails a positive obligation on states to protect and contributes to the protection of human rights, although states can impose restrictions on peaceful assembly in the conditions stipulated by legal provisions [13]. The legal regulation of the status of the ombudsman in Ukraine is determined by the Constitution of Ukraine and the Law of Ukraine "On the Human Rights Commissioner of the Verkhovna Rada of Ukraine"¹. Moreover, Article 55 of the Constitution of Ukraine stipulates the right of everyone to appeal for the protection of their rights to the Ombudsman, and the main goal of the ombudsman's activities lies in the exercise of parliamentary control over the observance of the rights and freedoms of citizens in various fields.

In this regard, one can agree with the position of Petryshyna, who emphasised the special role of the Human Rights Commissioner of the Verkhovna Rada of Ukraine as an element of the mechanism for protecting human rights in Ukraine. The researcher pointed to the special constitutional status of the Commissioner, since the recognition and protection of human and civil rights and freedoms is a guarantee of democracy and the rule of law [14]. Petryshyna addressed the guarantees of the Ombudsman's activities, namely: a ban on interference in his or her activities by state authorities, local authorities, associations of citizens, enterprises, institutions, organisations, regardless of the form of ownership, and their officials, including a prohibition to demand from him or her an explanation of the merits of unfinished or pending cases; inviolability; financial independence; termination of the activities of the Commissioner; list of powers; fundamentals of activity; requirements for the candidate for the position; the duty of the Commissioner to submit to the Verkhovna Rada of Ukraine an annual report on the state of observance and protection of human rights and freedoms [15].

2. MATERIALS AND METHODS

When preparing this study, the works were analysed both on the methodology of legal research and those related to the use of specific international legal instruments. The work of Deplano, which is the latest research in the field of legal and international legal methodology, was largely used as the methodological base in terms of the study of international law methodology [4]. In the study, the author draws attention to the fact that International Legal Research (ILR) is an area at the intersection of legal librarianship and legal research. The author also believes that in addition to state practice and practice of international courts and tribunals, as well as international organisations, ILR sources should formally include the practice of non-state actors, including

1. Law of Ukraine No. 776/97-VR "On the Human Rights Commissioner of the Verkhovna Rada of Ukraine". (1997, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/776/97-%D0%B2%D1%80#Text>.

non-governmental organisations, soft law instruments, and social media interactions, when they are used by the state.

Deplano additionally addressed the fact that, apart from studying authoritative sources, such as international agreements, international litigation, and diplomatic practice, it is necessary to analyse the effectiveness of international law in the national legal system, which is a rather complicated procedure [4].

Therewith, recently the process of collecting and storing primary data and sources of ILR itself has become the subject of scientific research. As an autonomous field of research, ILR deals directly with the study of both types of sources of international law: international agreements and national legislation (which differs from the national law of the researcher and constitutes an analysis of foreign law from his standpoint). Within the framework of this study, the task was slightly facilitated by the fact that this study does not imply a detailed comparison of the provisions of Ukrainian legislation on the status of an ombudsman with foreign legislation (this will become the subject of subsequent developments), but is aimed at studying the specifics of the functioning of the mechanism for protecting human rights in Ukraine at the national and international levels. Nevertheless, the study investigates national and international legislation, as well as the practice of its application, including the instruments of “soft law”.

Nowadays, most Ukrainian and foreign legal journals that carry out double-blind peer review require the inclusion of a section on methodology in their articles. As Semchuk notes, too little attention is paid to methodological issues in Ukrainian legal science [14].

The methodological framework of the study in its classical legal aspect is the well-known study by the professor of Yale University, Tom R. Tyler. The author recommends statutory analysis of the law (doctrinal analysis) as the main method of classical legal research, which includes attempts to understand the best balance of rights and obligations within the framework determined by legislation. Such research is primarily a process of collecting and analysing facts, identifying and solving legal issues, searching, analysing and synthesising legal powers and determining whether a law is effective. It is based on moral, legal, and political philosophy. In this case, the analysis is built around the question of how it should be [16].

3. RESULTS AND DISCUSSION

At the same time, the study also provides some factual data, however, taking into account their specificity, which was pointed out by J. Monahan & L. Walker [17], as well as S. Diamond & P. Mueller [18]. Therefore, the study contains some factual data, but they do not turn it into a sociological study in the field of law, but only serve as additional argumentation for some theoretical positions.

Considering the above, the study used the classical legal method as the main one, as well as the method of international legal research (ILR), as an additional method. At the time of the adoption of the Constitution in 1996, the institution of the Ombudsman was an absolutely new direction of extrajudicial protection of human rights and freedoms for Ukraine, which was supposed to influence the situation, mainly by the strength of its moral authority, based on international human rights standards. Ukraine was very far from meeting international standards in the field of human rights and freedoms, and they had to be actively promoted in the minds and law enforcement practice. Therefore, the Ombudsman had to develop an individual strategy of action to promote both international standards and the rule of law. One of the main directions of the work of the First Ombudsman of Ukraine on the development of a legal culture and the implementation of international standards in the field of human rights and freedoms was to promote Ukraine’s accession to international documents in the field of human rights and their effective implementation into national legislation. Due to the initiative of the Ombudsman, a number of international and European conventions have been ratified, including the 1951 UN Convention relating to the Status of Refugees¹; the 1977 European Convention on the Legal Status of Migrant Workers²; the 2000 UN Convention against Transnational Organised Crime and its Protocol on Preventing and Combating Trade people, especially women and children, and the punishment for it³; 2006 UN Convention on the Rights of Persons with Disabilities⁴; 2002 Optional Protocol to the UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment⁵.

The Ombudsman’s reports with conclusions and recommendations are the source of the so-called “soft law”. For “soft law” serves as the basis for the specific activities of the Ombudsman on the application of international public and private law. In fact, this law can be called the

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1. United Nations Convention relating to the Status of Refugees. (1951, July). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx>.
 2. European Convention on the Legal Status of Migrant Workers. (1977, November). Retrieved from <https://rm.coe.int/1680077323>.
 3. United Nations Convention against Transnational Organized Crime and the Protocols Thereto. (2000, November). Retrieved from <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.
 4. United Nations Convention on the Rights of Persons with Disabilities. (2006, December). Retrieved from https://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf.
 5. Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. (2002, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/opcat.aspx>.

“case law of the Ombudsman” as indicated by the First Ombudsman of Ukraine – N. Karpachova [19].

The powers and activities of the Ombudsman of Ukraine were assessed at the UN level as fully consistent with the Paris Principles, approved by Resolution 48/134 of the UN General Assembly on December 20, 1993¹, regarding the status of national institutions engaged in the promotion and protection of human rights. First of all, this refers to independence, openness of activities, as well as an impartial position in upholding and protecting human rights and freedoms. Therefore, in March 2009, by the decision of the Bureau of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights at the UN, the Ombudsman of Ukraine was granted the highest accreditation status “A”, which gives the right, in particular, to be directly involved in meetings of the UN Human Rights Council and speak on the issues under discussion along with official delegations. At the same time, the causes of human rights violations are rooted not only in the problems of the country itself, but are also the consequences of global processes. Thus, a huge challenge to the rights and freedoms in the country is the intensifying poverty of the population, which in itself constitutes a violation of human rights and makes it impossible to exercise all other rights. Over 70% of Ukrainian citizens have been and remain below the poverty line [19]. This trend, unfortunately, is typical not only for Ukraine, but also for the entire Europe, as follows from the report of the European Network of the National Human Rights Institutions (2019) [20]. As stated in the above report, poverty is not only a lack of income; it is a lack of access to goods, services, and the community involvement that is necessary to enjoy human rights. Poverty is both a cause and a consequence of human rights violations and must be tackled first. Due to the global financial and economic crisis, the level of economic decline in Ukraine has further exacerbated this problem. The rural population, large families and pensioners are especially affected. A specific attribute of Ukrainian poverty is its spread even among the working population and the emergence of such a phenomenon as hereditary poverty. In some regions of Ukraine, poverty turns into destitution and transforms entire regions into depressive ones. One way or another, this problem is affected by the overwhelming majority of citizens’ appeals that come to the Ombudsman (and their number since 1998 has been approaching 2 million).

As Karpachova pointed out, the most vulnerable social groups of the population have always been the priority of the Ombudsman: children, disabled people, elderly people, homeless people, minorities, women. Considering the intensity of stratification of the Ukrainian society into the poor and the rich, special attention was paid to the issues of discrimination against people on

social grounds: for example, it was possible to protect the right of a talented young poet Yulia Manzhula, a wheelchair person suffering from severe cerebral palsy, to receive higher education; to restore justice and protect the rights of the tragically deceased teacher Yuriy Murashov, chairman of the Ukrainian committee “Helsinki – 90” [21]. Poverty also violates the poor’s right to a fair trial. Even having achieved a court decision in their favour, ordinary people are forced to seek its implementation for years, since more than 70% of decisions of national courts are not enforced. Therefore, the number of applications to the European Court of Human Rights is growing. And then in Ukraine, 95% of decisions of the European Court are not fully implemented, since the state has not solved systemic problems associated with improving legislation, law enforcement practice, and taking comprehensive measures to implement pilot decisions of the ECHR. Despite the fact that currently a new mechanism for the enforcement of the ECHR judgments has been introduced, given the volume of accumulated debts and the number of complaints against Ukraine, Ukraine is still far from resolving the issue of non-enforcement of the ECtHR judgments.

It was poverty and unemployment that prompted millions of Ukrainians to seek greener pastures outside the country. This led to the emergence of such a phenomenon as the mass migration of Ukrainian citizens abroad in search of earnings and a better fate. As Karpachova noted, the labour activity of migrants without a formalised status, in unsatisfactory conditions and with irregular working hours, in case of non-observance of safety measures and performance of work associated with a risk to life and health, manifestations of disrespect for the honour and dignity of a person – all these problems concern not only donor countries, but also recipient countries of migrants. Therewith, in 2003, the Ombudsman presented to the Parliament a Special Report “The state of observance and protection of the rights of Ukrainian citizens abroad” (2003), which became a generalised act of the Ombudsman’s response to numerous facts of violation of the rights of Ukrainian citizens – labour migrants [22]. It provides not only a comprehensive analysis of the problem, but also recommendations and proposals, the implementation of which should contribute to the development of a long-term national policy in the field of migration relations, taking into account the prospects for global development, the interests of Ukraine and its citizens. Another important step along this path was the presentation of the Ombudsman to the President of Ukraine on the need to ratify the 1977 European Convention on the Legal Status of Migrant Workers². Parliament ratified this convention on March 16, 2007.

A new challenge to human rights and freedoms in the world, born of the global financial and economic crisis,

1. Resolution 48/134 of the United Nations General Assembly. (1993, December). Retrieved from <https://www.legal-tools.org/doc/b38121/pdf/>.

2. European Convention on the Legal Status of Migrant Workers. (1977, November). Retrieved from <https://rm.coe.int/1680077323>.

was the growth of international terrorism, which has become the main threat to the fundamental human right – the right to life. The reasons for this threat are as follows: unfair access to resources and national wealth in many countries of the world; massive poverty; intensifying polarisation of the world into rich and poor countries; gross violations of fundamental human rights; dominance of the law of force in international relations as opposed to the force of law, when economically dominant countries allow themselves to declare the territories of other countries as a zone of their national interests, destabilise the situation, inciting internal conflicts and civil wars, including carrying a threat to the deployment of military bases in many countries of the world [23; 24]. The manifestation of international maritime terrorism in the modern world manifested itself in the unprecedented pirate attacks and the seizure of merchant ships in the Gulf of Aden. Not only Ukraine, but also other states turned out to be unprepared for this modern challenge to human rights and freedoms.

In addition, hostilities in Donbas region led to gross, massive, and systematic violations of human rights: hostage-taking, torture, rape and ill-treatment, killings and extrajudicial executions, forced labour, looting and robberies, trafficking in persons and weapons, lack of medical aid and medicines, considerable restriction of the right to freedom of movement, impossibility of making social payments for pensioners, disabled people, children, women. Residents of the front-line territories were simultaneously faced with two challenges – the danger that arises from the impossibility of ensuring security in the immediate vicinity of the war zone and, at the same time, the growing risks of poverty. The solution to this issue cannot be found exclusively at the national or exclusively at the international level – it requires the simultaneous and coordinated application of both mechanisms for protecting human rights. As the results of study suggest, the institution of the ombudsman has a dual nature – the basis of its status is determined by national legislation, and the specifics of its work are largely determined by international provisions. It is this dual role that ensures the special place of the Commissioner for Human Rights in the mechanism for the implementation of international law in the field of human rights protection. The matter of the way the states implement the provisions of such international instruments into their national legislation also becomes particularly relevant, as states must adhere to the changing horizons of international law: respect the concepts of the past, meet the requirements of the present, and work for the future. Therefore, in many respects, the main issue is the problem of implementation of the obligations assumed by the state at the international level into the national law. This refers not only to the ways of statutory consolidation of the operation of such international law provisions at the national level, but also the practice of their application.

Vivek Sehrawat pointed out that the application of international law relies on the state apparatus for implementation at the national level [1]. In this case, the

mechanisms for the implementation of international law can be conditionally divided into two groups: 1) direct incorporation, according to which the status of duly ratified international agreements as part of national legislation is established at the legislative level – in this case, the adoption of additional legislative acts or separate mechanisms for the implementation of such agreements at the national level is not required; 2) implementation – in the event that, for the practical implementation of the obligations assumed, the country must adopt additional regulations, e.g., make provision for liability for certain actions under the threat of punishment or develop a national mechanism to protect certain rights.

In the activities of the ombudsman, both mechanisms are used – the direct incorporation of international documents on human rights to ensure the legal basis of his or her activities and the use of the implementation mechanism, because the very activities of the ombudsman represent the performance of the obligations undertaken by the state to ensure the national mechanism for the protection of human rights. Justin Malbon suggested implementing a global ombudsman service to improve access to justice for those who are negatively impacted by (global) corporate manufacturing or investment activities. The proposed mechanism will offer a low-cost, relatively quick and fair means of obtaining reimbursement. This would overcome most of the jurisdictional barriers faced by plaintiffs suing global corporations in their national jurisdictions [25]. Tero Erkkilä pointed out that the institution of the ombudsman has spread throughout the world, covering all regions and most independent states. Along with the spread of the institution, its institutional development has also become global, which means that its national divisions are increasingly involved in transnational processes where the institution is being developed [26]. The institution of the ombudsman sits between the semantic fields of administrative law, human rights, and good governance.

At present, two mechanisms for protecting human rights can be distinguished in Ukraine: the right of citizens to appeal to the European Court of Human Rights at the interstate level and the right to appeal to the Commissioner for Human Rights at the national level. Both mechanisms have common features (the procedures are carried out without additional payment, and the appeal itself does not make provision for the obligatory participation of a professional lawyer at the initial stage) and substantial differences. At the current stage in Ukraine, the activities of the Commissioner for Human Rights (Ombudsman) constitute the basis of the national mechanism for the protection of human rights. H.V. Muliar stated that the institution of the Human Rights Commissioner of the Verkhovna Rada of Ukraine occupies an important place in the system of guarantees of the rights and freedoms of citizens, since it is an intermediary institution for resolving disputes arising with the participation of state bodies or officials, as well as an effective authority overseeing the observance of human rights and freedoms in various spheres of life [27].

CONCLUSIONS

Human rights have two aspects: international and national. International and national human rights law constantly interact. In Ukraine, historically, a situation has developed when the fundamental human rights and the mechanism for their protection were assumed by the country in the form of international obligations and then implemented into national law. At the time of the adoption of the Constitution of Ukraine in 1996, the institution of the Ombudsman was an absolutely new direction of extrajudicial protection of human rights and freedoms for Ukraine, which was supposed to influence the situation, mainly by the strength of its moral authority, based on international human rights standards. Ukraine was very far from meeting international standards in the field of human rights and freedoms, and these standards had to be actively promoted in the minds and law enforcement practice. One of the main directions of the work of the First Ombudsman of Ukraine on the development of a legal culture and the implementation of international standards in the field of human rights and freedoms was to promote Ukraine's accession to international documents in the field of human rights and their effective implementation into national legislation. The Ombudsman's reports with conclusions and recommendations are the source of the so-called "soft law". For

"soft law" is the foundation of the specific activities of the Ombudsman on the application of international public and private law. In essence, this law can be called the "case law of the Ombudsman".

At the same time, the causes of human rights violations are rooted not only in the problems of the country itself, but are also the consequences of global processes. Thus, a huge challenge to the rights and freedoms in the country is the intensifying poverty of the population, which in itself constitutes a violation of human rights and makes it impossible to enjoy all other rights. The growth of international terrorism, which has become the main threat to the fundamental human right – the right to life – has become a new challenge to human rights and freedoms in the world, born of the global financial and economic crisis. In addition, the hostilities in the Donbas region led to gross, massive, and systematic violations of human rights: residents of the front-line territories were faced with two challenges at once – a danger that arises due to the impossibility of ensuring security in the immediate vicinity of the war zone and the increasing risks of poverty. The solution to this issue cannot be found at the national or at the international level exclusively – it requires the simultaneous and coordinated application of both mechanisms for the protection of human rights.

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НАЦІОНАЛЬНА СТІЙКІСТЬ ДО ДЕМОКРАТІЇ: УКРАЇНСЬКИЙ ДОСВІД

Анотація. *Актуальність та важливість цього питання зумовлені тим, що забезпечення стійкості нації і країни й сучасного розвитку демократичного суспільства вимагає синергетичної діяльності та ефективного діалогу між органами державної влади та громадянами для розуміння проблем і потреб держави та суспільства, особливо у швидко мінливих турбулентних умовах. Мета цієї статті – визначити основні загрози для України та пояснити визначення національної стійкості, розуміючи, що основою взаємозв'язку між національною безпекою та національною стійкістю є сприйняття людьми цих проблем, включаючи їх зв'язок з урядом та адміністративними органами, установами. Провідним підходом до вивчення цього питання був контент-аналіз, що дозволив надати основні відповіді, відповідно до мети – виявити основні загрози та прояснити концепцію національної стійкості; також використовувались статистичні методи – комбіновані методи збору та обробки даних, такі як узагальнення та систематизація, обробка соціологічної інформації, оцінка закономірностей розподілу, графічний метод тощо. Стаття визначає, що основними загрозами для України серед української студентської молоді є внутрішні виклики управління суспільством, зовнішні загрози територіальній цілісності та економічній небезпеці; водночас оновлюється концепція національної стійкості, підкреслюючи найбільш часто використовувані компоненти, такі як здатність націй та країн успішно долати внутрішні та зовнішні загрози, зберігаючи за такої умови патріотичний дух та національну ідентичність, враховуючи високий рівень якості життя у соціально незалежній країні. Ця стаття має практичне значення для переосмислення поняття «національна безпека» та «національна стійкість» відповідно до їх характеристик, приводячи якість результатів цієї концепції до найбільш задовільної як для держави, так і для її громадянина. Отже, розробка необхідних заходів стійкості в Україні може бути спрямована; результати статті можуть бути використані науковцями, практиками, державними службовцями, громадянським суспільством для розробки та впровадження цієї концепції в Україні та стати основою для подальшого вивчення цієї концепції в інших демократичних країнах*

Ключові слова: *сприйняття загроз, державне управління в Україні, безпека національної оборонної сфери, економічна криза, соціально-політичні процеси*

NATIONAL RESILIENCE IN DEMOCRACY: UKRAINIAN EXPERIENCE

Abstract. *The actuality and importance of this issue are due to the fact that ensuring resilience of the nation and the country and modern development of democratic societies requires synergistic activities and effective dialogue between public authorities and citizens to understand the problems and needs of the state and society, especially under rapidly changing turbulent conditions. The purpose of this article is to identify the main threats to Ukraine and clarify the definition of national resilience, understanding that the basis of the interface between national security and national resilience is the human perception of these problems, including their relationship to the government and administrative institutions. The leading approach to the study of this issue was content analysis, which allowed to provide the main answers, in accordance with the goal – to identify the main threats and clarify the concept of national resilience; statistical methods were also used – combined methods of data collection and processing, such as generalization and systematization, processing of sociological information, assessment of distribution patterns, graphical method, etc. The article reveals that the main threats to Ukraine among the Ukrainian student youth are considered to be the internal challenges of governing society, external threats to territorial integrity and economic danger; at the same time, we update the concept of national resilience, emphasizing the most commonly used components, such as the ability of nations and countries to successfully overcome internal and external threats, while maintaining patriotic spirit and national identity, given the high level in quality of life in a socially independent country. This article has practical value for rethinking the term “national security” and “national resilience”, according to their characteristics, bringing the quality of the results of this concept to the most satisfactory for both the state and its citizen. Thus, the development of necessary measures of resilience in Ukraine can be directed; the results of the article can be used by scientists, practitioners, government officials, civil society for the development and implementation of this concept in Ukraine and be a basis for further study of this concept in other democracies*

Keywords: *threats perception, public management in Ukraine, national defence sphere safety, crisis economic, socio-political processes*

INTRODUCTION

Modern characteristics of risks, challenges and threats (hereinafter – stressors) variability, unpredictability, combination, hybridity, complexity and ambiguity of their consequences have made the issues of prevention, control, increased preparedness to meet them and eliminate the consequences of their occurrence extremely relevant for countries, so for their population. Increasingly, the number and significance of the impact of stressors already exceeds the adaptive capacity of countries and nations, so the development of resilience is among the most important tasks of scientists and managers in the world. It is time to realize that the world has changed, the situation has changed, both globally and locally – humanity has reached a new level of development, where we will have to live in new conditions and circumstances, to play by new rules. The world has changed – we can fight it, deny it or wait for the return of the “status quo”, but it is better for us to be “ready to live with a lower level of security, without ceasing to fight for the necessary level of freedom” [1]. Modern crisis economic and socio-political processes in Ukraine have revealed acute problems in the development of our society, which have resulted from both general globalization challenges and special national contradictions. The shortcomings related to the actual lack of a social development strategy

in the context of maintaining stability, ensuring stability and balance have become clearer [2].

Factors of instability and inhibition of progressive development that complicate management processes in Ukraine include: unsatisfactory level of management efficiency of socio-economic and security processes; inconsistency in making and inefficiency in the implementation of management decisions; low level of public trust in public authorities and state institutions and organizations; complication of people's living conditions, impoverishment of the population and growth of social imbalances, etc. The situation is aggravated by the fighting in the east of the country, the Joint Forces operation; growth of forced migration; destruction of infrastructure and territories; formation of separatist sentiments”, etc. [3], intensified aggression in society and deterioration of the social climate, suffering of mental health, socialization disorders, etc.

Thus, since the occupation of the Autonomous Republic of Crimea, the coming of military and the beginning of undeclared hostilities on the part of the Russian Federation, Ukraine has received one of the world's most important stressors – war and terrorism, disturbing the peace, threatening the state and democracy. Therefore, the issue of formation and development of national

resilience is important and relevant for the country and the nation. The basis for the formation of an effective strategy for sustainable development of Ukraine as a European, democratic, independent state in modern conditions of turbulence and uncertainty should be a single general concept of development of the country and nation, the basic principles and purpose of which will be included in all policies. In Ukraine today, the expediency of introducing the term “resilience” is still controversial, as domestic scholars consider using the concepts of “national stability”, “national security”. We are convinced that the use of resilience is an extremely important issue for the Ukrainian scientific community to address today.

In the domestic scientific space M.M. Bilynska and O.L. Korolchuk [4; 5] first proposed to define national resilience as the ability of the social system to build a normal, full life in difficult conditions, the ability of society to withstand challenges and crises in various spheres of public life by making changes and adapting without harm. for the basic values of society and institutions. At the same time, they note that “national resilience” is also an element of society's ability to strengthen national security, and cannot be limited by military, economic or medical-psychological aspects”. We add and emphasize that resilience is equal to the preserved ability to move forward, to develop productively under any conditions and influences.

Thus, the aim of this article is the same – “to bridge the macro-level conceptualization of “national resilience” and micro-level perceptions of individuals” [6]. We explore citizen’s national resilience perception in war and terror-experienced Ukrainian democracy, suggesting a revised definition of national resilience in Ukraine. To this end, we first present a comprehensive review of the definitions of the concept “resilience” at both the individual and the national levels in Ukraine. Second, we describe our analysis which examines the perceptions and self-definitions of national resilience among Ukrainian youth. Also, we explore citizen’s threat perception and define three main threats for Ukraine and Ukrainians. Finally, we discuss our results and suggest theoretical and practical implications as well as acknowledge limitations of the current research.

1. MATERIALS AND METHODS

In order to study the meaning of the national resilience for Ukrainian democracy and to establish a prototype of national perception, we have gathered an understanding of this among Ukrainian students – how they think of national resilience using quality methods. Participants were recruited from the classical civil and military National universities. Permission to conduct research involving humans and their data were received, reviewed and approved by the Ethics Committee of the National Academy of public administration under the President of Ukraine. The use of open questions allowed us to establish a conceptual definition of national resilience both among civilian and military groups of student youth. It should be noted that this is the first time we have conducted such a study on the territory of modern Ukraine. The sample consisted of three

hundred and ninety-six respondents and included women (45.4%) and men (54.6%). Among the respondents, almost thirty-seven percent (36.9%) have a military specialization and, along with sixty-three percent of students (63.1%) receive other civilian professions. Most students of civilian universities study including such areas as “Finance, banking and insurance”, “legal” and “pedagogical” direction. The average age of respondents was 22 years. Although our data may differ from the characteristics of the entire population, they characterize the opinion of the student youth in Ukraine. The study was conducted during 2017-2018. Two versions of the questionnaires were developed – paper and electronic, which included a list of closed and open questions. For this publication, we used the important results, of the answers to two questionnaires.

Each questionnaire included two open-ended questions: 1. “In your opinion, what are the three biggest threats to modern Ukraine?” and 2. “In your opinion, what is the national resilience definition in Ukraine?”. The procedure for analyzing both questions was to select the most common answers, group similar statements ranking and form the results of the study – the formulation of answers to achieve the goal of the study. Also, combined data collection methods were used: computerized online interview CAWI (Computer Assisted Web Interviewing), developed using the functionality of the GoogleSurvey platform, and PAPI method (Pen-and-Paper Personal Interview) using a paper interview form. Data array processing was performed in the software environment IBM SPSS 18 (license code d91d9caec9c8f306c0fa).

The method of content analysis was used to analyze the results and summarize the answers of respondents to achieve the goal – to identify the main threats and clarify the concept of national resilience. The analysis of the first question allowed us to rank and identify the priority of threats that modern student youth in Ukraine feels for their country. Using methods of statistical processing of information, we grouped the responses, as a result of which we formed five main groups of threats, to which we attributed the most frequently used responses of respondents. While the analyzed information on the second question allowed to study the mood of the respondent students and to establish a prototype of national resilience – how it is felt, perceived by young people today. Combinations of statistical methods were also used, such as generalization and systematization of data, processing of sociological information (coding, logical control), estimation of regularities of data distribution, nonparametric methods of research of interrelation, graphic method.

2. RESULTS

The analysis of the results of the survey of student youth in Ukraine on their understanding of the main threats in the presence of which modern Ukraine lives and operates showed: studying the threats prescribed by respondents, we obtained a list of 331 positions, which are divided into 5 groups – presented in Table 1.

Table 1. Distribution of respondents' answers to the question “What, in your opinion, are the three biggest threats to modern Ukraine?” by gender and specialization of study, %

	Total respondents, including:	By sex		by specialization	
		men	women	military	civilian
(1) Internal challenges of governing a society	42.5	49.1	34.1	53.8	34.7
Corruption, bribery	17.9	20.8	14.2	21.3	15.5
Government (incompetence and inaction of politicians)	8.4	11.6	4.3	13.6	4.8
Internal conflicts, civil war	6	6.3	5.5	6.7	5.4
Lawlessness and impunity	3.2	4.7	1.4	5.7	1.5
Indifference of society (lack of patriotism, mentality of people)	3.5	3.6	3.4	3.7	3.4
Degradation of society (loss of culture of the Ukrainian people, spiritual decline)	3.5	2.2	5.3	2.7	4.1
(2) External threats to territorial integrity	26.2	24.9	27.9	24.8	27.2
War (military aggression from the Russian Federation)	23.6	22.7	24.7	22.1	24.7
Threat to the territorial integrity of the country	1.8	1.1	2.7	1.5	2
The threat of terrorism, the presence of illegal weapons	0.8	1.1	0.5	1.2	0.5
(3) Economic danger	17.4	15.9	19.2	12.7	20.6
Unemployment	2.4	2.2	2.7	2.2	2.6
Economic crisis (economic imbalance, threat of default, devaluation of the hryvnia)	13.9	12.3	16	9.4	17
Financial dependence on other countries (external debt)	1	1.4	0.5	1	1
(4) Slowing down the socio-humanitarian development of society	13.9	10.1	18.8	8.7	17.5
Poverty (starvation)	2.6	2.9	2.3	3	2.4
Demographic situation (birth rate reduction, labor emigration)	3.4	1.1	6.4	0.2	5.6
Diseases and bad habits (alcoholism, drug addiction)	1.4	1.4	1.4	2	1
Low quality of medicine, education and social support	1.6	1.8	1.4	1.7	1.5
Quality of the roads	0.8	1.1	0.5	0.2	1.2
(5) Ecological threats	4	1.8	6.9	1.5	5.8
Ecological conditions (environmental pollution, climate change, ecological threat, deforestation)	4	1.8	6.9	1.5	5.8
TOTAL	100	100	100	100	100

According to the data obtained, the vast majority of respondents believe that the main challenges facing modern Ukraine are:

(1) Internal challenges of governing a society: corruption and bribery in the highest echelons of power, incompetence and inaction of politicians, lawlessness and impunity – as a norm, the threat of civil war, as well as public indifference (lack of patriotism, mentality) and loss of Ukrainian culture, spiritual decline – 42.5%;

(2) External threats to territorial integrity: military

aggression by the Russian Federation, the threat of terrorism, the presence of illegal weapons “on-hand” – 26.2%;

(3) Economic danger: unemployment, economic imbalance, threat of default, devaluation of the hryvnia, financial dependence on other countries, including the presence of external debt – 17.4%.

In addition, as the threats to the country are also considered: (4) slowdown in socio-humanitarian development of society associated with poverty (starvation), depopulation, labor migration, the development of incurable diseases and

the spread of bad habits, poor quality of medical and educational services, social support, as well as (5) deterioration of the environmental situation – these factors were noted by 13.9% and 4.0% of respondents, respectively. Some (16.5%) of respondents could not identify any threat to the country.

Among the selected groups of factors that form the main threats to modern Ukraine, it should be noted that the largest percentage of respondents are concerned about

military aggression by the Russian Federation – about a quarter of all respondents. At the same time, every fifth man (20.8%) and those in the military (21.3%) consider the spread of corruption and bribery the greatest threat to Ukraine. The economic crisis is a high threat among women and civil servants (16-17%) (Table 1). The analysis also showed that there is some differentiation in the distribution of responses among men and women, as presented in (Fig. 1).

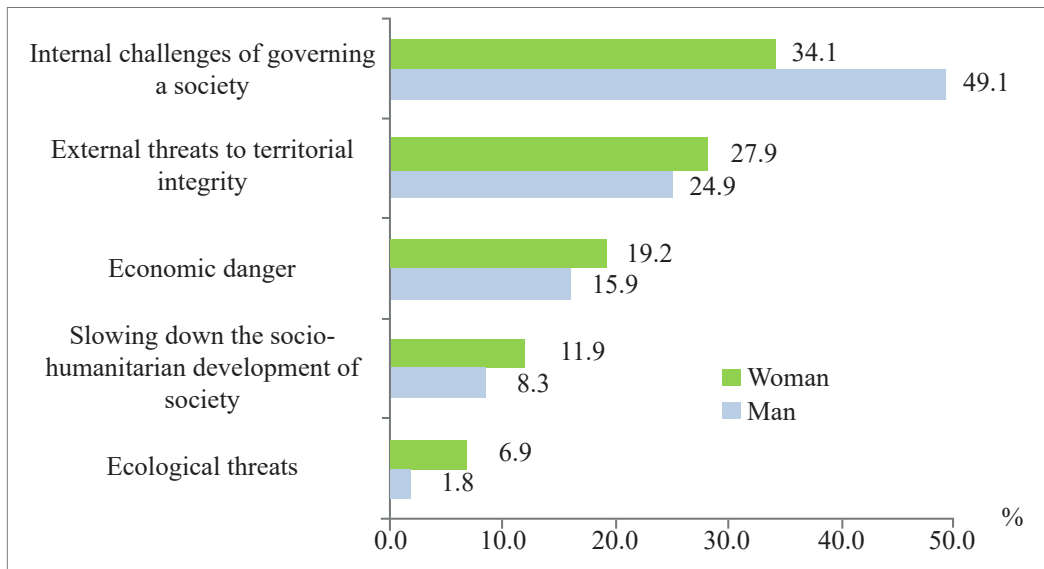


Figure 1. Distribution of respondents' answers by sex to the main threats to modern Ukraine, in % among those who decided to answer

Source: Calculated by the author according to the survey data

As we can see from Figure 1, the three main threats to modern Ukraine are the same for both women and men. However, the distribution of respondents is different. Thus, 49.1% of surveyed men consider the internal challenges of society to be the most important threat. The corresponding share among women is 15 percentage points lower and is at 34.1%. At the same time, 47.1% of women consider external threats to territorial integrity and economic danger

to be critical, while the corresponding percentage of support among men is 40.8%. Note that the similarity coefficient of gender distribution structures is 86.9%. 98.6% of young people receiving military education are men. Therefore, it is obvious that the distribution of answers of respondents by specialization of education, repeats the trends of distribution of answers by gender (Fig. 2).

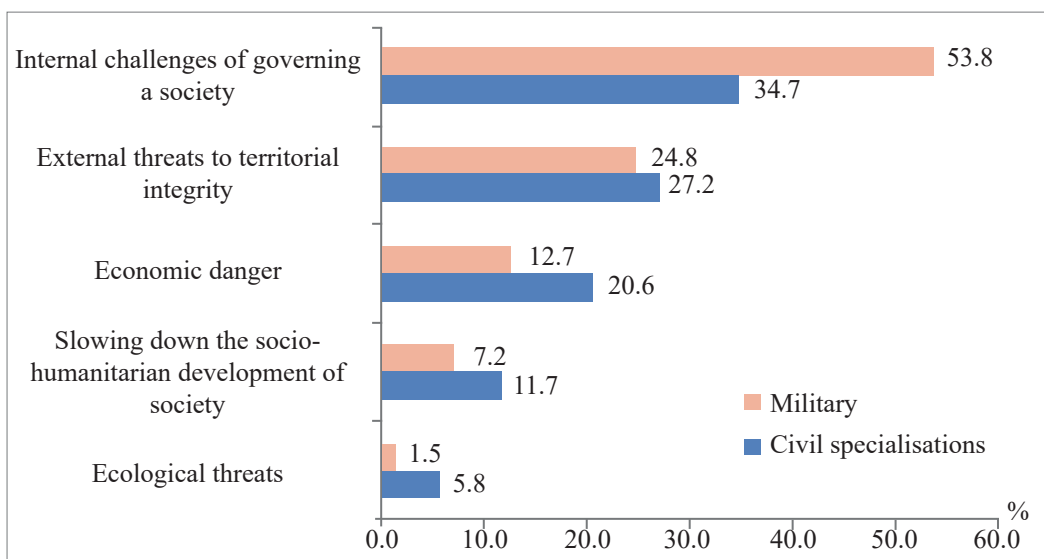


Figure 2. Distribution of respondents' answers to the main threats to modern Ukraine depending on the specialization of education, in % among those who decided to answer

Source: Calculated by the author according to the survey data

3. DISCUSSION

3.1 *The Concept of Resilience*

Since the beginning of the XXI century, humanity has been analyzing the stressors associated with modernity, hybridity, war and terrorism, learning to anticipate, prevent and combat their consequences. At the same time, the concept of resilience began to be studied in the context of the ability to resist and develop under the influence of such a severe stressor as terrorism. The destructiveness of terrorism worldwide has yet to obliterate people's motivation to survive and to thrive. Individuals, as well as communities, are characterized by the ability to overcome adversity, often referred to as resilience [7-9].

In this article we will not study the nature and formation of the term resilience, understanding its controversy and lack of uniform interpretation, even today, we will limit ourselves to the general understanding that resilience is the ability of a person or social system to build a normal, full life in difficult, stressful conditions. [7; 10-13]. This term requires study, scientific substantiation; – is a consequence of successful individual self-regulation and the ability to function effectively during traumatic events [14; 15], and the ability to restore internal balance, or stable functioning after injury, misfortune or failure. There are a number of features designed to help people overcome adversity [16], and a positive trajectory of adjustment after stress [17], which creates the conditions for successful adaptation and continued effective operation. In other words, after the impact of a traumatic event, the resident person quickly recovers, or does not develop psychological or psychosomatic disorders [7; 18; 19].

The above definitions allow us to summarize that resilience is both the result of appropriate correction after the onset of stressors, and the process that occurs during the appearance and influence of the stressor, and/or after its action. We agree with the authors that the consideration and examination of such a process should include the study at the national level of perceptions of the affected population of socio-psychological aspects that may lead to the ability of the population to mitigate the consequences of such disasters [6]. It is worth noting that conceptually, we consider resilience to be broader than resilience, risk and threat, because it means resistance – the ability to protect integrity under conditions of strong stressors or their combined effects, and, importantly, the ability to continue quality life under new, stressful conditions and continue to evolve.

In this article we rising up a question of the national resilience nature, and how it is perceived within democracies, as was done by our colleagues from Israel – their theoretical substantiation and the conducted research formed the basis of our research in Ukraine. We do not intend to question the nature of national resilience, but we want to describe its perception in the conditions of modern Ukrainian democracy in order to highlight certain recommendations for Ukraine.

3.2 *The Role of the Stressors*

The modern world is full of stressors that affect people, nations and countries every day. These include man-made

Thus, among the military, one in two sees danger in the internal challenges of governing the state, and one in four – external threats to the territorial integrity of the country. On the other hand, among the representatives of civil specialization, the positions are supported by 34.7% and 27.2%, respectively. At the same time, every fifth civilian (20.6%) considers the economic danger to be one of the most important threats, while among the military the corresponding percentage is 12.7%. The coefficient of similarity of distribution structures by specialization of education is 80.8%.

Content analysis of the given definitions of national resilience allows us to draw such conclusions that the youth understands national resilience, as the ability of the nation (people, citizens) to maintain balance – to experience troubles (both internal and external) and to accept and resist crises, adapt to new, changed conditions, remaining calm (stable, enduring) and, most importantly, patriotic (united, acting side by side, preserving their own idea and freedom), with faith in a better future. Furthermore, it can be concluded that the crisis conditions (as the most commonly used words in the definitions by Ukrainian youth) include war, occupation of Ukrainian territories and external military aggression by the Russian Federation and imperfection of power and governance (crises in various spheres, corruption, inaction).

In summary, we emphasize that analyzing the answers of the respondents, it can be noted that most of the answers link national resilience with the ability of the country, nation, people to cope with any problems. Also, we should emphasize that the living and working conditions of every Ukrainian are important for the formation of national resilience. The shortest answer was “side-by-side struggle” and “confidence in the future”. Among the longest – “This is when a nation can and is able to adapt to radical changes in any area of life, and that stimulates it to develop new skills to solve new problems that the nation has not faced before. In order for a nation to be stress-resistant, it must know that its state can provide support in any situation, there must be a national spirit so that people can be united to overcome everything together”.

As was expected, the respondents included psychological and political components in the definitions, as well as the psychological component, individual resilience, which is the most commonly used element in defining national resilience. Trust in state institutions as those that should provide certain conditions, resolve internal issues, inspire patriotism and optimism, encourage unity – have become important components that are often used in the definitions of respondents.

Let us assume that the definition of national resilience should include: – the ability of the nation and the country to successfully combat internal and external threats (crises, war, failure of government and administration, economic, humanitarian and other spheres) while maintaining the patriotic spirit and national identity, as well as providing the state with a high level and quality of life of its people (opportunities to develop and be healthy) and maintaining its own social basis and independence intact.

disasters, natural disasters, as manifestations of incessant climate change, economic failures, social crises, wars, cyberattacks, terrorism. The losses from the action of such stressors are enormous – material, financial, infrastructural, etc., and, especially, the most important resource, the most powerful potential of countries, nations – people – suffers from blows. At the same time, the number of cases is constantly growing, they become more powerful, combining and changing, have a complex and unpredictable impact, causing turbulence in the living conditions of countries and nations. In the sociological and psychological literature, the concepts of danger associated with the concept of anxiety and fear, which is due to the natural course of life: for example, to distinguish between threat and danger is very difficult, because man in today's world is constantly in danger because there is no confidence, and social stability has been replaced by constant uncertainty, under which stressors are extremely common.

U. Beck emphasized that modern society carries many risks and dangers of a global nature, from which neither the poor nor the rich are insured [20]. Analyzing the works of the classics of sociology on the topic of security / danger T. Shypunova [21] considers two types of danger: 1) threat as a danger (risk) to the body, life, well-being and freedom (ontological threat – insecurity); 2) danger in the perception and assessment of these threats as epistemological uncertainty (uncertainty). Another classic of sociology, dealing with issues of risk, danger and safety is N. Luhmann. He emphasized that modern societies are societies of predominant risk, due to their complexity and opacity, uncertainty and uncertainty, covering almost all spheres of life [22].

The source of the dangers that undermine the stability and stability of modern society, create a danger to human existence are various processes of both social and natural nature, and therefore they are divided into the following types: natural (earthquakes, floods, hurricanes, tsunamis, etc.); environmental (environmental pollution, global warming); epidemiological (various epidemics, the spread of which in the context of globalization is a serious threat to public health – for example, previously unknown to mankind epidemics, bird flu, swine flu, COVID infections, etc.); man-made (catastrophes, explosions, fires, etc.); social (wars, terrorist attacks, various social conflicts caused by tensions in the field of interethnic, socio-political, religious relations, as well as related to the growth of social stratification, poverty, crime, deviance in society, etc.); socio-psychological threats associated with various mental disorders, decreased social and mental well-being of the population, increasing aggression, cruelty, indifference, social apathy in society, etc. [23].

It is well known that the feeling of danger by its psychological nature is closely related to the feeling of anxiety – such an emotional state that arises in situations of uncertainty and danger, characterized by the expectation of undesirable developments. The problem of feeling safe / dangerous is also social, as the main reasons for its occurrence are often social factors. Using a sociological approach, social risk factors include: the political and

economic situation in the country; level of social stratification; social contradictions (employment, unemployment); demographic factors (including migration); crime rate and law enforcement activities; condition of roads and infrastructure; level of education and medical care; the level of spiritual and cultural life of the population. Sources of potential dangers and their affecting factors for humans – phenomena, processes, objects, properties that can, under certain conditions, harm human health or life or systems that ensure its vital functions. Everyone intuitively senses danger and understands its significance in their own way. According to UN experts, most people associate the feeling of danger with everyday problems and worries, and do not base it on fears of global catastrophes or international conflicts.

The feeling of danger also has a deeply individual tone, which mainly depends on: a) the level of social and spiritual development of the individual; b) situations and social order that positively or negatively affect the worldview of the citizen [24]. In identifying hazards, it is necessary to proceed from the principle of “everything affects everything”, i.e. the source of danger can be all living and non-living, and all living and non-living things can also be subject to danger. Sources (carriers) of dangers are [24] 1) natural processes and phenomena; 2) elements of the technogenic environment; 3) human actions that lead to threat of danger.

Dangers are characterized by constant existence in space and time; implementation in the form of flows of energy, matter and information; do not act selectively, and when they arise, affect the entire material environment. The reasons why some objects do not suffer from certain dangers, or some suffer more and others less, are called the properties of the objects themselves. The list of possible dangers in the literature includes more than 150 items and is not considered complete. It is important to develop measures to prevent and overcome the negative consequences, so there is a need to identify, analyze both the actual stressors, hazards and sources that cause them, and clarifying factors that directly affect the person.

Sources of man-made hazards are called objects of material and cultural environment related to human impact; social – low spiritual and cultural level, which is often associated with unsatisfactory financial condition, poor living conditions and activities (strikes, uprisings, revolutions, conflict situations on ethnic, ethnic, religious grounds, etc.); sources of political dangers – conflicts at the international and interstate levels, spiritual oppression, political terrorism, ideological conflicts, wars, etc. Still, it should be borne in mind that most modern sources of danger are of a combined nature, such as: natural and man-made – smog, acid rain, dust storms, deserts and frost; natural and social – drug addiction, epidemics of infectious diseases, etc.; socio-technogenic – occupational injuries and morbidity, mental disorders and diseases caused by the impact on consciousness and subconscious (media and / or special technical means, drugs, etc.). In addition, a significant factor is the hybridization of modern stressors and hazards.

We live in a world of major geopolitical shifts and life-changing technological innovations ... From the rise of nationalism, to increased demands for privacy, following widespread data leaks; from balancing growing human needs with planetary and environmental limits, to the impacts of sophisticated automation on people's lives... to take responsible action that brings about a stable, sustainable and peaceful world [25]. It should be emphasized that humanity today daily fights and confronts the growing number and variety of natural and anthropogenic man-made stressors and catastrophes and the spread of deadly viruses and bacteria; global economic, social, political crises; the inability of international organizations to ensure global peace, and so on. A clear characteristic of modern risks and threats is variability, compatibility and uncertainty, which can ever worsen current trends [26] and provoke unknown consequences. In recent decades, the issue of ensuring resilience to the challenges of national security in a democracy, such as terrorism and political violence, has become important in the world [6]. According to US State Department experts, global terrorism is intentional, politically motivated violence perpetrated by substate groups or illegal agents involved in hostilities to influence the relevant audience [27]. Terrorism is defined as:

1) "any type of political violence that does not have adequate moral and legal justification, regardless of who resorts it – a revolutionary group or government" and as "political extremism involving violence against innocent individuals" [28];

2) or through the prism of rationalism and consistency, as a "intimidating, clearly calculated attempt to use violence to achieve certain goals" [29];

3) "as a danger to the social and political stability of States, a threat to the global development of democratic structures, and an assault on the safety and individual freedoms of citizens, and called on all States to adopt appropriate measures to tackle terrorism and its social, political and economic causes" [30];

4) "as a threat to democracy, human rights and society" [30];

5) characterized as one that "leads to the destruction of the civilian population and the corresponding conquest of territories" [31];

6) the modern feature of the terrorist threat in the context of globalization is considered to be that "their result is the growth of violence in the world and the spread of the idea of violence and violence in society" [32].

We agree that terrorism damages the most valuable potential and resource of the world – people: "the very feeling of danger creates new challenges in the functioning of all spheres of public life" [33], "terrorism is so strongly linked to the truth. It appeals to our emotions, to our feelings, instead of rational thinking" [1]. Terrorism does more than kill the innocent: It undermines democratic governments, even in mature democracies like those in the United States and much of Europe. The fear terrorism generates can distort public debates, discredit moderates, empower political extremes, and polarize societies. An ar-

ray of actors, including governments, international institutions, and civil society can decrease the scale and scope of terrorist violence and mitigate its most dangerous political effects [34]. Finally, political leaders should emphasize societal resilience in order to decrease the psychological impact of terrorism.

The unprecedented nature of stressors and the unprecedented nature of their combined effects, the turbulence they encourage to develop, have brought the issue of resilience as a concept that explains the issues of individual and national stability, stability and security in general. At present, there is still no single interpretation of the essence of the term "resilience" and "national resilience", which is due to: 1) relatively short study time; 2) study in different branches of science and in different vectors, respectively, distinguishing different subjects and objects of research, etc. But it is clear that the national resilience, in association with national security and stability of development, necessarily depends on the level of resilience of its population – individual resilience. The feeling of insecurity and closeness to military events, terrorism traumatizes society, and interpretations of terrorist acts change the perception of the world by man, the perception of threats. Psychologically resilient individuals usually perceive the world in a meaningfully predictable, controlled environment.

Studies conducted in Israel [9; 35; 36] and in South Africa [37] showed that people who are exposed to severe psychological stress, in response to traumatic events, tend to see the world more threatening, unpredictable and dangerous, those who have not been traumatized, individual interpretation of reality, will see the world more positive. Thus, we agree that in democracies, where issues of national security and national resilience are closely interlinked, psychological and political perceptions play an important role in absorbing stress and quickly returning to the "norm" of external threats. threats will be personal relationships (such as optimism) and political relationships (e.g., patriotism and trust in government institutions) [6].

Individual and societal level after the influence of stressors, which help management to address issues of national security and resilience. At the human level, optimistic characteristics indicate faster and more effective adaptation to changing conditions, the ability to cope with threats, perceiving less dangerous). This is due to the fact that optimism reflects the reassurance of thoughts, the ability to expect and seek new ideas and solutions, etc., and in the face of constant real threats and influence of terror, optimism is seen as an individual socio-cognitive attitude to the world – optimists are better adapted to stress conditions, showing greater resilience.

In this regard, interesting research was conducted by a team of scientists from Israel and America, which inspired us to apply the same in Ukraine. The research is based on the understanding that national resilience is provided mainly by national security and resilience of people, respectively, is also determined by the feeling of stressors and the perception and attitude of the population to government, government agencies and more. As a

result, the authors proved that the basis of perception of the definition of national resilience is also provided by the political and psychological characteristics of citizens such as threat perception, optimism, patriotism and trust in government agencies. The result of this study was the reconceptualization of the term “national resilience”, which we repeated in Ukraine.

3.3 *The Concept of National Resilience*

The most modern theories aimed at solving problems of prevention and overcoming stressors, catastrophes are looking for mechanisms that will be able to ensure the stability of life processes of countries and people in crisis – to overcome difficulties, change, continue to develop. It is not just about adaptation, but about innovation, creativity and real change of imperatives and patterns to provide the ability, opportunities, resources to tackle the big challenges of our time. Therefore, national resilience issues are becoming increasingly important. This, again, emphasizes and emphasizes the importance of research on the development of national resilience in the world and in Ukraine in particular. Adequate counteraction to modern hybrid threats can be ensured only if cooperation between state institutions, civil society organizations, business, media, IT sector and all other stakeholders is established, as complex stressors need a public response. Therefore, in order to apply a set of measures to make a public response, it is necessary to create a scientifically sound concept and strategy that can cope with this task.

Today, even in Ukraine, anthropogenic crises, such as terrorism, wars, which spread human suffering and turn people's lives upside down, have become more frequent. “This is, above all, a human crisis that calls for solidarity. The creativity of the response must match the unique nature of the crisis – and the magnitude of the response must match its scale” [38]. There are already good developments in the initial stages of national resilience development in the world – concepts have been formulated, sets of policies, practices and decisions affecting its formation have been developed and implemented at various levels, applied on a special basis (state security, prevention and reduction of natural disasters, etc.) with a mandatory set of specific data, information support, coordination and cooperation of organizations, territories, authorities. national resilience was defined as the resilient ability of a community to resist and recover from adversity (economic stresses, pandemics, cataclysms), as a paradigm shift in emergency preparedness... which emphasizes strengths, not just a description of vulnerabilities / weaknesses [3; 39; 40].

Modern complex and traumatic living conditions of the world, which are stimulators of activity and relevance of the formation and improvement of HP, are in a wide range from natural (floods, hurricanes, earthquakes, forest fires, etc.) to anthropogenic (wars, disasters, cyber and terrorist attacks). hybrid effects, etc.). The catastrophic events of September 11, 2001, combined with the chronic threat of terrorism and the widening threat of war (such as the threats from North Korea and Iraq), dramatically

changed Americans' attitudes toward perceptions, threats, and invulnerability – more often than not, the impact of terrorist attacks known as collective trauma [41-44]. This determines the importance of the term “resilience” not only in the psychological literature, but also in modern political discourse [45]. Since the events of 2014, the Revolution of Dignity, the annexation of Crimea and the military intervention of the Russian Federation on the territory of Ukraine, the country and its citizens have also changed their attitudes to the processes of ensuring the national resilience.

The five main components of national resilience include: physical and psychological health, social and economic justice and well-being, effective communication with risks, integration of organizations (governmental and non-governmental), and social connectedness [39]. F.H. Norris and the author define national resilience as a set of network adaptive opportunities for economic development, information and communications, community competence and social capital [17]. I Nuvayhid, H. Zurayuk, R. Yamoce, C. Kortas [40] believe that national resilience is a process rather than a result in which collective identity, prior experience with an adverse event, and established social support networks contribute to increasing national resilience over time. In addition, community cohesion, social solidarity and associated political leadership affect the quality of national resilience after a negative event [39].

The concept of national resilience has emerged in the literature as a recognition that the power of a nation should be valued – as military and political-psychological potential [46; 47]; as a process of adaptation and “absorption” of stressors or changes caused by an external threat; as the ability of society to withstand stressors and crises in various fields, by making changes and adaptations without compromising the core values of society and institutions [48]. The level of national resilience is seen in two different ways: 1) as the ability of society to meet challenges with its intact values and institutions [47], 2) as adjustments and adaptations that help “close the gap” between current tensions and community needs; its capabilities [49; 50]. In addition, at the national level, under new behavioral patterns, emerge, 3) as a response to the threat, new political and social relations that can characterize the country's ability to overcome crises and conflicts [13; 51]. Such relationships are considered measurable indicators of patriotism, optimism, social integration and political trust [6]. These four indicators are a practical dimension of the national resilience formed in terms of social capital. We support the idea that national resilience should also be measured in terms of political and psychological attitudes, as this affects the strength of democracy and trust.

The authors of the work “What does national resilience mean in a democracy? Evidence from the United States and Israel” highlighting the importance of applying the political and psychological component of national resilience in research strategy. Based on this, we support their position that national resilience is the ability of society or citizens to withstand stressors and crises in any area of society and the state by making changes and adaptations

without damaging their own core values and institutions [52]. The United States and Israel are two Western democracies that have been under threat of terrorism for decades. Today, Ukraine is also in a number of countries where terrorist attacks and military events disrupt the daily life of society. These threats are too influential in terms of behavioral consequences, which can increase the ability of democratic societies to resist stressors.

It is important to emphasize that, without a doubt, political relations also have an impact on communities and the country's ability to cope with threats and endure hardships. For example, when assessing the response to a potential terrorist attack or initiating an operation against terrorists, public perception must be taken into account, as it allows decision-makers to assess the population's ability to tolerate a new round of violence. Such public perception is trust in government [6]. For example, the influence of terror has led to higher levels of patriotism among Americans [17]. Such high levels of patriotism and love for the country among citizens reflect a willingness to sacrifice for the sake of the country, to live under rocket fire, as the experience of Israel has shown [41-44], and available support for military responses to terror. Such data on the assessment of psychological and political consequences show the level of adaptability to new threatening situations of citizens in democratic societies. Such adaptation – behavioral and cognitive characteristics – is the basis of resilience. Based on a study of the perception of national resilience in a democracy among Israeli and American students [41-44; 53; 54], we conducted successful research and received results among the student youth of Ukraine. The comparison of the United States with Israel was due to two factors: 1 – both countries are Western democracies, 2 – both are under constant threat of terrorist attacks, which inevitably affects the political and psychological perceptions of the national resilience and security.

Today in Ukraine there is no common vision and coordination strategy for shaping and ensuring national resilience; this problem is only included in the list of important political decisions and trends in the future development of public administration. It is important today for Ukraine to form, develop and implement full-scale measures for the development of national resilience, applying its paradigm as a strategic imperative for the development of public administration. This requires basic research in this direction [3].

Thus, national resilience is: 1. – an indicator of society's ability to withstand stressors, threats, while maintaining integrity – intact values and institutions; 2. – progress, moving forward, through overcoming stressors, threats and their consequences, continuing productive life in new conditions and the development of society based on behavioral adaptation in changed, new conditions. National resilience is more broadly defined as a response to threats to social development through the formation of new political and social relations that characterize the country's ability to overcome crises and conflicts. The concept of national resilience should be extended to include political

and psychological components. In a democratic society, aspects such as trust in government and public institutions, patriotism and tolerance play an important role in political participation and social capital, which in turn leads to higher levels of national resilience [4].

CONCLUSIONS

Definitions of the term national resilience include military and political, economic and environmental, etc. aspects based on the main macro-level factors. We propose to integrate them with factors at the micro-level, in particular, including psychological and political ideas – people's perception of the definition of this term in Ukraine. Such a combination will provide an important component – real public participation, which is a key element of democratic societies, in defining the concept of national resilience for Ukraine and will add activity to the establishment of a constructive dialogue among government, administration and society.

It was found that it is important for Ukrainian student youth to ensure national resilience. The analysis also showed that young people consider issues of internal order, the efficiency of government and administration – corruption, inaction and impunity, as well as indifference, lack of patriotism the most threatening. Issues of national security and protection from external threats (war, terrorism, etc.) play an important role. Then there are the dangers of the economic crisis, socio-humanitarian development of society. It is proved that the national resilience is a dynamic process, not a static phenomenon, should be constantly checked and updated, synchronized to the realities of the life of the country and nation. It is important to note that such a study helps to evaluate the ability of democratic societies (including Ukraine) to set realistic goals for success in recovering from the impact of hazards through the action of stressors and crises. Issues of governing and control, terrorism, and military action are not the only threats of the modern democratic world, but, unfortunately, are strong stressors for Ukrainian realities. For example, our analysis showed that after internal problems related to the governing of the state, the largest threats people think of are external threats, including war and terrorism. The next place is occupied by problems of the economic crisis and the slowdown in social development.

Thus, it is necessary to continue the research on the questions of psycho-political factors of national resilience, which will allow authorities, representatives of the government, to better understand the needs and concerns of citizens regarding the relevance of the threats to their livelihoods and to find the most effective measures and methods that can be used to prevent and/or resolve crisis situations. It is important to note that today there is an urgent need for scientists to study and explore the various factors that weaken and strengthen national resilience to improve, and where necessary, develop and implement an adequate authentically adapted to the realities of the national strategy results. It is also important that, notwithstanding such analyses by groups of scientists from Ukraine and

Israel, we can state that the results of these studies have led to critical insights. The presence of the main threats and ensuring the stability of the political institutions of society are important components of the national resilience.

Given the current global threats, the data show that governance is a key element in strengthening national resilience as well as democracy when gaining the support and trust of citizens in government. On the other hand, the state must study the views of its citizens and the real needs, problems and threats in order to have a vital impact on the country's ability to cope with stressors and crises. The expediency of introducing the term "resilience" is still controversial in Ukraine, but we are convinced that the use of resilience is an extremely important issue to address to on the agenda of the Ukrainian scientific community today.

The results of our study suggest that such public opinion polls require further implementation. The answers will be fundamental arguments for improving national resilience in Ukraine, which will help to better understand how to measure and shape it in order to implement and develop in the country, ensuring the resilience of nation and state.

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ВЕРХОВЕНСТВО ПРАВА І НАДЗВИЧАЙНИЙ СТАН: ГЕНЕЗИС ПРОБЛЕМИ

Анотація. *Метою статті є прояснення співвідношення концепцій верховенства права і надзвичайного стану в контексті питання про природу права та його співвідношення із силою. Актуальність теми зумовлена потребою в переосмисленні ідеї верховенства права та його меж в контексті сучасних викликів, зокрема в умовах пандемії. Дослідження має міждисциплінарний характер, що полягає в поєднанні юридичної, філософсько-правової та історико-філософської перспектив з використанням методів філософсько-правової рефлексії, порівняння, аналізу й синтезу та історико-філософської реконструкції. Прояснення співвідношення верховенства права і надзвичайного стану здійснюється у три кроки. Спершу експліковано засадничу ідею верховенства права, яка об'єднує численні його інтерпретації: право розглядається як антитеза свавілля сильного. Відповідно верховенство права виявляється вимогою, іманентною будь-якій правовій системі. Водночас підкреслено внутрішню обмеженість верховенства права, пов'язану з нормативною природою останнього, яка з неминучістю зумовлює необхідність балансування верховенства права і справедливості і радикалізацією якої покликана до життя ідея надзвичайного стану. Другу частину статті присвячено критичному аналізу теорії надзвичайного стану, яка, на протизвагу ідеї верховенства права, ототожнює право і силу, а зрештою, і заперечує право як таке, підносячи безправ'я до норми. Насамкінець, на третьому кроці проаналізовано три підходи до співвідношення верховенства права і надзвичайного стану: 1) пріоритет надзвичайного стану, 2) слабку версію пріоритету верховенства права і 3) сильну версію пріоритету верховенства права. Зроблено висновок, що фундаментальна опозиція між верховенством права і надзвичайним станом унеможливує їх несуперечливе поєднання, а відповідні спроби завжди виявляються компромісом не на користь першого. Натомість, на думку авторів, варто визнати обмеженість самого права, не полишаючи водночас дискурсу верховенства права та засадничих для нього підстав*

Ключові слова: *природа права, право і сила, права людини, надзвичайна ситуація, стан виключення*

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RULE OF LAW AND STATE OF EXCEPTION: THE GENESIS OF THE PROBLEM

Abstract. *The purpose of this study was to clarify the correlation between the concepts of the rule of law and the state of exception in the context of the question of the nature of law and its correlation with force. The relevance of the study is explained by the need to reinterpret the idea of the rule of law and its boundaries in the context of modern challenges, in particular in the context of a pandemic. The study is of an interdisciplinary nature, which lies in combining legal, philosophical legal, and historical-philosophical perspectives using methods of philosophical legal reflection, comparison, analysis and synthesis, and historical-philosophical reconstruction. The correlation between the rule of law and the state of exception was clarified in three steps. First, the fundamental idea of the rule of law was explicated, which unites its numerous interpretations: law was considered as the antithesis of the arbitrariness of the powerful. Accordingly, the rule of law turned out to be a requirement immanent to any legal system. At the same time, the internal limitation of the rule of law associated with the statutory nature of the latter was emphasised, which inevitably necessitates striking a balance between the rule of law and justice, and the radicalisation of which brings to life the idea of a state of exception. The second part of this study contains a critical analysis of the theory of the state of exception, which, in contrast to the idea of the rule of law, identifies law and force, and ultimately denies law as such, normalising lawlessness. Finally, in the third step, three approaches to the correlation between the rule of law and the state of exception were analysed: 1) the priority of the state of exception, 2) a weak version of the priority of the rule of law, and 3) a strong version of the priority of the rule of law. It was concluded that the fundamental opposition between the rule of law and the state of exception renders their consistent combination impossible, and the corresponding attempts always turn out to be a compromise not favouring the former. However, according to the authors of this study, it is necessary to recognise the limitations of the law itself, without abandoning the discourse of the rule of law and the fundamental grounds for it*

Keywords: *nature of law, law and power, human rights, state of emergency, state of exception*

INTRODUCTION

Along with human rights and democracy, the rule of law is currently one of the key ideals that inspires liberal societies. The Preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms mentions the rule of law as part of a common European heritage¹, and Article 3 of the Charter of the Council of Europe – as a principle that every member of the Council of Europe must necessarily recognise². As Tom Bingham notes, in a world divided based on nationality, race, skin colour, religion, and wealth, the rule of law is one of the key unifying factors, which, perhaps, most brings us closer to a universal secular religion, an ideal, but an ideal that should

be sought in the interests of good governance and peace, at home and in the whole world [1, p. 172]. In this sense, the rule of law is more of an aspiration than an existing state of affairs, an excessive ideal to which a particular society can approach to a greater or lesser extent. At the same time, this concept refers to a set of specific requirements for the legal system, generally aimed at curbing power arbitrariness by establishing certain limits of discretion for holders of public power. For its part, the concept of a state of emergency problematises precisely these boundaries, and therefore the rule of law as such, bringing to the fore the question of appropriateness of using the rule of law as

1. Convention for the Protection of Human Rights and Fundamental Freedoms. (1990, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

2. Charter of the Council of Europe. (1949, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_001#Text.

an evaluation criterion for the way in which society tries to cope with an emergency [2]. In other words, the question is whether such a situation constitutes an exception to the law, or whether it remains subject to legal regulation.

The generally accepted answer to this question, which is respected by current international law and almost all national legal systems, is formulated, in particular, by the Venice Commission in the arguments provoked by the fight against the COVID-19 pandemic regarding compliance with the principles of democracy, human rights, and the rule of law in a state of emergency. This answer lies in the fact that "a state of emergency is itself a legal institution, which is subject to legal regulation, though the rules applicable to it might be somewhat different from those applicable in times of normalcy", and therefore, "even in a state of public emergency the fundamental principle of the rule of law must prevail" [3], although this refers to a weakened version of the rule of law [4, p. 115]. A stricter position is that it is in emergencies that the need for the rule of law is greatest, and therefore difficult times require not to weaken the rule of law, but on the contrary, to strengthen it [5, p. 1004]. However, in any case, the rule of law and the state of emergency are considered to be such that can be consistently combined.

However, despite the governments' declaration of commitment to the rule of law under any circumstances, in practice one can observe a widespread deviation from its requirements with reference to the exclusivity of the current situation. In this sense, the state of compliance with the obligation stipulated by the European Convention for the Protection of Human Rights and Fundamental Freedoms to notify the Secretary-General of the Council of Europe of a derogation from human rights obligations is quite demonstrative. Due to the COVID-19 pandemic, almost all Member States of the Council of Europe are now resorting to such a retreat, but only 10 countries out of 47 have officially announced this¹. Given the scale of such disregard for law in the modern world, the Italian philosopher Giorgio Agamben defends an alternative to the generally accepted concept of a state of exception as a zone of absolute anomie, or a kind of legal vacuum, and concludes that law today has actually lost all meaning, since the state of exception has turned from an exception to the norm [6, p. 134].

It can be assumed that the polar interpretations of the above-mentioned problem are related to different opinions on the nature of law as such, in particular on the nature of its connection with force, and rethinking the correlation between the rule of law and the state of exception from the standpoint of legal understanding will explain the paradox of the state of exception.

The purpose of this study was to clarify the correlation between the rule of law and the state of exception in the context of the question of the nature of law. For this,

the following tasks were set: to describe the available approaches to understanding the rule of law, to explicate the fundamental idea of the rule of law, which combines its numerous interpretations, and to identify the limits of the rule of law (2.1), to conduct a critical analysis of the concept of a state of exception in the versions of Carl Schmitt and Giorgio Agamben (2.2), as well as to describe the connection between different opinions on the correlation between law and power and the corresponding ideas about the nature of the state of exception and to analyse three approaches to the correlation between the rule of law and the state of exception, which can be conditionally designated as the priority of a state of exception, weak and strong versions of the priority of the rule of law (2.3).

1. MATERIALS AND METHODS

This study is a philosophical-legal and at the same time a historical-philosophical exploration, and as such has an interdisciplinary nature. The authors' approach to understanding the problem of correlation between the rule of law and the state of exception is to combine legal, philosophical-legal, and historical-philosophical perspectives.

The legal component of the study comprises analysis of individual elements of statutory consolidation and practice of applying the concepts of the rule of law and the state of exception in the modern world to formulate the problem of their correlation as both a theoretical and practical issue. The philosophical-legal perspective involved the interpretation of the problem in the light of the main question of the philosophy of law – the question of the nature of law. Based on this instruction, the fundamental idea of the rule of law and the idea of a state of exception were considered from the standpoint of the correlation between law and power and compared in a synchronous dimension. For its part, the study of the genesis of the problem of correlation between the rule of law and the state of exception involves placing it in a broad historical-philosophical context, consistently reconstructing the corresponding concepts, their basic ideas, and key concepts that embody these ideas. However, for historical-philosophical research as a study of the history of ideas, it is not the reproduction of the chronology of events that is of primary importance, but their theoretical reconstruction, the identification of semantic connections between ideas that can unfold in the nonlinear space of thought. Here, along with the method of phenomenological reduction, elements of hermeneutical interpretation of the semantic core and semantic ties between ideas are used. Thus, the diachronic measurement of research is associated with a method that can be referred to as the method of historical reconstruction, through which two key lines of understanding the nature of law and its correlation to power are connected with the concepts of the rule of law and the state of exception.

The main method of study was the philosophical-legal

1. Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms. (2021, June). Retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>.

reflection, which lies in the desire to cover the ultimate foundations of the studied phenomena of the rule of law and the state of exception, in particular through problematisation and identification of dialectical oppositions of law and force, revealing their interpenetration and insurmountable boundaries. At different stages of this study, the method of philosophical-legal reflection was supplemented by logical methods of comparison (the logical composition of the “strong” and “weak” versions of the rule of law and its correlation with the state of exception), analysis and synthesis (conceptual components and their combination into a complete concept), as well as the method of historical reconstruction of ideas, notions, and concepts that fill the semantic constructions of the rule of law and the state of exception with content that goes considerably beyond their usual empirical perception.

The study was conducted in three stages. At the first stage, the authors analysed and compared two main approaches to understanding the rule of law – narrow (formal) and broad (substantive), generalised the main interpretations of the rule of law and identified the fundamental idea for all of them. Next, proceeding from the proposed interpretation of the idea of the rule of law, its limits were identified. For its part, the problematisation of the latter allowed outlining the scope of questions that set the internal dynamics of the problem under study, and the main areas of answering these questions in the Western intellectual tradition. The second step was to analyse the concept of a state of exception, the basic motives of which were compared with the fundamental idea of the rule of law in terms of the correlation between law and power. In particular, the theories of the state of exception by Carl Schmitt and Giorgio Agamben were consistently reconstructed, their comparison and critical interpretation was made from the standpoint of the philosophy of law. At the third stage, the problem of correlation between the rule of law and the state of exception was updated in the light of recent history and three main approaches to solving this issue were analysed and compared: the theory of priority of the state of exception, weak and strong versions of priority of the rule of law. Finally, reconstructing the genesis of the problem of the correlation between the rule of law and the state of exception in the light of the question of the nature of law allowed concluding on the nature of this opposition and its significance for law.

2. RESULTS AND DISCUSSION

2.1 *The idea of the rule of law in the light of the question of the nature of law*

The history of the rule of law goes back to the origins of the Western intellectual tradition, but even today this expression means different things for different people, remaining an “essentially contested concept” [7]. Thus, narrow concepts of the rule of law connect it with numerous formal and procedural requirements for the legal system. Consequently, according to Joseph Raz, “an undemocratic legal system based on the denial of human rights can, theoretically, meet the requirements of the rule

of law better than any of the legal systems of more educated Western democracies” [8, p. 211]. But the proponents of broad (substantive) concepts refer to the rule of *good* law [9, p. 118], and therefore, respect for human rights is a determining condition for the implementation of the rule of law [10, p. 23; 11]. However, despite such serious differences, this does not refer to different “rules of law”, but rather to “many faces of the rule of law” [9, p. 117], since they are all united by one fundamental idea.

Such a common denominator is the view of law as the antithesis of the arbitrariness of the strong, which has already been expressed in the best way possible by Plato and Aristotle in the famous principle of “rule of laws, not people” [12, p. 51-59; 13, p. 477-478]. In this sense, the observations of the German historian Reinhart Kosellek, who describes the gradual displacement of the idea of justice beyond history as a history of power, or force, are interesting. Thus, if the stories of Herodotus always contain an element of justice as a fate that punishes evil, then Thucydides emphasises the balance of power rather than justice, demonstrating that the stronger wins wars, and insisting on the priority of law in the face of force, on the contrary, can lead to death. Eight hundred years after Thucydides, Augustine came to the conclusion that all states are essentially great robbers, and true justice will be established by God only at the end of all earthly stories. Nevertheless, the right remains a necessary condition for survival of the humankind, despite the need for its daily reproduction. According to Kosellek, all these schemes of interpretation of the correlation between law and force should be addressed precisely because they remind of the burden that falls on a person's shoulders when they are forced to assert the right as opposed to violence [14, p. 368-377]. The idea of the rule of law is essentially an attempt to think of justice in a world dominated by force.

The radical opposition between force and law, which is brought to life by the idea of the rule of law, is a key motive of the philosophy of law, which still dictates internal dynamics for the latter. If force is considered as the source of an individual volitional act, then law represents a universal impersonal mind. In the modern world, the embodiment of this reasonableness, which can resist the arbitrariness of those in power, is human rights. For its part, the rule of law appears as a means of “saving fundamental rights from the clutches of political decisions” [15, p. 148]. It is worth agreeing with Mortimer Sellers, who noted that the general history of law in the West is the history of the struggle to establish the rule of law against competing attempts by rulers to be above or outside the law. Moreover, according to Sellers, this idea is present in every legal system – at least declaratively – since it is “the essence of what justifies or could justify the existence of any legal system, if it is justified at all” [16, p. 198-199]. Indeed, history convincingly proves that the strong do not need justice – the weak always appeal to justice. Therefore, the struggle for the rule of law is also a struggle for law as such, which is an alternative to force.

Along with the strong support for the rule of law in

Western culture, there are also various forms of criticism of this idea, primarily due to its internal limitations, which, in turn, is conditioned by the nature of law as such. The key argument is that no abstract provision can guarantee a fair result in each particular case, and therefore it is worth focusing rather on the contextual practice of judgement from case to case, based on the virtue of practical wisdom, which theoretically cannot be codified [9, p. 129].

Aristotle has already emphasised this: “every law is drawn up for a general case, but some things cannot be said correctly in a general form”, so “the error is found not in the law or in the legislator, but in the nature of the subject because this is the matter of actions” [17, p. 168]. This, however, implies not a rejection of the rule of law, but the need to balance it with justice: a judge can deviate from the strict application of the general rule to avoid injustice in a particular case [17, p. 168]. This refers not to the absolute freedom of discretion, but to careful balancing between the rule of law and equity – a motive that persists in the modern philosophy of law. Thus, John Tasioulas formulated several rules for this balancing: 1) equity should be applied by an authorised judge; 2) the judge should consider the true purpose of the rule, even if it does not draw from the literal interpretation of the latter; 3) a fair decision should be based on objective moral grounds for derogation from the law, and not on the subjective preferences of the judge; 4) the injustice prevented through derogation from the requirements of the rule of law should be serious enough to justify such a derogation; 5) derogation from the requirements of the rule of law for equity is less excused in areas where these requirements are particularly important (e.g., the requirement of foreseeability in criminal law) than in those where they are less important (e.g., the same requirement in family disputes); 6) derogation from the requirements of the law in favour of a person, especially in a criminal law context, is more justified than one that worsens the person's situation in comparison with the current law [18].

Thus, the famous saying *Summum jus, summa injuria* (“The greatest law (is) the greatest injustice”) reflects the internal limitation of the rule of law, which is associated with the tradition of practical wisdom in philosophy and legal science founded by Aristotle. Another line of thought, focused not on mitigating the mentioned paradox, but on radicalising it, revolves around the idea of a state of exception.

2.2 State of exception concept

In the most general sense, the idea of a state of exception is that a situational decision as an act of individual will terminates the general norm. In the legal context, the holistic concept of a state of exception was first formulated by Carl Schmitt. According to Schmitt, from the very beginning there has been a gaping pit between the norm and real life, between the rule and its application, to overcome which an intermediary is needed – the decision of the sovereign. Thus, developing the famous thesis of Thomas Hobbes that “authority, not truth, creates law”, Schmitt bases law

exclusively in an act of violence, a strong-willed decision, considering the latter as a specific legal act. According to Schmitt, each provision is by definition designed for normal living conditions and cannot be applied in a state of chaos. In other words, the actual order is not a consequence, but a prerequisite for the operation of the provision. A situation where a normal state is threatened is an exception that it is not described in the provision and cannot be described in it. And in such a situation, the sovereign decides whether a normal situation really prevails or whether there is a state of exception in which the provision can be suspended. Accordingly, the sovereign is outside the normal legal order and still belongs to it, since he is competent enough to decide whether the rule can be suspended. Thus, Schmitt essentially leaves the question of what is law and what is not, at the mercy of an absolute decision of the sovereign, which is based only in himself [19, p. 15-29]. It is in this *ex-nihilo* decision that, in his opinion, the essence of law lies: “authority proves that to produce law it need not be based on law” [19, p. 27]. Schmitt gives it a meaning similar to the meaning of a miracle in theology, and connects the idea of a state governed by the rule of law with the loss of ideas about transcendence, “bunishing the miracle from the world” and rejection “not only the transgression of the laws of nature through an exception brought about by direct intervention, as it found in the idea of a miracle, but also the sovereign's direct intervention in a valid legal order” [19, p. 57].

According to Schmitt, the act of violence and the state of exception established therein are not just inscribed in the law, but constitute the very essence of the latter, which, however, becomes indistinguishable from violence. Accordingly, the idea of the rule of law loses all meaning. In this regard, the current popularity of Schmitt's concept, the most famous interpretation of which belongs to Giorgio Agamben, is quite demonstrative. Agamben does not just update the theory of a state of exception, but shows that in the modern world, a state of exception has become the norm: “Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally” [6, p. 134].

At the anthropological level, this refers to bare life, that is, not to a specific way or form of human life, but to the very fact of life that is common to all living beings: in a state of exception, a sovereign decision suspends the provision that recognises a person's dignity and rights, and resumes human life in the form of a simple biological fact, an object of pure manifestation of power, a life that is completely unprotected, since it can always be taken away with impunity [20, p. 114]. Developing Michel Foucault's concept of “bio-politics”, according to which, in the course of history, natural life is gradually included in the mechanisms and processes of state power, Agamben argues that politics is not just historically transformed into bio-politics, but is initially such [20, p. 13]. As an example of the

maximum politicisation of life, he considers the situation of prisoners of Nazi concentration camps, who, along with their citizenship, lost any legal identity: “Auschwitz marks the death and destruction of any ethics based on dignity and compliance with the norm” [21, p. 74-75]. According to Agamben, it is the concentration camp, where the future determined by the authorities appears to a person in the form of absolute inevitability, that makes up the biopolitical paradigm of modernity [20, p. 151-229].

Agamben considers the state of exception not as a special right (like the law of war), but as a space of absolute anomie, a legal vacuum, “an empty space where an action that does not relate to law in any way collides with a norm that does not relate to life in any way” [6, p. 134]. Unlike Schmitt, Agamben is extremely concerned about the revealed totality of the state of exception, but is forced to state that “from the camps it is impossible to return to classical politics” [20, p. 238], and from the state of exception in which we live, it is impossible to return to the rule of law [6, p. 135].

Consequently, the inability of Schmitt and Agamben to distinguish between law and power leads to their identification, and then to the complete denial of law as such and the elevation of lawlessness to the norm. In the end, this refers to the gradual disappearance of law due to the destruction of the corresponding experience [22]. Thus understood, the idea of a state of exception poses a radical challenge to the dominant idea of the development of modern law as a global promotion of the rule of law [23, p. 687].

2.3 *The problem of correlation between the rule of law and the state of exception*

If the idea of the rule of law is based on the opposition of power and law, aimed at protecting the dignity and rights of everyone, especially the weak, then the concept of a state of exception proceeds from completely opposite ideas about power as a source of law. In the modern era, these two visions of law became the basis for the theory of absolute natural human rights and the theory of absolute sovereignty. The question of how these two “absolutes” can be consistently combined remains at the centre of philosophical and legal discourse, and the answer to it from the doctrine of supremacy is primarily the institution of judicial control over political decisions [12, p. 142-147]. Notably, Agamben practically ignores the role of the judiciary in his concept, although it is often at the centre of modern debates around the state of exception, which is fairly emphasised by researchers of the philosopher's work [23, p. 684].

Therewith, neither the institution of judicial control nor other tools of the rule of law are sufficient to meet all the modern challenges of the latter, and therefore the theory of a state of exception is experiencing a new wave of popularity today. In particular, it turned out to be surprisingly popular after the events of September 11, 2001 and the outbreak of the war on terrorism, which was declared by the United States and other countries. The unprecedented deviations from the requirements of the rule of law and restrictions on constitutional rights resorted to by governments could

not be explained otherwise than by the uniqueness of the situation, which required extraordinary solutions [5]. Such an event was also the COVID-19 pandemic, which once again focused the attention of philosophers and lawyers on the relationship between the rule of law and the state of exception.

There are three main approaches to solving this issue. Representatives of the first of them (followers of Schmitt) argue that in an emergency, one should rely on general flexibility and sensitivity to circumstances in the actions of the state, which is also desirable in normal times. According to this approach, the rule of law is not in itself the main reference point for the authorities in the face of danger. The second position (presented, for example, by Kim Lane Scheppele) is that in the name of the rule of law, the available constitutional guarantees must remain in force; moreover, in emergencies, they are most needed. Finally, representatives of the third approach (for example, Veronique Champeil-Desplats) propose to protect the rule of law by adopting special emergency rules that make provision for reduction of civil liberties or provision of officials with broad discretion in matters that are usually governed by general legal provisions [2]. These positions can be conditionally designated as a priority of the state of exception, a strong and weak version of the priority of the rule of law, respectively. Evidently, the first approach partially follows the line of Schmitt and Agamben and takes the state of exception beyond the law and order, treating it as an exception to the rule or a *state of exception*. Accordingly, under the permanent state of exception declared by Agamben, there is no place for either the rule of law or the law as such.

The strict version of the rule of law priority was an idiosyncratic response to the practical application of the first approach, in particular the disproportionate US response to the 2001 terrorist attacks. As Kim Lane Scheppele notes on this occasion, the experience of fascism, communism, and world wars in the 20th century forced society to significantly reconsider Schmitt's theory of the state of exception, but the Bush administration's response to the events of September 11 was based on Schmitt's logic, and therefore foresaw a world that had not existed for a long time, and that is why it was not supported by many European allies of the United States [5, p. 1003-1004]. It should be added that the radical changes in legal understanding discussed by the researcher primarily concern the establishment of the idea of human dignity and human rights, which cannot be stopped by any political decision. In this sense, the new enthusiasm of lawyers regarding the idea of a state of exception cannot but cause concern of lawyers, which was surprisingly aptly expressed by Bjarne Melkevik when he said that “this subject is introduced as a Trojan horse in order to accept the unacceptable” [24, p. 7].

The third of the described approaches is a kind of compromise and considers the state of emergency as part of the available law and order, a critical but predictable situation for the latter (*state of emergency*, however, no longer an *exception*). At present, it is this approach that

is generally accepted at the level of international law and most national legal orders. Its obvious advantage is predictability, and its disadvantage is that it introduces a *lite* version of the rule of law, which may eventually infect or even displace the concept of the rule of law, which should be fully applied [2]. Such a process is described, for example, by Veronique Champele-Desplats, who, using the example of the state of emergency introduced in France in 2015-2017, demonstrates how the very concept of the rule of law is transformed and weakened: 1) the state prioritises security requirements; 2) the government that interferes with the rights and freedoms that it must respect in accordance with the classical concept of the rule of law promises to compensate for such interference; 3) in the persecution of its enemies, the state builds a legal regime around the deviation from the provisions that concern these enemies. Consequently, the concept of the rule of law transforms into a formal, security-oriented, compensatory, and discriminatory concept [4, p. 115-117]. However, can the concept of the rule of law, even if formal, be discriminatory? And would it still refer to the same phenomenon?

The analysis of the main approaches to the correlation between the state of exception and the rule of law highlights the fundamental opposition between the relevant ideas, which makes their combination in practice quite problematic.

CONCLUSIONS

Placing the problem of the correlation between the rule of law and the state of exception in a broad philosophical context allows clarifying the ideological foundations of both concepts and, taking this into account, look in a new way at the connection between them. The study of the genesis of both concepts in the Western intellectual tradition suggests that the modern debate around the emergency in law is based on a fundamental conflict between the idea of the rule of law, where law is thought of as the antithesis of power, and the idea of a state of exception, which is based

on the idea of power as the only source of law. If power is considered as the source of an individual volitional act, then law represents a universal impersonal mind, and the modern embodiment of this intelligence, which can resist the arbitrariness of those in power, is human rights. Thus, if the idea of the rule of law emphasises the fundamental anti-authoritarianism of law based on human dignity, then the theory of the state of exception, on the contrary, roots law in authority, which, for its part, makes it impossible to distinguish it from violence.

Proceeding from the opposite grounds, these two concepts represent two different traditions of dealing with the paradox of normativity of law, which lies in the impossibility of equally fair application of the general provision to individual cases. On the one hand, this refers to the tradition of practical wisdom derived from Aristotle, focused on carefully balancing the abstract requirements of the general provision and situational justice, considering the purpose of law, and on the other hand, on the tradition of absolutising the decision as the only way to apply the provision by stopping it, resulting in the idea of a state of exception.

The analysis of the main approaches to the correlation between the state of exception and the rule of law (the priority of the state of exception, the weak version of the priority of the rule of law, the strong version of the priority of the rule of law) highlights the above-identified essential contradictions between the relevant concepts. In particular, such an analysis demonstrates that the fundamental opposition between the rule of law and the state of exception makes it impossible to combine them consistently, and the corresponding attempts always turn out to be a compromise not in favour of the former in a lightweight version of it, which can later completely replace the concept of the rule of law. Instead, it is necessary to recognise the limitations of the law itself, without abandoning the discourse of the rule of law and the fundamental grounds for it.

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ЗАРУБІЖНИЙ ДОСВІД КОНСТИТУЦІЙНО-ПРАВОВОГО РЕГУЛЮВАННЯ ОБМЕЖЕННЯ ПРАВ ЛЮДИНИ В УМОВАХ НАДЗВИЧАЙНОГО ТА ВОЄННОГО СТАНІВ

Анотація. У статті досліджуються зарубіжний досвід конституційно-правового регулювання обмеження прав людини в умовах надзвичайного та воєнного станів в Македонії, Вірменії, Білорусії, Молдавії, Грузії Латвії, Литві, Албанії, Азербайджані, що є актуальним в умовах сучасності, виходячи з наявності локальних воєних конфліктів, ситуацій надзвичайного стану або можливості їх існування в багатьох країнах світу. Мета роботи полягає у проведенні аналізу тексту та змісту конституцій зарубіжних країн для з'ясування та розтлумачення підстав обмеження прав і свобод людини і громадянина в умовах надзвичайного і воєнного станів. Для досягнення поставленої мети у роботі використовується система методів наукового пізнання, зокрема загальнонаукові (аналізу, синтезу), приватні (порівняльний, кількісного й якісного аналізу, апроксимації), а також спеціально-юридичні (формально-юридичний, порівняльно-правовий). Практична цінність дослідження полягає у виявленні чотирьох переважаючих тенденцій в конституціях зарубіжних держав до порядку визначення обсягу обмежень прав людини в умовах особливих режимів: 1) закріплення в конституціях вичерпного переліку прав і свобод, які не можуть бути обмежені в період надзвичайного та воєнного стану; 2) закріплення в конституції вичерпного переліку прав і свобод, які можуть бути обмежені з метою захисту прав людини, демократичного устрою держави, громадської безпеки, благополуччя населення та моральності; 3) поєднання двох перших варіантів закріплення обмежень в тексті Конституції; 4) закріплення у текстах конституцій можливості обмеження органами державної влади прав і свободи особистості в умовах особливих правових режимів в інтересах національної безпеки без вказівки на конкретні права і свободи, які можуть бути (або не можуть бути) обмежені

Ключові слова: надзвичайна ситуація, правовий режим, обмеження прав людини, національна безпека, громадський порядок, демократичний устрій

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FOREIGN EXPERIENCE IN CONSTITUTIONAL AND LEGAL REGULATION OF RESTRICTIONS ON HUMAN RIGHTS IN CONDITIONS OF EMERGENCY AND MARTIAL LAW

Abstract. *The study investigates the foreign experience of constitutional and legal regulation of restrictions on human rights in conditions of emergency and martial law in Macedonia, Armenia, Belarus, Moldova, Georgia, Latvia, Lithuania, Albania, Azerbaijan, which is relevant in modern conditions, based on the presence of local military conflicts, emergencies, or the possibility of their existence in many countries of the world. The purpose of this study was to analyse the text and content of the constitutions of foreign countries to clarify and explain the grounds for restricting human and civil rights and freedoms in conditions of emergency and martial law. To achieve this purpose, the study employed a system of methods of scientific cognition, namely general scientific (analysis, synthesis), particular (comparative, quantitative and qualitative analysis, approximation), as well as special legal (formal legal, comparative legal) methods. The practical value of the study lies in the identification of four prevailing trends in the constitutions of foreign states to the procedure for determining the scope of restrictions on human rights under special regimes: 1) consolidation of an exhaustive list of rights and freedoms in the constitutions, which cannot be restricted during the period of emergency and martial law; 2) consolidation of an exhaustive list of rights and freedoms in the constitution, which can be restricted to protect human rights, the democratic structure of the state, public safety, the well-being of the population and morals; 3) combining the first two options for consolidating restrictions in the text of the constitutions; 4) consolidation of the possibility of limiting the rights and freedoms of the individual in the texts of constitutions by state authorities under special legal regimes in the interests of national security without specifying particular rights and freedoms that may (or may not) be restricted*

Keywords: *emergency, legal regime, restrictions on human rights, national security, public order, democratic system*

INTRODUCTION

The practice of applying special legal regimes demonstrates that the legislation of most foreign countries considers such regimes as legal institutions governing the state of emergency of the exercise of state power in various situations when the normal functioning of society and the state becomes impossible. Therewith, the introduction of such regimes is inevitably associated with restrictions on human and civil rights and freedoms, which sometimes have an imperative nature with the use of coercion. At the same time, in the modern conditions of the development of civilisation, the introduction of the principle of humanism in all spheres of social existence, restrictions on human and civil

rights and freedoms should be reasonable and proportional, restrictions related to the conduct of special legal regimes should not be excessive and imposed in violation of the procedural order. The above requires the development of proper criteria for restrictions on human and civil rights and freedoms under special regimes. Considering the foregoing, for a correct understanding of the grounds, essence, and limits of restrictions on human and civil rights and freedoms under special legal regimes, it is important to investigate the provisions of international law and foreign practice of applying a state of emergency and martial law.

Since 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 key features of special legal regimes is beyond doubt. Within each country of the modern age and in the international space, emergencies 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 emergencies.

The state has a relatively greater freedom of action when dealing with national security issues. However, any decision of a political or legal nature in a state governed by the rule of law where the rule of law applies is limited by the constitution of the country that establishes the scope of discretionary powers of each body. 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) [1, p. 176].

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 and 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 [2, p. 72].

Certain aspects of the constitutional regulation of human rights restrictions have become the subject of scientific consideration by P. Sabrin [3, p. 219], B. Vankovskaya [4, p. 108], L. Dantfort [5, p. 144], S. Ramet [6, p. 288], D. Harutiunian [7, p. 62], D. Valieiev [8, p. 311], A. Mkrtumian [9, p. 23], M. Bryusis [10, p. 150], M. Rokhava [11, p. 131], E. Chenovich [12, p. 1090], V. Napetvaridze, T. Tskhovrebadze [13, p. 311], D. Lukianov [14, 15], Yu. Barabash [16], Ye. Hetman [17]. The relevance of studying the issue of constitutional legal regulation of restrictions on rights in conditions of emergency and martial states is covered through an evaluation of the significance of the principle of legality for society, which ultimately lies in the embodiment of universal values (human dignity, humanism, freedom, justice, and equality) in real legal relations. The principle of legality imposes an obligation on state institutions and their officials to comply with the laws (in a broad sense) in the exercise of power.

It is well known that to decide on the legitimacy of the restriction of human rights, the European Court of Human Rights uses the test: whether the restriction of the right is

stipulated by law; whether a certain restriction pursues a legitimate purpose; whether the restriction was necessary in a democratic society; whether such a restriction is discriminatory [18, p. 467]. This approach emphasises that human rights are based on interests that are fairly balanced with the interests of society, which necessitates the state to limit the exercise of human rights. The first issue – the foreseeability of the restriction of rights by law – become the subject matter of this study.

When restricting the exercise of human rights, state authorities themselves should be limited in their actions by the established provisions of law. Such rules of conduct of state authorities are consolidated in the texts of state constitutions because they act as an agreement between citizens of the country, society and the state to coordinate the interests (private and public) of the parties. Considering the above, it is the constitutional legal regulation of the restriction of human rights by state authorities that is important for preventing arbitrariness by officials in law enforcement in specific life circumstances to coordinate the interests of a person and society.

The purpose of the study is to analyse the content of the constitutions of individual foreign countries to clarify and interpret the grounds for restricting human and civil rights in special conditions to ensure a balance between the protection of fundamental rights and national (state) security.

1. MATERIALS AND METHODS

To carry out the study, a system of methods of scientific cognition was applied, namely general scientific (analysis, synthesis), particular methods of scientific cognition used in the branches of many sciences (comparative analysis, quantitative and qualitative analysis, approximation), as well as special legal methods (formal legal, comparative legal). The authors of this study applied the general philosophical (universal) method of cognition at all stages of the cognitive process. The method of approximation, which lies in replacing some objects with others, in some sense close to the original, but simpler, allowed investigating the numerical characteristics and qualitative properties of the object, reducing the task to the study of simpler or more convenient objects (for example, those whose features are easily calculated or whose properties are already known). Used figuratively as a method of approximation, a sign of an approximate, non-exhaustive nature, the method allowed determining the significance and level of influence of peaceful assemblies of people on the development of a democratic regime in Belarus.

Using the analysis method, the inherent and individual features of the constitutional and legal regulation of human rights restrictions under emergency and martial law conditions in Macedonia, Armenia, Belarus, Moldova, Georgia, Latvia, Lithuania, Albania, and Azerbaijan were identified and studied. Comparative analysis provided an opportunity to identify different approaches to the procedure for determining the scope of restrictions on human and civil rights and freedoms under special regimes stipulated

in the constitutions of foreign states. Using the generalisation method, four prevailing trends of restrictions on human and civil rights and freedoms under special regimes in modern countries were identified.

The method of deduction made it possible, based on the doctrinal opinions of researchers, to draw a general conclusion on the inherent features of constitutional legal regulation of human rights restrictions in conditions of emergency and military conditions, the existing grounds for their classification. The inductive method of cognising the provisions of the Constitution of the Republic of Macedonia, the Constitution of the Republic of Armenia, the Constitution of the Republic of Belarus, the Constitution of the Republic of Moldova, the Constitution of the Republic of Latvia, the Constitution of the Republic of Lithuania, the Constitution of the Republic of Albania, the Constitution of the Republic of Azerbaijan provided an opportunity to obtain a general conclusion on the inherent features of the grounds for restricting human rights under a state of emergency and martial law. The historical method of cognition contributed to the coverage of teleological prerequisites for the development of constitutional provisions of foreign countries regarding the restriction of human and civil rights, allowed achieving an in-depth understanding of their essence and substantiate new recommendations for improving the legal provisions.

The study also used special legal methods, namely formal legal and system-structural methods, which were used in the development and study of the terminology of this study, specifically upon clarifying the content of the categories “martial law”, “state of emergency”, as well as to cover the features of the definition of these legal categories in different modern countries.

The regulatory framework for this study includes the Constitutions of foreign countries that establish the legal grounds for the legal restriction of human rights, namely the Constitution of the Republic of Macedonia of November 17, 1991¹, the Constitution of the Republic of Armenia of November 27, 2005², the Constitution of the Republic of Belarus of March 15, 1994³, the Constitution of the Republic of Moldova of July 29, 1994⁴, the Constitution of Georgia of August 24, 1995⁵, the Constitution of the Republic of Latvia⁶, the Constitution of the Republic of Lithuania⁷, the Constitution of the Republic of Albania⁸, the Constitution of the Republic of Azerbaijan⁹. In addition, the paper used doctrinal sources that cover the content of constitutional legal regulation of human rights restrictions.

2. RESULTS AND DISCUSSION

The legal regime is a meaningful legal phenomenon that connects an integral set of legal provisions. The analysis of the constitutions of foreign countries demonstrates that most of them consolidate the possibility of restricting human and civil rights and freedoms in conditions of emergency and martial law. Notably, the scope of such restrictions is almost the same for both the martial law regime and the state of emergency. Based on the results of a comparative analysis, the identified various approaches to the procedure for determining the scope of restrictions on human and civil rights and freedoms under special regimes stipulated in the constitutions of foreign states, which include four prevailing trends:

2.1. Consolidation of an exhaustive list of rights and freedoms in the constitutions, which cannot be restricted (terminated) during a state of emergency and martial law.

Thus, Article 54 of the Constitution of the Republic of Macedonia of November 17, 1991¹⁰ stipulates that the freedom and rights of a person and citizen may be restricted only in cases defined by the Constitution. The freedom and rights of a person and citizen may be restricted during a state of war or a state of emergency in accordance with the provisions of the Constitution. Restrictions on freedoms and rights may not result in discrimination based on gender, race, colour, language, religion, national, or social origin, property, or social status. Restrictions may not apply to the right to life, the prohibition of torture, inhuman and degrading treatment and punishment, the legal definition of punishable crimes and sentences, or the freedom of personal opinion, conscience, thought, and religious beliefs.

The work on the text of the Constitution of Republic of Macedonia began before the collapse of socialist Yugoslavia in 1991 [3, p. 219]. The most important dispute in the drafting of the Constitution was related to the description of Macedonia as a “state of citizens” (all citizens enjoy equal rights) or as a “national state” (privileges are granted to Macedonians over other groups of nationalities living in the country) [4, p. 108]. The drafters of the Constitution applied a compromise formula, defining the country as national in the preamble and consolidating equal rights and obligations of all nationalities in the text. This regulation retains the name “Constitution of the Republic of Macedonia” despite the change in the country's name (originally – the Former Yugoslav Republic of Macedonia, then – North Macedonia). The changes are explained

1. Constitution of the Republic of Macedonia. (1991, November). Retrieved from https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspix.
2. Constitution of the Republic of Armenia. (2005, November). Retrieved from <https://www.president.am/en/constitution-2005/>.
3. Constitution of the Republic of Belarus. (1994, March). Retrieved from <http://by-law.narod.ru/index02.html>.
4. Constitution of the Republic of Moldova. (1994, July). Retrieved from <http://www.presedinte.md/titul2#2>.
5. Constitution of Georgia. (1995, August). Retrieved from <https://matsne.gov.ge/ru/document/view/30346?publication=36>.
6. Constitution of the Republic of Latvia. (1922, February). Retrieved from <https://likumi.lv/doc.php?id=57980>.
7. Constitution of the Republic of Lithuania. (1992, October). Retrieved from https://www.lrs.lt/home/Konstitucija/Konstitucija_RU.htm.
8. Constitution of the Republic of Albania. (1998, November). Retrieved from <https://www.parlament.al/Files/sKuvendi/kushtetuta.pdf>.
9. Constitution of the Republic of Azerbaijan. (1995, November). Retrieved from <https://mincom.gov.az/ru/view/pages/13/>.
10. Constitution of the Republic of Macedonia. (2019, January). Retrieved from https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspix.

by the political and legal conflict between Macedonia and Greece, where the latter “insists on its ownership of the copyright to the name “Macedonia” [5, p. 288]. The Former Yugoslav Republic of Macedonia was the official name used since 1993 in the UN [6, p. 144]. In 2018, the governments of Greece and the Republic of Macedonia came to a consensus on the name of the country, as a result of which the Macedonian party changed its name to the Republic of North Macedonia.

Article 44 of the Constitution of the Republic of Armenia¹ establishes that some fundamental human and civil rights and freedoms – except for those referred to in Articles 15, 17-22, and 42 of the Constitution – may be temporarily restricted, as provided by law, during martial law or a state of emergency, within the scope of international obligations assumed to derogate from obligations in emergencies.

The Constitution of the Republic of Armenia was amended in 2005 [7, p. 61]. The changes were a prerequisite for the development of a new judicial system in the country. The effectiveness and efficiency of judicial protection is a guarantee of the inviolability of human rights under special regimes. The judicial code, which summarises all approaches and principles of the judicial system and which is designed to ensure judicial and legal reforms, is a unique document that has no world analogues [8, p. 311]. The new judicial system of Armenia recognises case law, the same resolution of judicial disputes in cases with similar factual circumstances. The source of case law in Armenia considers the decisions of the European Court of Human Rights and the Court of Cassation of Armenia [9, p. 23].

According to Articles 23 and 63 of the Constitution of the Republic of Belarus², restriction of individual rights and freedoms is allowed only in cases stipulated by law, in the interests of national security, public order, protection of morals, public health, and the rights and freedoms of others. The exercise of the rights and freedoms of the individual stipulated in this Constitution may be suspended only under conditions of a state of emergency or martial law, in accordance with the procedure and limits defined by the Constitution and law. When implementing particular measures during a state of emergency, the rights stipulated in Article 24, Part 3, Article 25, Articles 26 and 31 of the Constitution may not be restricted.

The mechanism for implementing the institution of restriction of human rights in the interests of the state in the Republic of Belarus is becoming particularly important in 2020 in the presidential elections of the country for the 6th term of office. As noted by M. Briusys, O. Lukashenko

has been the country's president for 26 years. This means that he has been in power in the post-Soviet space longer than the current de facto ruling heads of state, except for Emomali Rahmon in Tajikistan. In international comparison, the regime in Belarus has outlived other regimes by 7-23 years, depending on which typology is used for comparison [10, p. 150].

Article 35 of the Constitution of the Republic of Belarus³ guarantees freedom of assembly. However, according to M. Rokhav, this right is violated, which suggests that the Constitution is a formality. This feature is often found in authoritarian regimes, but it becomes particularly important for personalist regimes, where the ruler can break the rules according to their will [11, p. 131].

According to the European Union Human Rights Report⁴, “the most commonly used tool of the regime's rule in Belarus is “soft” repression: these are restrictions that are designed to pre-emptively prevent the opposition from gaining influence on social processes in the country. The regime systematically restricts freedom of assembly, expression, and association”. When determining the significance and level of influence of peaceful assemblies of people on the development of a democratic regime in the country, it is worth referring to the opinion of E. Chenovich, who justified the interrelation between the democratic struggle for power and the active, voluntary participation of the country's population in elections using the example of the law of physics: momentum is equal to mass multiplied by speed ($p = mv$). It approximates the law of physics and assumes that the impulse of disagreement of citizens with the current political and legal regime is the product of the participation of citizens (mass) and the number of protest actions per week (speed) [12, p. 1090]. That is, systematic illegal and undemocratic restrictions on freedom of assembly and expression in a particular country ultimately determine the absence of any influence of the country's population on the political and legal authorities of the country.

Article 6 of the Law of the Republic of Belarus “On Mass Events in the Republic of Belarus” also draws attention to itself⁵, imposing the obligation to pay for state functions to maintain law and order during meetings carried out by law enforcement agencies of state authorities on civil society institutions. Thus, the decision to allow or prohibit holding a mass event of the head of the local executive and administrative body is made considering the payment for public order protection services provided by the internal affairs bodies, expenses related to medical care, cleaning the territory after holding a mass event on it.

Article 54 of the Constitution of the Republic of

1. Constitution of the Republic of Armenia. (2005, November). Retrieved from <https://www.president.am/en/constitution-2005/>.

2. Constitution of the Republic of Belarus. (1994, March). Retrieved from <http://by-law.narod.ru/index02.html>.

3. *Ibidem*, 1994.

4. Human rights in Belarus: The EU's role since 2016. (2018, June). Retrieved from [www.europarl.europa.eu/RegData/etudes/STUD/2018/603870/EXPO_STU\(2018\)603870_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603870/EXPO_STU(2018)603870_EN.pdf).

5. Law of the Republic of Belarus No. 114-3 “On Mass Events in the Republic of Belarus”. (1997, December). Retrieved from https://kodeksy-by.com/zakon_rb_o_massovyh_meropriyatiyah.htm.

Moldova¹ establishes that laws prohibiting or diminishing human and civil rights and fundamental freedoms cannot be adopted in the Republic of Moldova. The exercise of rights and freedoms is not subject to any restrictions other than those stipulated by law, comply with generally recognised provisions of international law and are necessary in the interests of national security, territorial integrity, economic well-being of the country, public order, to prevent mass disorder and crime, to protect the rights, freedoms, and dignity of others, to prevent the disclosure of information obtained confidentially, or to maintain the authority and impartiality of justice. These provisions do not allow restrictions on the rights proclaimed in Articles 20-24 of the Constitution.

The issue of restricting human rights in the Republic of Moldova under special legal regimes is becoming relevant in the context of the existence of the self-proclaimed Pridnestrovian Moldavian Republic on the territory of the state, unrecognised by the international community. Thus, in the case of *Ilaşcu and others v. Moldova and Russia*², the applicants submitted that they had been convicted by the Pridnestrovian Court, which had not had the relevant powers to carry out proceedings under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms³, the proceedings had not been fair, resulting in deprivation of property, which was in breach of Article 1 of Protocol No. 1; their detention in Transnistria had not been lawful, which was in breach of Article 5 of the Convention and the conditions of their detention had been contrary to Articles 3 and 8 of the Convention; there had been a violation of Article 2 of the Convention due to his conviction to death. The applicants submitted that the Moldovan authorities were responsible under the Convention for the alleged violations of the rights vested in them because they had not taken any proper measures to put an end to them, the Russian Federation shared the responsibility as the territory of Transnistria had actually been and still is under Russian control due to the Russian troops and military equipment stationed there.

The European Court of Human Rights has noted that Member States must be held accountable for any violations of the rights and freedoms protected by the convention committed against persons under their “jurisdiction”. The extension of jurisdiction is a necessary condition for the state to be held accountable for actions or inaction that cause violations of human and civil rights and freedoms. The concept of jurisdiction is interpreted in the sense of a term used in public international law⁴. From the standpoint of public international law, the phrase “within their jurisdiction” should be interpreted as the territorial jurisdiction

of a state, which implies the jurisdiction of a state throughout its territory. The said presumption may contain an exception under special circumstances, in particular when a state is deprived of the right to exercise its powers in part of its territory. This may be the result of military occupation by the armed forces of another state effectively controlling the territory concerned, acts of war or insurrection, or acts of a foreign state supporting the establishment of a separatist state on the territory of the state concerned.

The European Court of Human Rights emphasises the superiority of the territorial principle of jurisdiction in the application of the Convention for the Protection of Human Rights and Fundamental Freedoms⁵, however, when solving particular cases, it is not necessarily limited to the national territory of states, since in exceptional circumstances the actions of states committed outside their territory or giving rise to consequences there, may indicate that they exercise their jurisdiction under Article 1 of the Convention.

According to the principles of international law, the responsibility of a state can be provided for if, because of military actions (legal or illegal), it exercises in practice effective control over a territory found outside its national territory. The obligation to ensure human and civil rights and freedoms within the specified territory comes from the fact of such control, regardless of whether it is carried out directly through its armed forces or through a subordinate local administration.

2.2. Consolidation of an exhaustive list of rights and freedoms in the constitution, which may be restricted during a state of emergency and martial law to protect human rights, the democratic structure of the state, public safety, the well-being of the population and morals.

Thus, Part 4, Article 71 of the Constitution of Georgia⁶ stipulates that during a state of emergency or martial law, the President of Georgia has the right to restrict by decree the rights listed in Articles 13, 14, 15, 17, 18, 19, 21, and 26 of the Constitution in the country or any part of it. During a state of emergency or martial law, the President of Georgia has the right to suspend by decree the operation of Paragraphs 2-6, Article 13; Paragraph 2, Article 14; Paragraph 2, Article 15; Paragraphs 3, 5, and 6, Article 17; Paragraph 2, Article 18; and Paragraph 3, Article 19 of the Constitution in the country or any part of it. The President of Georgia immediately submits the decree provided for in this paragraph to Parliament for approval. The decree on restriction of the rights comes into force immediately after its publication, and the decree on suspension of the provision – immediately after its approval by the Parliament.

V. Napetvaridze and T. Tskhovrebadze, analysing

1. Constitution of the Republic of Moldova. (1994, July). Retrieved from <http://www.presedinte.md/titul2#2>.

2. Case of *Ilaşcu and others v. Moldova and Russia*. (2004, July). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%22248787/99%22%5D%22itemid%22:%5B%222001-61886%22%5D%7D>.

3. Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

4. Case of *Ilaşcu and others v. Moldova and Russia*, op. cit.

5. Convention for the Protection of Human Rights and Fundamental Freedoms, op. cit.

6. Constitution of Georgia. (1995, August). Retrieved from <https://matsne.gov.ge/ru/document/view/30346?publication=36>.

the process of adopting the Constitution of Georgia from the standpoint of discourse ethics, used the tool of the discourse quality index in accordance with the criteria developed by Jurgen Habermas [13, p. 311]. This methodology focuses on observing the behaviour of participants in the discourse, which allows measuring the quality of political debates. Within the framework of the study, the researchers investigated and analysed over 200 pages of verbatim records of the parliamentary debate on the adoption of the Constitution of Georgia in 1995.

The Constitution of Georgia of 1995 is the legal successor of the 1921 Constitution, which stipulated the mandatory referendum on constitutional issues. Due to the activities of self-proclaimed governments in the Tskhinvali region and Abkhazia, the Georgian government failed to hold a referendum. The topic of the referendum was the main cause of controversy during the debate in the Georgian parliament. One group of parliamentarians argued that the Constitution could not be adopted in violation of the 1921 Constitution. The second group argued for the necessity of adopting the Constitution by the Parliament, since the restoration of the country's independence encourages the adoption of the Fundamental Law of the state, which would guide the future development of the state. On August 24, 1995, the Parliament of Georgia adopted a new Constitution of Georgia.

G. Gabrichidze and his colleagues, analysing the so-called Foundations of the “constitutional” and “legal” system of individual unrecognised subjects on the territory of Georgia and Ukraine, claim that the “constitutional” orders in these “republics” are described by indisputable similarities, and residents of these entities have the same problems regarding the protection of their fundamental rights and the application of international conventions to them [19, p. 93].

According to Article 116 of the Constitution of the Republic of Latvia¹, human rights established by Articles 96, 97, 98, 100, 102, 103, 106, and 108 of the Constitution, may be restricted in cases stipulated by law to protect the rights of others, democratic state structure, public security, prosperity, and virtues. The expression of religious beliefs may also be restricted based on the conditions set out in this Article.

In Latvia, national security issues are governed by the Law “On National Security”², which defines the national security system and its tasks. The specified law defines the competence of the Parliament (Seimas), the Cabinet of Ministers and the President of the state, individual ministries, and self-government bodies regarding discrediting actions to maintain law and order. The Constitution of the Republic of Latvia does not state *exresis verbis* that the legitimate purpose of restricting fundamental human and civil rights is to ensure national or state security. But if one looks at the

practice of the Constitutional Court of the Republic of Latvia, they can see that the court has identified the protection of state security as a legitimate purpose of restricting rights, along with protecting the democratic structure of the state.

As noted by the head of the Constitutional Court of the Republic of Latvia A. Lavinis, if there is a legitimate purpose of restricting fundamental rights, then the Constitutional Court must perform its special task of weighing, on the one hand, a specific restricted right, and on the other hand, national security [20]. Thus, in case No. 2004-14-01 of December 6, 2004³, the Constitutional Court of the Republic of Latvia noted that to use public safety as a lawful purpose of legal regulation, the legislator had to objectively justify the existing or potential link between the adoption of an act and the elimination or reduction of a security threat. Taking this position, the court ruled out the possibility of the legislator to “hide” behind unfounded references to national security.

In this case, the Constitutional Court of the Republic of Latvia, recognising the restriction as disproportionate, and the refuted provision as unconstitutional, pointed out to the legislator that the reference to the interests of national security was unfounded. The case was related to the institution of migration, which is currently of great interest in European countries due to the desire of citizens of less developed countries to obtain permanent residence in legal, democratic, and social states with an elevated level of economic development. The legal provision contested before the Constitutional Court was part of the Law “On Immigration”⁴ and provided that the decision of the Minister of Foreign Affairs and the Minister of the Internal Affairs to include a person in the list of persons for whom entry to the Republic of Latvia is prohibited was not amenable to appeal. Thus, the legislator restricted the human right to a fair trial, pointing out that the purpose of the provision is to protect state and national security, as well as to create quick and effective means for situations where state and public security is at risk. Furthermore, as the legislator noted, this is necessary not only to protect state and public security, but also to prevent the disclosure of information with restricted access⁵.

Referring to the practice of the European Court of Human Rights, the Constitutional Court of the Republic of Latvia confirmed that it was within the competence of the state to determine the procedure for controlling the entry and residence of foreigners, and especially to regulate the expulsion of foreigners found guilty of a criminal offence. This refers to the case of *C. v. Belgium* No. 35/1995/541/627, of May 26, 1996⁶.

The Constitutional Court, assessing within the framework of the case the balancing exercise between the interests of protecting national security and the impact on the

1. Constitution of the Republic of Latvia. (1922, February). Retrieved from <https://likumi.lv/doc.php?id=57980>.

2. Law of Latvia “On National Security”. (2002, May). Retrieved from <https://likumi.lv/ta/en/en/id/14011-national-security-law>.

3. Judgment of the Constitutional Court of the Republic of Latvia “On the Compliance of Section 61, Paragraph Six of the Law “On Immigration” with Article 92 of the Constitution of the Republic of Latvia”. (2004, December). Retrieved from <https://likumi.lv/ta/id/97554>.

4. Law of Latvia “On Immigration”. (2003, July). Retrieved from <https://likumi.lv/ta/en/en/id/68522>.

5. Judgment of the Constitutional Court of the Republic of Latvia “On the Compliance of Section 61, Paragraph Six of the Law “On Immigration” with Article 92 of the Constitution of the Republic of Latvia”, op. cit.

6. Judgment of European Court of Human Rights in the case “*C. v. Belgium* No. 35/1995/541/627”. (1996, May). Retrieved from <https://www.refworld.org/cases,ECHR,3f3266b04.html>.

applicant's right of access to a court, not only determined the limits of the legislator's discretion, but also made several important findings:

– firstly, the court pointed out that a democratic society had the right to national security;

– secondly, internal security services should be empowered to fulfil their legitimate purpose of protecting national security, but they should not be given an uncontrolled opportunity to violate fundamental rights and freedoms. Therewith, the court recognised the need for procedural restrictions on human rights to prevent the leakage of information that harms national security and noted the breadth of the scope of discretionary powers of the executive branch in matters of national security;

– thirdly, the court recognised that the limits of the exercise of the right to a fair trial can be narrowed in cases related to national security. However, the complete exclusion of remedies cannot be justified, and the authorities cannot be exempted from effective control by the judiciary when they claim that a case involves national security and terrorism.

Under Article 145 of the Constitution of the Republic of Lithuania¹, when martial law or a state of emergency is imposed, the rights and freedoms specified in Articles 22, 24, 25, 32, 35, and 36 of the Constitution may be temporarily restricted. According to Article 25 of the Constitution of the Republic of Lithuania, everyone has the right to have their beliefs and express them freely. No one should be hindered from finding, receiving, or distributing information and ideas. Freedom of expression, as well as the right to receive and impart information, may not be restricted except by law, when it is necessary to protect a person's health, honour, or dignity, private life or morals, or for protecting the constitutional order. Freedom of expression of belief and the right to impart information are incompatible with criminal acts – incitement to national, racial, religious, or social hatred, incitement to violence or discrimination, and slander and misinformation.

The interpretation of the content of the specified Article is provided in the decision of the Constitutional Court of the Republic of Lithuania of 16 May 2019 “On the Compliance of the Decision of the Seimas of the Republic of Lithuania of January 12, 2018 on the Establishment of a Special Investigative Commission of the Seimas of the Republic of Lithuania and the Obligation to Conduct a Parliamentary Investigation of the Lithuanian National Radio and Television and Its Financial and Economic Activities

with the Constitution of the Republic of Lithuania”². Notably, the Constitutional Court of the Republic of Lithuania exercised a considerable influence on the development of a democratic state governed by the rule of law, the formation of legal practice and legal doctrine of the country [21, p. 234].

The Constitutional Court of the Republic of Lithuania stressed that the provisions of Article 25 of the Constitution represent the constitutional basis of freedom of information, which is inseparable from the constitutional freedom of belief and expression and is a condition of the latter. Consequently, the right of a person to have their beliefs and express them freely (freedom of belief and expression) and the freedom to look for, receive, and disseminate information and ideas (freedom of information) are directly related.

Interpreting the content of freedom of information as the innate freedom of the individual, the Constitutional Court held that this freedom was one of the foundations of an open, just, and harmonious civil society and a democratic state, and an important prerequisite for the exercise of human rights and freedoms stipulated in the Constitution, since a person could fully exercise most of their constitutional rights and freedoms only if they could freely seek, receive, or transmit information, which, in particular, is realised through freedom of the media³. In this context, Lithuania is a pluralistic democracy, and freedom of the media is one of its foundations. The content of media freedom is based on the constitutional principle of diversity of sources of public information⁴.

The public's interest in proper information presupposes the corresponding constitutional obligations of the state. The state (its institutions and officials) bears not only a duty of negative content not to obstruct the free flow of information and ideas, but also a duty of positive content to take all necessary measures so that, firstly, other persons do not obstruct such activities, secondly, the media engage in their mission in accordance with the fundamental values of a democratic society in a state governed by the rule of law. Proceeding from this, the state should have proper mechanisms for monitoring the activities of media because the latter have a great influence on society, which can threaten national security, public order, and the legitimate interests of society. Consequently, the freedom of the media is not absolute, there is a possibility of their control as far as other constitutional obligations allow, such freedom does not negate parliamentary control over the media.

2.3. Combination of the first two options for consolidating restrictions in the text of the Constitution.

1. Constitution of the Republic of Lithuania. (1992, October). Retrieved from https://www.lrs.lt/home/Konstitucija/Konstitucija_RU.htm.

2. Decision of the Constitutional Court of the Republic of Lithuania. (2019, May). Retrieved from <https://www.lrkt.lt/en/court-acts/search/170/ta1942/content>.

3. Ruling “On the Compliance of Article 8 and Paragraph 3, Article 14 of the Republic of Lithuania’s Law on the Provision of Information to the Public with the Constitution of the Republic of Lithuania”. (2002, October). Retrieved from <https://www.lrkt.lt/en/court-acts/search/170/ta1212/content>.

4. Resolution “On the compliance of Paragraph 5, Article 5 (wording of June 29, 2000), Paragraphs 1, 3, and 4 of Article 6 (wording of June 29, 2000), Paragraph 1, Article 10 (wording of June 29, 2000), Paragraphs 1 and 2, Article 15 (wording of June 29, 2000) of the Law of the Republic of Lithuania on National Radio and Television of Lithuania and Paragraph 4, Article 31 (wording of August 29, 2000) of the Law of the Republic of Lithuania on the Provision of Information to the Public Under the Constitution Republic of Lithuania”. (2006, December). Retrieved from <https://www.lrkt.lt/en/court-acts/search/170/ta1325/content>.

Under Article 175 of the Constitution of the Republic of Albania¹, during a state of war or emergency, the rights and freedoms stipulated in Articles 15; 18; 19; 20; 21; 24; 25; 29; 30; 31; 32; 34; 39, Paragraph 1; 41, Paragraphs 1, 2, 3 and 5; 42; 43; 48; 54; 55 cannot be limited. In case of a natural disaster, the rights and freedoms stipulated in Articles 37; 38; 41, Paragraphs 4; 49; 51 may be restricted. Acts declaring a state of war, emergency, or natural disaster should indicate the rights and freedoms that are restricted.

Albania recognised COVID-19 as an emergency and applied the *rebus sic stantibus* principle [22, p. 53], which indicates the impossibility of performing international contractual obligations due to substantial changes and leads to the suspension of the international human rights treaty. This principle allows the treaty to become unusable due to fundamental changes in circumstances. In the international public domain, this principle is an exemption clause from the general rule *pacta sunt servanda* (promises must be fulfilled).

The suspension of international treaties is stipulated by the law of the Republic of Albania on international agreements, which states that a country can temporarily suspend the implementation of relevant international agreements in relations with other subjects of international law but must always do so in accordance with the provisions of international law. Therewith, international, governmental, and interdepartmental agreements differ. Agreements are signed on behalf of Albania by the President of the Republic, or any person authorised by him/her, intergovernmental agreements are signed by the Prime Minister, and interdepartmental agreements are signed by the head of the corresponding institution. International treaties are suspended in the same form and by the same person, who, depending on the type of agreement and its nature, has the authority to sign.

The internal procedure involves putting forward a proposal by the competent ministry to suspend an international agreement, which is accompanied by a draft law or decision on suspension and an explanatory report explaining the reasons for the suspension. The consent of the Ministry of Foreign Affairs and the Ministry of Justice is obtained separately. Agreements dealing with European Union issues require the consent of the Ministry of European Integration.

Notably, Albania used the right to suspend international treaties for the second time after 1997, when there were riots and armed uprisings and the overthrow of the state regime in the country.

2.4. Consolidation of the possibility of state authorities to restrict individual rights and freedoms in the texts of constitutions under special legal regimes in the interests of national security, without specifying particular

rights and freedoms that may (or may not) be restricted. Consolidation of the list of rights that may or may not be restricted is usually established by special provisions of sub-legislative acts of state authorities. Notably, consolidation of the list of human and civil rights and freedoms in the texts of solely sub-legislative acts provides an opportunity for abuse of the right by state authorities, which in practice can lead to violations of human and civil rights and freedoms.

Thus, Part 3, Article 71 of the Constitution of the Republic of Azerbaijan² establishes that when declaring war, a state of war and a state of emergency, as well as mobilisation, the exercise of human and civil rights and freedoms may be partially and temporarily restricted, considering the international obligations of the Republic of Azerbaijan. The rights and freedoms whose exercise is restricted are notified to the population in advance.

In the Judgment of the European Court of Human Rights in the case of Chiragov and others v. Armenia of June 16, 2015³, the issue of human rights was raised in Nagorno-Karabakh, which today is de jure a recognised part of Azerbaijan, but before such recognition was actually controlled by Armenia and was called the “Nagorno-Karabakh Republic” [23, p. 3840]. In this decision, the court referred to the provisions on the laws and customs of warfare on land, the so-called Hague Regulations (The Hague, October 18, 1907)⁴ and noted that the territory is considered occupied when it is actually transferred to the power of the enemy army. Accordingly, occupation, in the interpretation of The Hague Regulations of 1907, exists when a state exercises effective power over the territory or part of the territory of a hostile state. The term “de facto power” is considered synonymous with the term “effective control”⁵. Military occupation is referred to, in particular, when foreign troops are present on the territory or part of the territory, which capable of exercising effective control without the consent of a sovereign state. Accordingly, the European Court of Human Rights recognised the authority to ensure human rights by the Armenian side in the territory of the “Nagorno-Karabakh Republic”, applying the principle of hybrid control and found that the Republic of Armenia, due to its military presence and provision of military equipment, took part in the conflict in Nagorno-Karabakh. It is this military support that has been and remains the decisive factor for conquering and maintaining permanent control over the territory. Furthermore, the budget of the “Nagorno-Karabakh Republic” was formed at the expense of sources of the Republic of Armenia, that is, there is a monetary impact involved. Consequently, the European Court of Human Rights recognised Armenia's obligation to ensure respect for human rights in this territory.

1. Constitution of the Republic of Albania. (1998, November). Retrieved from <https://www.parlament.al/Files/sKuvendi/kushtetuta.pdf>.

2. Constitution of the Republic of Azerbaijan. (1995, November). Retrieved from <https://mincom.gov.az/ru/view/pages/13/>.

3. European Court of Human Rights (ECHR). Case of Chiragov and Others v. Armenia. (2015, June). Retrieved from <http://www.refworld.org/cases,ECHR,5582d29d4.html>.

4. Regulations on the Laws and Customs of War on Land. (1907, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_222#Text.

5. European Court of Human Rights (ECHR). Case of Chiragov and Others v. Armenia, op. cit.

CONCLUSIONS

National security issues are governed at the constitutional level, the Fundamental Law of each state defines the national security system and its tasks, the competence of the Parliament, the President of the state, the executive body, individual ministries, and self-government bodies. As the analysis of political and legal relations in different countries of the world has demonstrated, the regulation of the rights and obligations of subjects of law becomes particularly important after the emergence of a military conflict on the territory of a particular state. In this regard, the process of implementing human and civil rights requires more imperative methods of regulation, justifiably takes the form of an emergency procedure for regulating public relations, sometimes relying on means of coercion.

Therewith, legal provisions and actions of executive state and local self-government bodies cannot avoid control by the judiciary if such a provision or action encroaches on the legitimate interests of a person. The judiciary in general and its constituent parts in particular must guarantee control over the other two branches of government. The Constitutional Court of countries, assessing the compliance of laws with the Constitution, implements the principle of the supremacy of the Constitution, thereby ensuring constitutional

justice. Courts are competent to verify the lawfulness and constitutionality of decisions taken by other branches of government in cases where such decisions are related to national security.

National security and human rights come into conflict when restrictions on fundamental rights are imposed in the interests of public safety. The task of state and local government bodies in such cases is to ensure a balance between the protection of fundamental rights, on the one hand, and national (state) security, on the other hand. Fundamental rights can only be restricted if there is a legitimate purpose for such restriction. Several articles of the Convention for the Protection of Human Rights and Fundamental Freedoms refer to national security as a legitimate purpose for which it is permissible to restrict certain rights. Only the protection of constitutional values can be the legitimate purpose of restricting fundamental rights. The rights of persons stipulated in the Constitution may be subject to restrictions in the circumstances provided for by law, in order to, firstly, protect the rights of others, secondly, protect the democratic structure of the state, and thirdly, protect public safety, welfare, and morality.

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ТЕОРЕТИЧНІ ОСНОВИ ТА ПРІОРИТЕТИ РОЗВИТКУ ПРАВА НАЦІОНАЛЬНОЇ БЕЗПЕКИ

Анотація. *Правовий зміст національної безпеки розкривається у праві національної безпеки та постає вкрай важливим напрямом розвитку правової науки в сучасних умовах розв'язаної РФ проти України збройної агресії та кризових процесів у системі міжнародної безпеки. Метою дослідження є визначення особливостей права національної безпеки як галузі національної системи права і встановлення перспектив розвитку цієї галузі права. Проведене дослідження здійснено з використанням комплексу методів, серед яких важливими є діалектичний, формально-логічний, історико-правовий, порівняльно-аналітичний, соціологічний методи, а також методи структурного аналізу, правового моделювання, прогнозування. Право національної безпеки розглядається самостійною галуззю права, що виявляє свою суспільну значущість у правовому забезпеченні національної безпеки. Національні інтереси, як загальнозначущі охоронювані правом інтереси утворюють об'єкти права національної безпеки, відображаються у соціальних комунікаціях, які під дією права національної безпеки набувають ознак правових стратегічних комунікацій. Водночас інтегративні якості права національної безпеки проявляються у взаємодії з правом міжнародної безпеки та військовим правом. Право національної безпеки утворює систему правового забезпечення національної безпеки. Пріоритети розвитку права національної безпеки реалізуються у комплексі науково-дослідних, організаційних та освітніх заходів, що обумовлює впровадження відповідної наукової спеціальності та освітньої спеціалізації. Практична цінність дослідження полягає у розкритті ознак права національної безпеки як ціннісно-нормативної системи статусів, правил поведінки, комунікацій, що має публічне визнання і легітимізована з метою забезпечення безпечних умов життєдіяльності людини, існування і розвитку суспільства й держави, та в обґрунтуванні розвитку предметної сфери права національної безпеки у напрямі якісних показників правового забезпечення усіх складових системи національної безпеки, структурування її видів, рівнів – від національного до міжнародного, входження у правову систему колективної міжнародної безпеки на основі міжнародних принципів і стандартів, які формують таку систему безпеки*

Ключові слова: *правовий зміст національної безпеки, національні інтереси, правові стратегічні комунікації, система правового забезпечення національної безпеки*

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THEORETICAL FOUNDATIONS AND DEVELOPMENT PRIORITIES OF NATIONAL SECURITY RIGHTS

Abstract. *The legal content of national security is revealed in the law of national security and becomes a crucial area for the development of legal science in modern conditions of the armed aggression unleashed by the Russian Federation against Ukraine and crisis processes in the international security system. The purpose of this study was to determine the features of national security law as a branch of the national legal system and establish prospects for the development of this branch of law. This study employed a set of methods, which include dialectical, Aristotelian, historical-legal, comparative-analytical, sociological methods, as well as methods of structural analysis, legal modelling, and forecasting. National security law is considered an independent branch of law that demonstrates its public significance in the legal support of national security. National interests, as generally significant interests protected by law, form objects of national security law, are reflected in social communications, which, under the influence of national security law, acquire the features of legal strategic communications. At the same time, the integrative qualities of national security law are manifested in interaction with international security law and military law. National security law forms a system of legal support for national security. Priorities for the development of national security law are implemented in a complex of research, organisational and educational measures, which determines the introduction of the corresponding scientific speciality and educational specialisation. The practical value of the study was to cover the features of national security law as a value-normative system of statuses, rules of conduct, communications, which has public recognition and is legitimised to ensure safe conditions for human life, the existence and development of society and the state, and to justify the development of the subject area of national security law towards qualitative indicators of legal support of all components of the national security system, structuring its types, levels – from national to international, entering the legal system of collective international security based on international principles and standards that form such a security system*

Keywords: *legal content of national security, national interests, legal strategic communications, system of legal support of national security*

INTRODUCTION

In the modern world, all aspects of ensuring the safety of human life, the existence and development of society and the state are important, which is an essential feature of national security as a state of protection from potential and real threats and at the same time coordinated activities to achieve a social state where security values are of particular importance. The appeal to the axiological foundations of national security [1, p. 248-394] confirms the need to determine the legal content of national security, its international legal dimension, and the influence of the international legal system on the development of national security law. The international legal system contains the

basic principles set out in international acts that bring each state closer to the requirements of law [2]. The global legal order and international security system are currently under threat of destruction due to the constant instability of the world. In the processes of solving many international and national problems, which lie in armed conflicts, mass violations of human rights and freedoms, guarantees of stability and order of the state are manifested precisely in law, and international and national security develop the social basis of national security law.

An important aspect in understanding the law of national security is the versatility of its action in strategic

communications, where the state combines efforts with other social actors to achieve certain strategic goals and solve security problems. At the same time, applied issues of legal support for the security and defence sector remain relevant [3, p. 480-534], determining the status nature of the security and defence forces and the systemic legal influence on the exercise of their powers to ensure national security, the establishment of the rule of law [4] in the regulatory, institutional components and functional purpose of the security and defence sector. The law of national security demonstrates its specific features in the system of national law and identifies general patterns, having signs of an independent branch of law, which is confirmed by the corresponding legal regime [5, p.71]. Another urgent and no less critical issue that the national security law of Ukraine solves by its means and resources is ensuring safe conditions for human life, realising the human right to security as an absolute right and at the same time a subjective right in legal relations that exist in the field of national security.

In legal science, a wide scope of national security issues, in particular their philosophical aspects, are considered in the studies by V. Bachynin, V. Bielievtseva, O. Danilian, O. Dzoban, S. Maksymov, I. Tykhonenko. Ensuring national security by means and resources of constitutional law was investigated by V. Antonov. Information aspects of legal support of national security are covered in the studies by O. Baranov, K. Beliakov, O. Dovhan, O. Zolotar, T. Tkachuk. Criminal law support of national security was investigated in the studies by V. Borysov, M. Karchevskiy, D. Mykhailenko, N. Savinova, O. Chuvakov, O. Sotula. Legal issues of military security have become the subject of scientific development by V. Kryvenko, S. Poltorak, and Ye. Streltsov. General theoretical aspects of the legal content of national security are reflected in the studies by P. Westerman, A. Gromytsaris, S. Holovaty, R. Dvorkin, L. Diuga, R. Yering, M. Koziubra, A. Kryzhanovskiy, Yu. Oborotov, N. Onishchenko, R. Paund, O. Petryshyn, P. Rabinovych, S. Udartsev, K. Feddeler, G. Hart, Yu. Shemshuchenko, P. Shlah, O. Yushchik, O. Yarmysh. Special legal branch problems of national security law were developed by S. Daikus, D. Moore, V. Lipkan, H. Novytskyi, V. Raihorodskiy, S. Chapchikov.

However, the state of research on national security law indicates the need for theoretical generalisation of scientific developments, identification and coverage of branch features of national security law of Ukraine, its content characteristics and features of operation in modern conditions. The theoretical foundations of national security law determine a certain line of development of modern legal science – from understanding the doctrinal features of national security law to developing a system of industry knowledge and principles, determining the features of action in a globalised world, which is of applied importance for ensuring national security.

The purpose of this study was to cover the features of national security law as a branch of the national legal system and identify prospects for the development of this branch of law. The study solved the tasks concerning the establishment of the national security law as a systemic

integrity, regarding topical issues of organising scientific research in the field of national security law, the development of an appropriate scientific speciality and academic discipline for training specialists for subjects of the security and defence sector, the application of national security law and its actions in the context of ensuring national, regional, and international security, achieving an effective level of legislative regulation of the activities of subjects of the security and defence sector in the context of European and Euro-Atlantic integration of Ukraine.

1. MATERIALS AND METHODS

To achieve the purpose of this study, the authors used the empirical materials concerning public relations, social communications in the field of national security, legislation in the field of national security and defence of Ukraine, international legal acts, analytical and review materials, results of scientific developments of Ukrainian and foreign researchers. The research materials consistently cover the basics of national security, guide in determining priorities for countering threats, and focus on new qualities of state sovereignty as a central issue of ensuring national security, which is reflected in law. Social communications in the sphere of national security determine the need for legal influence, the need to apply legal means in accordance with the purpose of such social communications, which leads to the development of an appropriate legal regime of national security and determines the ontological features of national security law.

At the same time, the epistemological justification of the methodology for studying national security law make provision for the definition of appropriate scientific approaches. For this purpose, the study used a considerable methodological potential of an interdisciplinary scientific approach, as well as philosophical views, political, sociological, and legal knowledge about law and the state, as well as their interaction. To cover the legal content and legal form of national security as a systemic integrity, the features of industry and applied scientific developments were used. The features of national security law were studied using systematic and institutional-functional approaches. The scientific development of the law of national security as integrity is carried out based on the possibilities of a comprehensive approach, which is focused on the integrity of the national security system. The axiological features of national security law were determined using an axiological approach, provided that there is a value-normative legal understanding and the development of an appropriate epistemological research platform. Non-linear features of national security law as a non-linear system were studied using a synergistic approach and the rhizome paradigm; this approach allowed covering the features of self-organisation of the national security law system, which manifests itself in the interaction of law, the state and civil society under the indispensable condition of recognising and ensuring human subjectivity.

The study employed dialectical, Aristotelian, historical legal, comparative-analytical, sociological methods, as

well as methods of structural analysis, legal modelling, forecasting, etc. In particular, the dialectical method contributed to solving the issue of conceptualising the law of national security, defining its principles and functions based on objectivity, interrelation, and interaction with other components of the national legal system and with international law. The historical legal method was used to investigate the establishment issue of the theory of national security law and its further development, to determine the problems of scientific reflection of the legal content of national security and their solution by modern legal science. The Aristotelian method allowed identifying the features of national security law, its content properties, and the terminology inherent in this branch of law. The comparative legal method was used to establish the unity and interaction of national security law and military law, national security law and international security law. The method of structural analysis was used to highlight the regularities and features of the structure of national security law, determine its network nature, horizontal interaction in the context of types of national security that develop the unity and integrity of national security law. Sociological and statistical methods were applied both independently and in interaction with the dialectical method to evaluate the importance of national interests as objects of national security law. The method of legal modelling was used for a variable assessment of scenarios for the development of intra-industry formations of national security law, its operation under special regimes, the use of tools and resources of international security law to solve problems of overcoming potential and real threats to national security. The forecasting method was used to determine the prospects for the development of national security law and its operation in modern conditions of global transformations, institutional impact on the national legal system in the processes of legal acculturation, the effectiveness and necessity of legal reception, the consequences of such processes to ensure legal security.

2. RESULTS AND DISCUSSION

2.1 Establishment of the concept of national security law

The concept of national security law of Ukraine goes through a rather complex path of establishment and development in the context of the shaping of paradigms of modern law and the state, considering the achievements of philosophical, historical, sociological, political, and other branches of science and lies in the scientific development of the entire complex palette of theoretical and applied aspects of this complex issue for legal science by branch legal sciences, which allows reaching the conceptual level of its solution [5, p. 11-29].

The establishment of the concept of national security law takes place in the context of statutory and institutional definition of activities to ensure national security and protect national interests [5, p. 326-327]. Legal science based on a world-view understanding of national security and its essential-content features focuses on the development of research areas necessary for the practice of ensuring national security, which relate to the constitutional and legal nature of national security [3], administration in the field of national

security [6], criminal law problems of ensuring national security [7], features of ensuring national security in the information sphere [8] and in other areas of national security, in particular military security [9].

Conceptualisation of the law of national security of Ukraine lies in awareness of the empirical basis of national security with its subsequent ontological interpretation in the legal dimension based on appropriate methodological foundations to develop an appropriate concept. The empirical basis of national security law is the totality of all factors that ensure the security of a person, society, and the state, namely public relations, social communications in the field of national security, constitutional provisions and rules of legislation on the legal status of subjects of the security and defence sector and the organisation of activities in the field of national security, international relations in the international security system [5, p. 30]. The development of national security law is focused on the application of a certain model of national security, considering the specific features of the national legal system, as well as economic, political, cultural, military, information, anthropogenic, and other features of society. At the same time, the model of national security and national security law of the United States deserves attention [10], using the relevant standards of the EU and NATO Member States.

The concept of national security law of Ukraine is based on a security culture, which in the legal sense is considered as a legal strategic culture that serves as the basis for legal strategic thinking, in particular, awareness of the essential features of national security, its purpose and appropriate governance decision-making [11]. Legal strategic culture and legal strategic thinking are described as competent and professional, must meet the requirements of activities in the field of national security. At the same time, the right of national security consolidates the activities of the state, civil society, and citizens to ensure national security and operates in all social areas related to ensuring national security. However, the most important for its subject area are safe conditions of human life, sovereignty, territorial integrity, and the constitutional order of the state [12].

The development of national security law in Ukraine is influenced by the international legal system and international security law. The fundamental principles of international law – non-use of force or threat of force; peaceful resolution of international disputes; non-interference; cooperation; equality and self-determination of peoples; sovereign equality of states; conscientious performance of obligations under international law; territorial integrity; respect for human rights; inviolability of borders – define the principles of national security and exercise organisational influence on the national security law. In the context of the international security system crisis, the national security law finds its development in the coordination of regulatory provisions and institutional activities with international law [13], confirms its social value as a regulator of public relations, strategic communications to protect national interests in the context of performing the international obligations of the state, ensuring the protection of human rights and fundamental freedoms.

The national security law forms the legal content and legal form of national security and asserts the integrity of national security in all its varieties, sets the legal standardisation and general binding nature of social requirements and regulations on national security issues, defines and ensures the protection of national interests. The national security law identifies the most stable meaningful connection with the legal order [14], which is essentially combined with the state of national security. Consequently, the right of national security is dependent on the legal order and affects the legal order due to the development of legal infrastructure and legal support for the protection of national interests.

The concept of national security law of Ukraine has its axiological basis, which contains a considerable number of interests and values that are important for society and a person, the achievement of which brings social existence to a level accessible to meet individual and group needs conditioned by the need for sustainable development. The axiology of national security [1, p. 250-304] looks multifaceted, passes from one quality of human and social existence to another, combines values of spiritual and material origin, is covered in the aspect from individual features to general, demonstrating its presence in the centre of the value reality of a person and their needs.

The legal regime of national security law identifies special features, contains a subject (public relations and social communications between subjects in the field of national security), a method that constitutes a set of imperative techniques and means of legal influence (legal regulation) on certain public relations and social communications, as well as the purpose of ensuring national security, which is specified depending on the sphere and safe living conditions of a person, society, and the state [5, p. 93-94]. The legal regime of national security is described by rather strict rules for governing public relations, which provides a mandatory method of legal regulation. Such a legal regime may acquire special features of a state of emergency or martial law, which, in particular, describes its exclusive public-legal nature, focused on the protection of generally significant interests.

Based on the subject and purpose of legal regulation (legal impact), national security law consolidates the corresponding regulatory requirements of constitutional law, administrative, criminal, information, environmental, and other branches of law related to the legal support of national security, reaching the level of consistency that allows effectively and successfully ensuring the operation of law in the field of national security. The origins of national security law are contained in constitutional law, and the most stable are the links of national security law with military law, where the commonality of objects and subjects, the unity of the legal regime for ensuring military security, protecting sovereignty and territorial integrity make it necessary to combine scientific developments and law enforcement practice [15].

Definition and coverage of the features of national security law in the system of law becomes possible based on value-normative legal understanding [16], thanks to which it turns out that the state is dependent on law and ensures

its operation using appropriate mechanisms, the legitimacy of which is obtained in law as in the value-normative system. For its part, legal standardisation demonstrates the general obligation of legal prescriptions provided with the possibility of legitimate coercion, which gives grounds for the operation or the validity of law. Important for substantiating the concept of national security law is a sociological approach that asserts the activity-based foundations of law [17]. The need characteristics of the law cover the issue of interests that find their implementation in the national security law as national interests [18]. At the same time, the communicative theory of law [19] allows substantiating the influence of social and strategic communications on the development of the national security law.

National security law has clear features of a non-linear system, which is manifested in its interaction with related branches of the national legal system and international law. The development of national security law in the system of national law occurs because of linear and non-linear processes, where the main standards do not have pre-programmed forms and content and are stated proceeding from the general need for the development of legal provisions in particular social communications. But social and moral-ethical, value standards are reflected in the joint interaction of social subjects, when consciousness perceives and reflects these standards precisely as legal provisions and generally binding rules of conduct [20].

2.2 Signs of national security law as a value-normative system

The concept of national security law of Ukraine is based on the general features of law as a social phenomenon, covering its social, value-normative, need-based, communicative, and other features, and at the same time focuses on the features of the subject security sphere [21]. Such approach allows identifying the national security law as a branch of law, a value-normative system of generally recognised and publicly defined statuses, rules of conduct and communications in the national legal system aimed at ensuring safe conditions for human life, the existence and development of society and the state.

The subjects of national security law of Ukraine are the state, society, and the individual. These subjects are societally individualised and specified in accordance with the specific features of communications in the field of national security. The law of national security recognises a person as the most important subject of law [22], the subjectivity of which is justified by the legal nature and directly depends on the possibilities of ensuring national security. The most important right of human existence – the right to life – actually proclaims the main idea of national security in its anthropological meaning and orients the corresponding activities of the state.

The right of national security of Ukraine has its objects – certain material and non-material benefits, which include national interests, achievements, needs and values of a person, society, and the state in the field of national security – from state and military to economic, information,

anthropogenic security, etc. In the law of national security, its objects – national interests [23] – acquire general significance for society, individual and collective subjects, since they are law-oriented, protected by law or secured by law and are public, legally protected interests.

The unity of objects of national security law is based on a common goal, which is national security. The specification of objects in certain types of national security confirms its integrity, which determines the actual integrity of national security law. Objects of national security law exist as corresponding to the systemic multiplicity of national interests – vital interests of a person, society, and the state, the implementation of which ensures safe living conditions and the well-being of citizens, the sovereign existence of the state and society, and the democratic development of the state organisation of society. The main objects of the right of national security are a person's life in the social space, their physical existence and well-being. In these circumstances, the human-centrism of law is confirmed and revealed in the law of national security. Other important national interests, in particular the sovereignty and territorial integrity of the state, relate to the spatial conditions of human and social life, which is reflected in the law of national security.

The national security law of Ukraine as an independent branch of law is based on the corresponding principles. The principles of national security law consider the fundamental, initial ideas and provisions that determine the essence and content of the influence of law on ensuring national security. The basic principles of national security law should include the rule of law; legality; protection and guarantee of human rights and freedoms; priority of protecting national interests that are generally important for society and the state; compliance of branch provisions and regulations with the requirements of international law and international treaties to which the state is a party.

The functions of national security law of Ukraine specify the functions of national law [24] in its interaction with international law in the field of national security and cover all areas of ensuring national security and protecting national interests. Consequently, the functions of national security law are regulatory, security, information, preventive, predictive, as well as the function of legal support of national security. Considering scientific opinions regarding the pragmatic nature of the paradigm of legal functions and their relevance for influencing public relations, the allocation of other functions of national security law is not excluded [5, p. 79-92].

The function of legal support of national security is of particular importance in modern conditions. At the same time, legal security remains relevant for the national legal system, which should be developed through the use of a legal regime containing resources, methods, and means of influencing all components of the national legal system based on the rule of law to ensure their compliance with national culture, traditions, national identity, national needs, property, and interests. National security law as a nonlinear system reflects the content of this branch of law in its structure. The structure of national security law is developed

as a result of the specification of the legal regime, where the subject – public relations and social communications in the field of national security – is a determinant, and the purpose of legal influence on such public relations and social communications is specified.

In such circumstances, the structuring of national security law reflects its specialisation and occurs in a horizontal combination, in the interaction of institutional regulatory communities focused on static branch features – system groups of legal provisions, as well as on its dynamic features – statuses and legal communications developed as a result of the action of such groups of legal provisions [5, p. 333-334]. The structure of national security law of Ukraine is a certain network of regulatory and institutional entities oriented horizontally in the national system of law, interdependent and connected by functional links to the legal support of the relevant type of national security, including international law.

The law of national security unites such (but not exclusively) inter-branch system formations: the law of information security law, the of national security law, the environmental and anthropogenic security law, the economic security law, the military security law, etc. The structure of national security law is dynamic, and the interaction of intra-industry entities is subject to constant changes in accordance with the specifics, status basis and social communications in the field of national security.

The law of national security of Ukraine reveals its essential and content features in the system of strategic communications [25], which are of particular importance in the field of national security and defence in the context of Ukraine's Euro-Atlantic integration. Strategic communications ensure cooperation between state institutions, society, and citizens in solving security issues and have a corresponding legal content. The application of national security law in the resolution of social conflicts allows coordinating and synchronising the actions of security and defence sector actors, in particular, in the manner of legal and necessary coercion to protect security in the interests of reaching a general compromise. As a result of the operation of national security law, strategic communications in the field of national security acquire the features of legal strategic communications.

Strategic communications in the field of national security are carried out considering national interests, and the national security law aligns the interests of individuals and individual social entities with national interests. That is why the national security law effectively affects bringing group interests in line with national interests, and in the case of a socially recognised and statutorily supported need to develop corporate interests, the national security law brings them to a level that ensures national security [5, p. 336-338]. At the same time, the national security law of Ukraine primarily ensures the subjectivity of a person in the sphere of national security and develops a legal barrier to the implementation of possible threats to their life. Subjective rights, freedoms, legitimate interests and legal obligations, as indispensable signs of human subjectivity, in this case are directly dependent on the solution of security issues and at

the same time are determined by the level of safety of human life and the state of protection of national interests.

Among the basic human rights in the context of ensuring the right of national security of its subjectivity is the right to security [26], which has the features of an absolute right, but in particular legal relations in the field of national security it is a subjective right. The right to security in the concept of human subjectivity has an axiomatic meaning as the initial formula of human-centrism of legal reality. Therewith, the human right to security forms the corresponding institution of national security law. Normative-value prescriptions of national security law are implemented in social practice by the state and society as active subjects of national security law.

The subjectivity of the state in legal relations and strategic communications is stipulated in the provisions of the Constitution of Ukraine and specified in the legislation defining the tasks, functions, and powers of state institutions in the field of ensuring national security. Such institutions form the security and defence sector of the state, have a legal status defined by law and act in accordance with it within their competence. The subjectivity of society in legal relations and strategic communications in the field of national security is exercised through certain institutions of civil society. These institutions, in accordance with the legislation and their statutory provisions, exercise democratic civilian control over the security and defence sector, can take part in strategic communications, conduct analytical, predictive, and other activities to solve systemic national security issues.

2.3 Development of national security law of Ukraine

In the modern conditions of globalisation of the world order, the national security system also becomes the basis for the legal security of society and the state, which lies in introducing the rule of law in the national legal system and developing the rule of law. In these circumstances, the purpose of national security law is updated towards ensuring legal security, that is, the protection of the national legal system from negative factors of regulatory and institutional origin, which objectively accompany global changes in the world order [5, p. 249-251]. At the same time, the national security law receives qualitatively new features, developing a system of legal support for national security. In this system, the law of national security forms the regulatory, and determines the institutional and organisational components [5, p. 252-285].

The regulatory framework of the system of legal support for national security comprises the corresponding constitutional provisions, national legislation, and provisions of international law. Its institutional component makes provision for the activities of special services and law enforcement agencies, prosecutor's offices and justice bodies, and other subjects of the security and defence sector. For the organisational component of the system of legal support of national security, the system of training specialists for

subjects of the security and defence sector, the development of a competent legal culture [27] and a conscious attitude of citizens towards national security as a vital basis for the existence of society and the state are relevant.

The development of national security law is topical in the context of a hybrid war [28], which has been waged by the Russian Federation against Ukraine for a long time. At present, the actions of hybrid warfare have gone beyond the Russian-Ukrainian armed conflict, and a number of states of the world have actually become participants in this confrontation using information, economic, energy, military, and other components, which certainly increases the importance of national security law.

Violations of the provisions and principles of international law by the Russian Federation in the creation of the so-called "security belt of the Russian Federation" ("managed conflict zones") on the territory of former Soviet Union republics that have embarked on the path of development of sovereign states require a suitable legal assessment to protect the national interests of such states. Notably, since the end of the 20th century, with the direct participation or support of the Russian Federation, long-term military and political conflicts began on the territory of Azerbaijan, Armenia, Georgia, Moldova, Tajikistan, and now – in Ukraine. There were also attempts by the Russian Federation to interfere in the internal affairs of the Baltic States, which managed to protect their peoples by gaining membership in the EU and NATO. In this context, scenarios for the development of events in the post-Soviet space deserve attention, which area addressed by Ukrainian researchers – specialists of the National Institute for Strategic Studies [29, p. 185-195], in particular:

- 1) "chaos scenario" – the emergence of a continuous conflict zone in the former Soviet Union;
- 2) "imperial scenario" – the creation of a regional post-Soviet empire with the possible repetition of well-known negative historical consequences;
- 3) "split scenario" – the emergence of the Eastern European democratic and Eurasian imperial segments in the post-Soviet space.

Active attempts to implement the second scenario began 20-25 years ago. However, the events of the last 10-15 years indicate a steady trend towards the development of the Eastern European democratic space, which in the process of "hybrid confrontation" and as a result of such a process, can spread to the entire post-Soviet space. The development of the Eastern European democratic space can also be facilitated by the de facto unification of the Member States of the European Union, NATO, and other states of the world to jointly recognise the gross violations of the fundamental principles of international security and the provisions of international law by the Russian Federation.

With adoption in 2018 of the Law of Ukraine "On National Security of Ukraine"¹, the process of developing a new model of the security and defence sector of Ukraine has commenced, which includes the following main components:

1. Law of Ukraine No. 2469-VIII "On National Security of Ukraine". (2018, June). Retrieved from <http://zakon.rada.gov.ua/laws/show/2469-19 #Text>.

1) the system of governance and democratic control; 2) the security forces; 3) the defence forces; 4) the military-industrial complex. In the order of comparison, the authors of this study noted that according to Article 17 of the Constitution of Ukraine¹, the following areas of national security are to be ensured: 1) protecting the sovereignty and territorial integrity of Ukraine; 2) economic security; 3) information security; 4) defence of Ukraine (military security); 5) national security; 6) protecting the state border.

At the same time, in 2018, based on proposals provided by scientists of the Section of National Security Law and Military Law of the National Academy of Legal Sciences of Ukraine, the Research Institute of Informatics and Law of the National Academy of Legal Sciences of Ukraine, and the Military Institute of the Taras Shevchenko Kyiv National University, a list of subject areas of research within the speciality 081 – “Law” was prepared and approved by Order of the Ministry of Education and Science of Ukraine No. 1477 of December 28, 2018², which introduced a new area – “national security law; military law”. In 2019, the introduction of educational specialisations “national security law” and “military law” in higher education institutions began.

The formula for specialisation “national security law; military law” in accordance with the provisions of the specified Order of the Ministry of Education and Science of Ukraine was proposed in the following wording: “Research of public relations in the field of national security and defence, as one of the main functions of the state; legal bases of state sovereignty, constitutional order, territorial integrity and inviolability of the borders of Ukraine, legal support of state and military security and border security; system and state-legal mechanisms for ensuring national security and defence of Ukraine; statutory regulation of the activities of the security subjects and security sector, military law enforcement agencies and military justice bodies; legal issues of implementation of standards of the Member States of the European Union and the North Atlantic Treaty Organisation in the legislation of Ukraine”.

Considering the above and other transformation processes taking place in Ukraine and the world, during 2018-2021, researchers of the Research Institute of Informatics and Law of the National Academy of Legal Sciences of Ukraine (currently the State Scientific Institution “Institute of Information, Security and Law of the National Academy of Legal Sciences of Ukraine”) together with representatives of the Section of National Security Law and Military Law of the National Academy of Legal Sciences of Ukraine, Ivan Chernyakhovskiy National Defence University of Ukraine, Military Institute of Taras Shevchenko Kyiv National University, Military Law Institute of

Yaroslav Mudryi National Law University, National Academy of Security Service of Ukraine, Bohdan Khmelnytskyi National Academy of State Border Service of Ukraine, National University “Ostroh Academy” and other institutions and establishments of Ukraine with the participation of specialists from the security and defence sector entities and representatives of a number of EU and NATO Member States, topical issues of ensuring national security and international legal order were elaborated and priority areas for the development of legal science in this area were proposed. Based on these and other scientific achievements [5; 15; 30], the Development Strategy of the National Academy of Legal Sciences of Ukraine for 2021-2025³, approved by the General Meeting of the National Academy of Legal Sciences of Ukraine on March 26, 2021 (defines priority areas, tasks, and principles of further development of legal science, scientific support for the modernisation of state-legal relations in Ukraine, promoting the growth of legal culture among the population) was supplemented with a separate section “Legal Support in the Field of National Security and Defence”. Research in the medium term can be based on corresponding areas, in particular:

- theoretical and legal grounds for ensuring national, information, and cyber-security, protecting the sovereignty, constitutional order, territorial integrity of Ukraine, human and civil rights and security;

- legal basis for the development and implementation of national policy on national security and defence, development of the national security system, reform and development of subjects of the security and defence sector and the military-industrial complex in the context of Euro-Atlantic integration of Ukraine;

- theoretical foundations of the development of national security law, international security law and military law; methodological and applied principles for the development of legislation on national security and defence, legal support for the organisation and activities of security sector entities, the functioning of non-state security sector entities as a component of the national security system of Ukraine;

- legal principles for ensuring national security in the foreign and domestic political spheres, in the sphere of national security, in the military sphere and in the sphere of state border security; modernisation of the legal policy of Ukraine regarding economic, energy, and environmental security strategies in the context of global and regional transformations;

- problems of combating terrorism, as well as cybernetic and organised crime and corruption, countering crimes against the foundations of national security, against the peace and security of humanity and the international legal order;

1. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/rada/show/254к/96-бп>.

2. Order of the Ministry of Education and Science of Ukraine No. 1477 “On the Statement of the Approximate List and the Description of Subject Directions of Research within a Speciality 081 “Law”. (2018, December). Retrieved from <https://mon.gov.ua/ua/npa/prozatverdzhennya-primirnogo-pereliku-ta-opisu-predmetnih-napryamiv-doslidzhen-v-mezhah-specialnosti-081-pravo>.

3. Development Strategy for National Academy of Legal Sciences of Ukraine for 2021-2025. Retrieved from http://www.aprnu.kharkiv.org/doc/strategiya_2021.pdf.

legislative support of intelligence and counter-intelligence activities;

– relevant issues of ensuring information security of Ukraine as one of the main functions of the state; legal grounds for ensuring cyber-security, combating cybercrime, cyber espionage, and cyberterrorism;

– legal support for the protection of personal data, information with restricted access, technical protection of information, prevention and counteraction of negative information influences and influences of information technologies to the detriment of a person, society, the state, and international law and order;

– legal aspects of the establishment and development of democratic control over state and non-state actors of the security and defence sector; legal grounds of civil-military cooperation, establishment and development of the strategic communications system of the security and defence sector and Euro-Atlantic integration of Ukraine;

– legal issues of establishment and development of systems of regional (subregional) and international security, international cooperation in this area and harmonisation of national legislation with the provisions of international law, EU legislation, and NATO standards in the field of security and defence.

CONCLUSIONS

Consideration of the theoretical foundations and priority areas for the development of national security law allows drawing the following main conclusions and proposals. National security law forms an independent branch in the national legal system that governs public relations in the field of national security of Ukraine. Its regularities and features, essential and content characteristics, features, principles, and functions create a system of knowledge about national security law. The national security law defines the objects of protection – national interests and the system of subjects of the security and defence sector. The applied significance of national security law lies in the development of a system of legal support for national security, which includes regulatory, institutional, and organisational components. The national security law is also the basis for the development of appropriate strategic thinking and legal culture, as indispensable organisational components of the system of legal support for national security.

The law of national security, along with military law and international security law, in the conditions of hybrid war and international armed conflict, global transformations and crisis processes in the system of international security, performs relevant tasks of legal support for the security of a person and citizen, society and state and international law and order at the national, regional (subregional), and international levels and is a vital area for the development of legal science. The national security law in Ukraine is established and developed considering the introduced model of national security, the features of the legal system and the system of state government, national historical and cultural values, as well as political, informational, economic, military, and other factors. At the same time, the national security model and national security law of the United States and the corresponding standards of the EU and NATO Member States deserve attention.

Legal support of the strategic communications system and the system of democratic civilian control over the security and defence sector, considering the experience and standards of the EU and NATO Member States, constitutes an extremely relevant area for the development of national security and military law in the context of Ukraine's European and Euro-Atlantic integration. Identifying priority areas of development and relevant fundamental and applied research is a prerequisite for the effective implementation of functions and public purpose by the national security law in the interests of ensuring the security of a person, society, the state, and the international community.

RECOMMENDATIONS

The practical value of the study was to cover the features of national security law as a value-normative system of statuses, rules of conduct, communications, which has public recognition and is legitimised to ensure safe conditions for human life, the existence and development of society and the state, and to justify the development of the subject area of national security law towards qualitative indicators of legal support of all components of the national security system, structuring its types, levels – from national to international, entering the legal system of collective international security based on international principles and standards that form such a security system.

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ПРАВОВЕ РЕГУЛЮВАННЯ СЛУЖБОВОЇ ТА БОЙОВОЇ ДІЯЛЬНОСТІ У СФЕРІ БЕЗПЕКИ ТА ОБОРОНИ УКРАЇНИ У КРИЗОВИХ СИТУАЦІЯХ

Анотація. У статті зазначається, що нинішня ситуація в Україні свідчить про потребу нового розвитку теорії військової діяльності правоохоронних органів в умовах врегулювання збройного протистояння в окремих районах Донецької та Луганської областей. Тому на перший план висуваються питання нормативно-правового забезпечення правоохоронних органів у реагуванні на кризові ситуації. Аналіз нормативно-правових актів показує, що правові норми недостатньо чітко сформульовані та неоднозначно трактуються правоохоронними органами. Тому необхідно вдосконалити законодавчий механізм запобігання та реагування на кризові ситуації, що загрожують національній безпеці України. Метою дослідження є всебічне розкриття сутності та особливостей правового регулювання бойових операцій у сфері безпеки та оборони України в кризових ситуаціях та розробка конкретних практичних рекомендацій, науково обґрунтованих пропозицій щодо вдосконалення державного управління у цій галузі. З метою вивчення передового досвіду України щодо функціонування державних механізмів реагування у сфері безпеки та оборони України на кризові ситуації під час Антитерористичної операції та Операції об'єднаних сил у деяких районах Донецької та Луганської областей, було проведено опитування експертів з питань антитерористичної безпеки. Результати опитування дали можливість визначити основні проблемні питання у функціонуванні системи антитерористичної безпеки та надати відповідні пропозиції щодо розвитку. Сьогодні державні органи влади повинні зосередитись на вдосконаленні організації управління, налагодженні міжвідомчого співробітництва між державними органами, підвищенні рівня попередньої підготовки персоналу, чіткому визначенні завдань правоохоронних підрозділів під час проведення спеціальних операцій. Напрямок подальших досліджень будуть спрямовані на розробку державних механізмів реагування компонентів сектору безпеки та оборони України на кризові ситуації

Ключові слова: теорія військової діяльності, система антитерористичної безпеки, державне управління, правоохоронні органи, національна безпека

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THE LEGAL REGULATION OF SERVICE AND COMBAT ACTIVITIES OF THE SECURITY AND DEFENSE SECTOR OF UKRAINE IN CRISIS SITUATIONS

Abstract. *The article states that nowadays situations in Ukraine shows that the theory of military activity of law enforcement forces needs a new development in the terms of settlement of armed confrontation in separate areas of Donetsk and Luhansk areas. Therefore, the issues of regulatory and legal support of law enforcement agencies in responding to crisis situations come to the fore. The analysis of normative legal acts shows that legal norms are not formulated clearly enough and ambiguously interpreted by law enforcement agencies. Therefore, it is necessary to refine the legislative mechanism for preventing and responding to crisis situations that threaten the national security of Ukraine. Therefore, the purpose of the research is to comprehensively reveal the essence and features of the legal regulations of combat operations of the security and defense sector of Ukraine in crisis situations and to develop specific practical recommendations, scientifically sound proposals for improving State governance in this field. In order to research the best practices of Ukraine on the functioning of Public mechanisms of response of the security and defense sector of Ukraine to crisis situations during the Anti-Terrorist Operation and the Joint Forces Operation in some districts of Donetsk and Luhansk regions, an expert survey of anti-terrorist security experts was conducted. The results of the survey provided an opportunity to identify the main problematic issues in the functioning of the anti-terrorist security system and provide appropriate development proposals. The State authorities today need to focus on improving the organization of management, establishing interagency cooperation between government agencies, increasing the level of pre-training of personnel, a clear definition of tasks for law enforcement units during special operations. Areas of further research will be aimed at developing State mechanisms of responding by the components of the security and defense sector of Ukraine to crisis situations*

Keywords: *theory of military activity, anti-terrorist security system, state governance, law enforcement agencies, national security*

INTRODUCTION

The difficult socio-economic, socio-political and military situation that has developed today in the regions of the State directly affects the level of national security of Ukraine. Carrying out an Anti-Terrorist Operation (ATO) in some districts of Donetsk and Luhansk regions has a catastrophic impact on the level and quality of life of the population, as well as on the territorial integrity of the State. Statistics of the most serious criminal offenses in 2013-2019 compiled by the General Prosecutor's Office of Ukraine¹ is a real confirmation of the existing threats. The increasing in the numbers of registered crimes in the main indicators of the sections such as like: Crimes against the foundations of national security, Crimes against public safety, Crimes against public order and morality most thoroughly proves the likelihood of threats resulting from crisis situations of socio-economic origin. Another group of indicators in the sections: Crimes in the service of official activity and professional activity, use of public services, Crimes in the field of economic activity and Crimes against property currently determines the existence of crisis situations in Ukrainian society. The emergence of crisis situations is an acute problem of national security and requires the Government to make timely, adequate and effective management decisions and comprehensive solutions with the participation of various departments and authorities in ensuring law and order, protecting the interests of the State and citizens, eliminating serious consequences [1]. In addition, the Decision of the National Security and Defense Council of Ukraine of September 14, 2020 "On the National Security Strategy of Ukraine", approved by the Decree of the President of Ukraine No. No.392/2020², prioritizes national security and centralized management of the security and defense sector in peacetime, in crisis situations that threaten national security, and in a special period, interagency coordination and interaction.

In the literature of recent years, some issues of service and combat activities of law enforcement forces in terms of the regulatory framework of crisis response were considered by scientists: O.M. Bandurka and O.M. Litvinov [2], O.V. Barabash [3], O.F. Dolzhenkov and R.V. Tarasenko [4], Y.V. Dubko and S.A. Butkevich [5], M.V. Kornienko [6], S.O. Kuznichenko [7], V.A. Lipkan [8], O.V. Pletnev [9], D.O. Savochnikina [10], M.P. Strelbytsky and M.L. Pogrebytsky [11], V.A. Syagrovets [12], H.P. Yarmaki [13] and others. Scholars have made a significant contribution to the research of the problems of service and combat activities of law enforcement in crisis situations; however, in their work only some issues of crisis response and the interaction

of law enforcement in these circumstances were studied. Thus, a comprehensive research of the legal regulation of combat operations of the components of the security and defense sector of Ukraine in crisis situations from the standpoint of State governance was not conducted, which is led to the choice of this topic and its relevance.

According to the generally accepted opinion among scientists of the security and defense sector, military service is a type of law enforcement activity that is inherent in military formations and law enforcement agencies of the special sector of security and defense and is implemented by performing law enforcement tasks mainly through law enforcement methods and in the case of aggravation on the situation – also by military, i.e., combat methods [14; 15]. Currently, there is a situation in Ukraine that the theory of military activity of law enforcement forces needs a new development in the context of the settlement of armed conflict. Regulatory issues come to the fore and are an integral part of the strategic and tactical principles of law enforcement. The laws and regulations are basis of legal regulation of service and combat activities in crisis situations. By-laws supplement the laws, which promptly eliminate the shortcomings of the legislation.

Therefore, the purpose of the research is to comprehensively reveal the essence and features of the legal regulations of combat operations of the security and defense sector of Ukraine in crisis situations and to develop specific practical recommendations, scientifically sound proposals for improving State governance in this field.

1. THEORETICAL OVERVIEW

Separately in this system there are some regulations of special governing bodies existed, which are created if necessary, in special conditions, such as emergency commissions, operational headquarters and so on. The Constitution is fundamental to all national legislation. It enshrines the principles that are being developed in laws and regulations. Article 17 of the Constitution of Ukraine³ enshrines the principles of social security, namely that "the protection of the sovereignty and territorial integrity of Ukraine, ensuring economic and information security are the most important functions of the State, the business of the entire Ukrainian people". A special role in the legal regulation of Ukraine is given to international regulations that have been ratified by Ukraine. Article 9 of the Constitution of Ukraine stipulates that valid international treaties, the binding nature of which has been approved by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of

1. General Prosecutor's Office of Ukraine: Unified reports on criminal offenses for 2014-2019. (2020). Retrieved from <http://www.gp.gov.ua/ua/stat.html>.

2. Decree of the President of Ukraine No. 392/2020 "On the decision of the National Security and Defense Council of Ukraine of September 14, 2020 "On the National Security Strategy of Ukraine". (2020, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/392/2020#Text>.

3. Constitution of Ukraine. (1996). Retrieved from <http://zakon2.rada.gov.ua/laws/show/254k/96-bp>.

international agreements that contradict the Constitution of Ukraine is possible only after the relevant amendments to the Constitution of Ukraine. These principles are also enshrined in the Law of Ukraine “On International Treaties of Ukraine” of 29.06.2004 No. 1906-IV¹.

Analyzing the activities of law enforcement forces, we can build the following hierarchical system of regulations on their legal force:

- Constitution of Ukraine;
- International legal acts ratified by Ukraine;
- Constitutional laws of Ukraine;
- Codes and laws of Ukraine;
- Resolutions of the Verkhovna Rada of Ukraine;
- Decrees and orders of the President of Ukraine;
- Resolutions of the Cabinet of Ministers of Ukraine;
- Interdepartmental interbranch regulations, departmental and interdepartmental regulations;
- Regulations of local state administrations;
- Normative acts of local self-government bodies.

A significant part of Ukraine’s legal acts is devoted to security (preventive) measures aimed to prevent the escalation of armed conflict within the State. The Article 37 of the Constitution of Ukraine² defines the conditions under which the activities of political parties and public organizations are prohibited in order to prevent armed conflicts such as formation and activity of political parties and public organizations whose program goals or actions are aimed at system of violence, violation of the sovereignty and territorial integrity of the State, undermining its security, illegal seizure of state power, propaganda of war, violence, incitement of interethnic, racial, religious hatred, encroachment on human rights and freedoms, public health, are prohibited.

According to the Article 85 of the Constitution of Ukraine³, the powers of the Verkhovna Rada of Ukraine in the field of internal armed conflict include: paragraph 9 about declaration of war and peace by the President of Ukraine, approval of the decision of the President of Ukraine on the use of the Armed Forces of Ukraine and other military formations. Armed aggression against Ukraine; paragraph 31 about approval within two days from the date of the President of Ukraine decrees on the imposition of martial law or state of emergency in Ukraine or in certain localities, on general

or partial mobilization, on declaring certain areas as an ecological emergency zones.

The Article 106 of the Constitution of Ukraine⁴ states the provisions on the activities of the President of Ukraine in the field of settlement of internal armed conflict: paragraph 1 states ensures State independence, national security and succession of the State; paragraph 17 states the Supreme Commander-in-Chief of the Armed Forces of Ukraine, exercises leadership in the spheres of national security and defense of the State; paragraph 18 states heads the National Security and Defense Council; paragraph 19 states submits to the Verkhovna Rada of Ukraine a motion to declare a state of war and decides on the use of the Armed Forces of Ukraine in the event of armed aggression against Ukraine; paragraph 20 states decides in accordance with the law on the general or partial mobilization and imposition of martial law in Ukraine or in certain localities in the event of a threat of attack, the danger of State independence of Ukraine.

Article 107 of the Constitution of Ukraine⁵ defines the status of the National Security and Defense Council of Ukraine as the coordinating body for national security and defense under the President of Ukraine. The competencies and functions of the National Security and Defense Council of Ukraine are determined by the Laws of Ukraine “On National Security of Ukraine”⁶ and “On the National Security and Defense Council of Ukraine”⁷.

2. MATERIALS AND METHODS

Many legal acts are devoted to crisis response. They are directly enshrined in the “primary” domestic laws and regulations that define the tasks, structure, rights, responsibilities and other issues of law enforcement. Measures taken in the settlement of armed conflicts under these regulations should be carried out within the limits required by the current situation. They must meet the requirements of international regulations ratified by Ukraine. These are acts that interpret the basic rules of international humanitarian law, which is codified in:

- The Hague Conventions and Declarations of 1899⁸ and 1907⁹;
- Geneva Conventions for the Protection of Victims of War of 1949¹⁰ and their Additional Protocols of 1977¹¹;

1. Law of Ukraine No. 1906-IV “On International Treaties of Ukraine”. (2004, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1906-15#Text>.

2. Constitution of Ukraine. (1996). Retrieved from <http://zakon2.rada.gov.ua/laws/show/254k/96-бп>.

3. *Ibidem*, 1996.

4. *Ibidem*, 1996.

5. *Ibidem*, 1996.

6. Law of Ukraine No. 2469-VIII “On National Security of Ukraine”. (2018, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/2469-19#Text>.

7. Law of Ukraine No. 183/98-BP “On the National Security and Defense Council of Ukraine”. (1998, March). <https://zakon.rada.gov.ua/laws/show/183/98-%D0%B2%D1%80#Text>.

8. First Hague Conference (1899, July). Retrieved from https://avalon.law.yale.edu/subject_menus/lawwar.asp.

9. Second Hague Conference (1907, October). Retrieved from https://avalon.law.yale.edu/subject_menus/lawwar.asp.

10. Geneva Conventions for the Protection of Victims of War. (1949, August). Retrieved from <https://www.icrc.org/en/doc/resources/documents/publication/p0173.htm>.

11. Additional Protocols to the Geneva Conventions of 1949. (1977, June). Retrieved from <https://www.icrc.org/en/document/additional-protocols-geneva-conventions-1949-factsheet>.

- The resolutions of the UN General Assembly¹, etc.;
- International acts also enshrine the legal status of the individual, rights and freedoms that cannot be restricted in emergency situations, namely: Universal Declaration of Human Rights²; International Covenant on Civil and Political Rights³; Convention for the Protection of Human Rights and Fundamental Freedoms⁴, etc.

As a separate block is international and domestic regulations on counter-terrorism are represented. These are the international legal instruments ratified by Ukraine, in particular:

- Convention for the Suppression of Unlawful Seizure of Aircraft⁵;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation⁶;
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents⁷;
- European Convention on the Suppression of Terrorism⁸;
- International Convention for the Suppression of Terrorist Bombings⁹;
- International Convention for the Suppression of the Financing of Terrorism¹⁰;

- Law of Ukraine “On Combating Terrorism”¹¹;
- Regulations on the Anti-Terrorist Center and its coordination groups at the regional bodies of the Security Service of Ukraine¹², etc.

An important role in the legal regulation of service and combat activities of law enforcement forces of Ukraine during the settlement of armed conflicts is played by the laws of Ukraine, which determine the legal basis for the organization and operation of law enforcement forces, its general structure, functions and powers. Among them are the following:

- Law of Ukraine “On the Armed Forces of Ukraine”¹³;
- Law of Ukraine “On the National Guard of Ukraine”¹⁴;
- Law of Ukraine “On the Security Service of Ukraine”¹⁵;
- Law of Ukraine “On the National Police of Ukraine”¹⁶;
- Law of Ukraine “On the State Border Guard Service of Ukraine”¹⁷;
- Law of Ukraine “On State Protection of Public Authorities of Ukraine and Officials”¹⁸;
- Law of Ukraine “On the general structure and number of the Department of State Protection of Ukraine”¹⁹;
- Resolution of the Cabinet of Ministers of Ukraine “On approval of the Regulation on the Civil Service of Ukraine

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3. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.
4. Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://www.echr.coe.int/documents/convention_eng.pdf.
5. Convention for the Suppression of Unlawful Seizure of Aircraft. (1970, December). Retrieved from <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280112834>.
6. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. (1971, September). Retrieved from <https://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-I-14118-english.pdf>.
7. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. (1973, December). Retrieved from https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-7&chapter=18&clang=_en.
8. European Convention on the Suppression of Terrorism. (1977, January). <https://rm.coe.int/16800771b2>.
9. International Convention for the Suppression of Terrorist Bombings. (1997, December). Retrieved from <https://www.refworld.org/docid/3dda06ddc.html>.
10. International Convention for the Suppression of the Financing of Terrorism. (1999, December). Retrieved from <https://www.un.org/law/cod/finterr.htm>.
11. Law of Ukraine No. 638-IV “On Combating Terrorism”. (2003, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/638-15#Text>.
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14. Law of Ukraine No. 876-VII “On the National Guard of Ukraine”. (2014, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/876-18#Text>.
15. Law of Ukraine No. 2229-XII “On the Security Service of Ukraine”. (1992, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2229-12#Text>.
16. Law of Ukraine No. 580-VIII “On the National Police of Ukraine”. (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.
17. Law of Ukraine No. 661-IV “On the State Border Guard Service of Ukraine”. (2003, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/661-15#Text>.
18. Law of Ukraine No. 160/98-BP “On State Protection of Public Authorities of Ukraine and Officials”. (1998, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/160/98-bp#Text>.
19. Law of Ukraine No. 3106-IV “On the general structure and number of the Department of State Protection of Ukraine”. (2005, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/3106-15#Text>.

for Emergencies”¹, etc. In order to research the conditions of the situation regarding the organization of legal regulation of service and combat activities of the components of the security and defense sector of Ukraine in crisis situations in the area, an expert survey in questionnaire form was conducted. Employees of law enforcement forces agencies who had personal practical experience in performing combat missions in some districts of Donetsk and Luhansk oblasts were selected as respondents. The sample was 150 respondents, the number of questions was 12.

3. RESULTS AND DISCUSSION

The following is a brief analysis of the results of the survey. To the following question: How did you gain knowledge about the nature and peculiarities of work during the Anti-Terrorist Operation and the Joint Forces Operation? the largest number of votes was given to the answers: acquired knowledge during training (29%) and from briefings, meetings held immediately before the tasks (26%). These results indicate both a sufficient level of early training of law enforcement officers during trainings, and the effectiveness of briefings, meetings and clarifications of tasks carried out immediately before the performance of duties in the area of the Anti-Terrorist Operation and the Joint Forces Operation.

To the following question: Was there enough knowledge to perform combat missions during the Anti-Terrorist Operation and the Joint Forces Operation? approximately a half number of votes were answered “yes” (57%). This answer indicates an approximately equal number of law enforcement specialists who already had experience both before and during combat missions in the area of the Anti-Terrorist Operation and the Joint Forces Operation.

To the following question: What difficulties did you encounter during performing the task? the largest number of votes was given to the answers: Insufficient legal support of activities (29%), Lack of information about the phenomenon (21%). These responses indicate a partially insufficient level of legal support for the NPU’s actions in the area of the Anti-Terrorist Operation and the Joint Forces Operation and the insufficient level of information exchange among the components of the state security and defense forces involved in the area of the Anti-Terrorist Operation and the Joint Forces Operation.

To the following question: What principles do you think should be followed during the conduction of the Anti-Terrorist Operation and the Joint Forces Operation? the largest number of votes was given to the answer: legality (26%). These results indicate the commitment of law enforcement officers to follow the letter of the law and to comply with current legislation in the management of their actions by leaders.

To the following question: In your opinion, does the existing legislation meet the requirements that arise

during the conduction of the Anti-terrorist Operation and the Joint Forces Operation? the largest number of votes was answered: fully compliant (33%). At the same time, a significant number of votes went to the answers: Poorly meets the existing requirements (31%) and Not fully meets (30%). These results indicate the opinion of employees of NPU units on the existence of shortcomings in the existing system of legal support of their activities or actions of the security and defense forces of the State as a whole and in the area of the Anti-Terrorist Operation and the Joint Forces Operation.

To the following question: What changes, in your opinion, should be made to the existing system of law enforcement during the Anti-Terrorist Operation and Joint Forces Operation? the largest number of votes was given to the answer: improve the legal framework (38%). These results indicate the understanding of the servicemen of law enforcement agencies the need to improve certain provisions of the legal support of these formations, as part of the security and defense forces in the area of the Anti-Terrorist Operation and the Joint Forces Operation.

To the following question: In your opinion, what contributed to the shortcomings in the organization of interagency cooperation during the Anti-Terrorist Operation and the Joint Forces Operation? the largest number of votes was given to the answer: Lack of coordination of joint actions (32%). These responses show an understanding of the importance of establishing a stable and lasting relationship and a high level of interaction between the components of the security and defense forces in the area of the Anti-Terrorist Operation and the Joint Forces Operation.

To the following question: What specific shortcomings did you note in the leaders’ management decisions regarding the organization of cooperation during the Anti-Terrorist Operation and the Joint Forces Operation? the largest number of votes was given to the answers: untimely leadership decision (22%) and low speed of transfer of leadership decisions (20%). These results of the answers testify to the dissatisfaction of law enforcement officers with the untimeliness of the relevant decisions made in the governing bodies and the speed of their delivery to the executors.

To the following question: In your opinion, on what principles should the training of employees to perform combat missions during the Anti-Terrorist Operation and Operation Joint Forces be based? the largest number of votes was given to the answers: regularity in planning and earliness in preparations (16%). These results show that law enforcement officers understand the importance of good and qualified planning and pre-training of security and defense forces in the area of the Anti-Terrorist Operation and the Joint Forces Operation.

To the following question: What measures do you think are necessary to improve the organization of

1. Resolution of the Cabinet of Ministers of Ukraine No. 1052 “On approval of the Regulation on the Civil Service of Ukraine for Emergencies”. (2015, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1052-2015-%D0%BF#Text>.

interdepartmental cooperation of law enforcement forces during the Anti-Terrorist Operation and the Joint Forces Operation? The largest number of votes was given to the answer: creation of a unified system of actions to respond to crisis situations during the Anti-Terrorist Operation and the Joint Forces Operation (38%). These results indicate the need to improve the system of general and centralized governance of security and defense forces in the area of the Anti-Terrorist Operation and the Joint Forces Operation.

The following question: Determine the role of law enforcement forces in the anti-terrorist security system of Ukraine (according to the experience of the Anti-Terrorist Operation and the Joint Forces Operation) the largest number of votes was given to the answer: the leading role (30%). The results of the answers indicate the respondents' desire to consider the NPU units as one of the key actors in the anti-terrorist security system of Ukraine (based on the experience of the Anti-Terrorist Operation and the Joint Forces Operation).

The following question: Determine the place of law enforcement forces in the anti-terrorist security system of Ukraine (by the experience of the Anti-Terrorist Operation and the Joint Forces Operation) was answered by the largest number of votes like: in the chain of secondary executors (21%). The results of the answers indicate an understanding of the importance of the managerial role of units of other formations in the anti-terrorist security system of Ukraine.

Thus, according to the results of the survey, it can be noted that the existing legislation and guidelines do not fully meet modern requirements for the organization of the service and combat missions by law enforcement units in the area of the Anti-Terrorist Operation and the Joint Forces Operation. The answers of the respondents also indicate:

- the relevance of issues of improving the organization of governance during the Anti-Terrorist Operation and the Joint Forces Operation;
- the establishment of interdepartmental cooperation of governing bodies during the Anti-Terrorist Operation and the Joint Forces Operation;
- the clear definition of tasks for law enforcement units in the area of the Anti-Terrorist Operation and the Joint Forces Operation, as a part of the security and defense forces of the State in the course of preventing and combating terrorism.

Also, a survey conducted in the form of a questionnaire proved that during emergencies it is extremely necessary to introduce emergency administrative and legal regimes. S.O. Kuznichenko notes that the extraordinary administrative-legal regime is described through a special administrative-legal regime, which, in turn, is described through the administrative-legal regime, through the legal

regime in general, which is revealed through the social regime in the philosophical sense. The legal regulation of relations arising in the context of various natural disasters, man-made accidents and catastrophes, social and military conflicts, has historically been carried out through acts governing the application of emergency measures. In this case, the legal regulation associated with the concept of special administrative and legal regime is applied [16]. Carrying out the analysis of scientific works [17-19] it can be concluded that emergency administrative and legal regimes are a form of national security in the face of global risk factors for the national interests of Ukraine. In general, authors agree with this reasoning.

The legal regime of the state of emergency is especially important among emergency administrative and legal regimes. According to the Law of Ukraine “On the Legal Regime of the State of Emergency”¹, a state of emergency is a special legal regime that may be temporarily imposed in Ukraine or in certain localities in case of emergencies of man-caused or natural nature not lower than the national level, that already lead or may lead to human and material losses, endanger the lives and health of citizens, or attempt to seize State power or change the constitutional order of Ukraine through the violence. The state of emergency provides for the granting of relevant authorities, military command and local authorities, in accordance with this Law, the power necessary to prevent threats and ensure the safety and health of citizens, the proper functioning of the national economy, State and local authorities, protection constitutional order, as well as allows for temporary, threatened, restrictions on the exercise of constitutional rights and freedoms of man and citizen and the rights and legitimate interests of legal entities, indicating the term of these restrictions.

In the case of an environmental emergency, the legal regulation of relations arising during emergency measures aimed at protecting human life and health and normalization of the ecological situation in the crisis area is carried out in accordance with the Law of Ukraine “On Environmental Emergency Zone”². The Article 8 of the Law discloses the legal regime of the environmental emergency zone, namely: the legal regime of the environmental emergency zone (a special legal regime that may be temporarily introduced in certain areas in case of environmental emergencies and is aimed at preventing human and material losses, prevention of threat to life and health of citizens, and also elimination of negative consequences of an emergency ecological situation). It is also determined that if there are sufficient grounds within the zone of ecological emergency, the legal regime of the state of emergency may be introduced.

In the event of an armed conflict an emergency legal regime of martial law requires its implementation. The

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. 1908-III “On Environmental Emergency Zone”. (2000, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1908-14#Text>.

Article 1 of the Law of Ukraine “On the Legal Regime of Martial Law”¹ provides that martial law is a special legal regime introduced in Ukraine or in some of its localities in case of armed aggression or threat of attack, danger of State independence of Ukraine, its territorial integrity and provides for the provision of relevant State authorities, military command, military administrations and local authorities the necessary power to deter the threat, repel armed aggression and ensure national security, eliminate the threat danger to the State independence of Ukraine, its territorial integrity, as well as temporary, threatened, restriction of constitutional rights and freedoms of man and citizen and the rights and legitimate interests of legal entities, indicating the term of these restrictions.

According to the results of the research, it is possible to note that the strategic situation of the XXI century covers many ethnic, religious, ideological drivers that require the sustainable solutions in societies which are undermined by conflict, disaster or humanitarian catastrophes. Military means alone cannot be used to solve these serious problems [20]. Under such conditions, according to majority of expert’s opinion and in accordance with modern requirements of international humanitarian law, the settlement of armed conflict in Ukraine can’t be carried out without civil-military cooperation. Civil-military cooperation as a military function is an integral part of modern multidimensional operations, appeals to all parties for cooperation in conflict situations and facilitates mutual support of civilian forces and means for the armed forces and vice versa [21]. The main idea of this interaction is to achieve a certain and usually desired end result, for better interaction of military and law enforcement agencies with the local population and civilian actors.

Military operations are currently taking place in a broader political and social context than before, so governing bodies increasingly need to take into account social, political, cultural, religious, economic, environmental and humanitarian factors in the planning and conducting of special operations. The scale, nature, risks and challenges in this multinational, multi-agent environment require greater understanding and emphasis on civil-military cooperation at all levels of work [22; 23]. The aim and the purpose of civil-military cooperation is the interaction between military and civilian actors in a comprehensive environment is to maintain the military command’s plan. Ideally, all participants will work to achieve a common goal, but where this is not possible, interaction will ensure that measures to maintain each plan are as consistent as possible. This will minimize obstacles or unintentional conflicts between all participants. This interaction can have the following components: coordination; cooperation; mutual support; coherent joint planning; information exchange². The leadership of military formations and law enforcement agencies, as

appropriate, needs significant civilian support to coordinate efforts to minimize disruption of a special operation. For this reason, civil-military cooperation plays an active role, it facilitates the planning of operations and is involved in these operations. Such activities in cooperation with other combat functions include:

- 1) the obtaining of operational information about the social component (civil environment) of the crisis situation;
- 2) the analysis of information and compilation of a comprehensive description of the crisis situation;
- 3) the assessment of the crisis situation, identification of civilian key indicators and factors that have a decisive influence on operations, as well as the impact of the military situation on the civilian environment;
- 4) the providing recommendations needed during the planning of the operation to mitigate critical military influence on the civilian population;
- 5) the participation of the civil-military cooperation specialists in planning of the operation;
- 6) the encouragement of the forces;
- 7) the ensuring a favorable impact on the public in the area of combat missions;
- 8) the access to civilian resources when is necessary providing.

Thus, the nowadays situations in Ukraine shows that the theory of military activity of law enforcement forces needs a new development in the terms of settlement of armed confrontation in separate areas of Donetsk and Luhansk areas. Therefore, the issues of regulatory and legal support of law enforcement agencies in responding to crisis situations come to the fore [24; 25]. The analysis of normative legal acts shows that legal norms are not formulated clearly enough and ambiguously interpreted by law enforcement agencies [26]. Therefore, it is necessary to refine the legislative mechanism for preventing and responding to crisis situations that threaten the national security of Ukraine. The basis of legislative regulation of service and combat activities of law enforcement forces in crisis situations are laws and bylaws, which define the tasks, structures, rights, responsibilities and other issues of law enforcement [27; 28]. The by-laws are supplementing the laws, which are promptly eliminating the shortcomings of the legislation. Currently, these regulations need to be finalized in line with the reforms introduced by the Government of Ukraine in the field of security and defense.

CONCLUSIONS

Today, law enforcement agencies and subdivisions operate without proper coordination and coordination of both independent and joint actions during the performance of service and combat missions. This applies to both related activities of services in various departments and in general service and combat activities of military formations and

1. Law of Ukraine No. 389-VIII “On the Legal Regime of Martial Law”. (2015, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/389-19#Text>.

2. AJP-9 NATO Civil-Military Co-Operation (CIMIC) Doctrine. (2003, June). Retrieved from <https://www.nato.int/ims/docu/ajp-9.pdf>.

special purposes law enforcement agencies. Therefore, the most pressing issues are the development of effective mechanisms for organizing interagency cooperation of law enforcement forces in responding to crises that threaten the national security of Ukraine. Military planning requires the use of civil-military cooperation, which allows all other military units to work within and outside the area of service and combat missions. Numerous parameters of modern military operations are influenced by civil-military cooperation, as their attention is focused on the civilian environment.

In order to research the best practices of Ukraine on the functioning of Public mechanisms of response of the security and defense sector of Ukraine to crisis situations during the Anti-Terrorist Operation and the Joint Forces Operation

in some districts of Donetsk and Luhansk regions, an expert survey of anti-terrorist security experts was conducted. The results of the survey provided an opportunity to identify the main problematic issues in the functioning of the anti-terrorist security system and provide appropriate development proposals. The State authorities today need to focus on improving the organization of management, establishing interagency cooperation between government agencies, increasing the level of pre-training of personnel, a clear definition of tasks for law enforcement units during special operations. Areas of further research will be aimed at developing State mechanisms of responding by the components of the security and defense sector of Ukraine to crisis situations.

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ПРОЦЕСИ ДЕЦЕНТРАЛІЗАЦІЇ ТЕРИТОРІАЛЬНОЇ ОРГАНІЗАЦІЇ УРЯДУ: ПРОБЛЕМИ ТА ПЕРСПЕКТИВИ

Анотація. У статті розглядається впровадження процесів децентралізації в національну систему державного управління. В контексті соціально-економічних та політичних проблем в Україні питання забезпечення ефективності регіонального розвитку стають дедалі актуальнішими. Поточна система адміністративно-територіального устрою та ієрархії влади, розподілу повноважень між органами державного управління на національному та регіональному рівнях та органами місцевого самоврядування не змогла забезпечити збалансований розвиток територій. Пріоритетом було забезпечення рівного доступу до соціальних, адміністративних, комунальних та інших послуг для населення як великих міст, так і сільських районів. Важливим аспектом розвитку є питання відповідальності громади за прийняття управлінських рішень. Представництво громади у питаннях територіального розвитку набуває підвищеної актуальності. З метою визначення перспектив подальшого впровадження реформи децентралізації в Україні було проведено ретроспективний аналіз розвитку реформи децентралізації в Україні та системи законодавчого забезпечення функціонування об'єднаних територіальних громад. Таким чином, у статті розглядається нормативна база щодо запровадження системи децентралізації влади в Україні. Визначено певні аспекти, які не були детально розроблені законодавством та перешкоджають подальшому розвитку системи об'єднаних територіальних громад. Аналіз законодавчої бази дозволив визначити основні нормативні документи, що регулюють процеси децентралізації в Україні, окреслити їх роль у розвитку процесів децентралізації та визначити правові межі можливостей та зобов'язань різних рівнів управління, включно з місцевим самоврядуванням та місцевим урядом

Ключові слова: державне управління, територіальний розвиток, механізми державного управління, законодавче забезпечення

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PROCESSES OF DECENTRALIZATION OF TERRITORIAL ORGANIZATION OF GOVERNMENT: PROBLEMS AND PROSPECTS

Abstract. *The article considers the implementation of decentralization processes in the national system of public administration. In the context of socio-economic and political problems in Ukraine, the issues of ensuring the effectiveness of regional development are becoming increasingly important. The existing system of administrative-territorial organization and hierarchy of power, distribution of powers between public administration bodies at the national and regional levels and local self-government bodies was not able to ensure balanced development of territories. The priority was to ensure equal access to social, administrative, communal and other services for the population of both large cities and rural areas. An important aspect of development is the issue of community responsibility for management decisions. Representation of the community in matters of territorial development is of increased relevance. A retrospective analysis of the development of decentralization reform in Ukraine and a system of legislative support for the functioning of amalgamated territorial communities were conducted in order to determine the prospects for further implementation of decentralization reform in Ukraine. Thus, the article considers the regulatory framework for the introduction of a system of decentralization of power in Ukraine. Certain aspects have been identified that have not been elaborated by law and hinder the further development of the system of amalgamated territorial communities. The analysis of the legal framework made it possible to identify the main normative documents regulating decentralization processes in Ukraine, outline their role in the development of decentralization processes, and determine the legal limits of capabilities and obligations of different levels of government, including local government and local government*

Keywords: *public administration, territorial development, mechanisms of public administration, legislative support*

INTRODUCTION

Ukraine is under reforming the system of public administration. The socio-economic and political crisis was the impetus for the search for new forms of organization of the hierarchy of government from national to regional and local levels. To ensure effective economic and social development, it is important to find managerial mechanisms

for the development and implementation of local development projects, the rational use of the resources and potential of the territories, the identification of priority areas of budget financing, the search for opportunities for the creation of co-financing and investment projects through the establishment of cooperation between the public and private sectors.

Thus, the new challenges and demands of society for the organization of the public administration system increase the relevance of the issue of ensuring the implementation of power mechanisms at the level of regional development. Accumulating the international experience and national realities of the functioning of socio-economic systems, it is appropriate to develop and implement decentralization reform as a mechanism for improving the effectiveness of public administration at the regional level in order to ensure synergy between the initiatives implemented. Decentralization reform aims to ensure sustainable and balanced development by transferring a number of powers, including financial, to local governments.

The issue of government decentralization in the context of transformations of socio-economic macro systems is of high relevance. Therefore, there is a high attention of the authors to this problem, the study of which is approved in scientific periodicals. So, Yu.O. Romanenko and I.V. Chaplay define marketing mechanisms of public administration systems and their peculiarities in the conditions of decentralization processes: authority, opportunities and development tasks [1]. M. Holovaty in his studies paid attention to the issues of multiculturalism, which can actively develop in the context of decentralization, taking into account the multinational nature of Ukraine in order to represent the interests and ensure the harmonious coexistence of national minorities within the unitary state [2]. V.Yu. Shvets, E.V. Rozdobudko, G.V. Solomina investigated the issue of efficiency of investment activities in the conditions of decentralization as the basis of social, economic and environmental development of territories [3]. A number of authors (A.V. Iatsyshyn, V.O. Kovach, Yu.O. Romanenko, I.I. Deinega, O.O. Popov, S.H. Lytvynova) determined the possibilities of using virtual technologies to ensure the development of territories in a decentralized environment [4]. T. Dobina, K. Haidukevych, S. Panchenko, I. Petrova, J. Sabadash defined certain aspects of management at the microeconomic level in the context of decentralization processes as a factor in the development of entrepreneurship [5]. A.V. Iatsyshyn, V.O. Kovach, Yu.O. Romanenko, determined the possibilities of using cloud services to train specialists in the development of territories, which is especially relevant in the conditions of the delegation of a number of managerial authority to the field [6]. The cluster model of economics as the basis of decentralization processes is considered in the works of O. Bakulina, I. Lehan, I. Bakhov [7], O. Nepomnyashchyy [8], O. Nepomnyashchyy [9], O. Nepomnyashchyy [10], T.V. Sych, V.O. Boniak, V.V. Dokuchaieva, Ye.M. Khrykov, N.S. Vasynova [11], Y.O. Romanenko [12], A.P. Lelechenko, O.A. Diegtiar, O.Y. Lebedinska, T.M. Derun, O.V. Berdanova [13], O.A. Diegtiar [14], S.H. Kuzmenko, T.V. Filipenko, A.A. Ryabev, M.V. Tonkoshkur, T.V. Shtal [15], V.V. Zablotskyi, O.Y. Palant, O.A. Diegtiar, T.V. Bielska, A.V. Rusnak [16], N. Orlova, I. Mokhova, O. Diegtiar, O. Khomutenko [17], S. Ignatyevs, O.A. Diegtiar, K.V. Osypenko, V.Y. Omelchenko, A.V. Cherkasov [18], N.S. Orlova, O.V. Kozureva,

O.A. Diegtiar, A.M. Shapovalova, S.I. Prykazka [19]. However, in the context of transformative socio-economic and public development processes, decentralization issues require an integrated approach to their definition, analysis and proposals to improve their implementation.

1. MATERIALS AND METHODS

The purpose of the article is to determine the prospects for the development of processes of government decentralization in order to improve the effectiveness of public administration at the national and regional levels. According to the intended purpose of the article, the following tasks are defined and solved: to analyse the retrospective of the development of decentralization reform in Ukraine; to review the system of legislative support for the development of the amalgamated territorial communities; to identify prospects for further implementation of decentralization reform in Ukraine.

The subject of the research in the article is regions and local communities – associations of administrative-territorial units aimed at obtaining large financial and administrative powers by the newly created groups by transferring these powers from the central authorities. The main hypothesis of the article is the assumption that local authorities and communities, understanding the problems of developing their own territories from the inside, can ensure a more efficient use of financial resources to ensure the social and economic development of the territory. The system of management of the group also helps to determine the most pressing issues of development and make decisions not only at the administrative level, but through the transfer of responsibility for the results of the implementation of this decision to each local resident of a particular group. Such a system will increase the efficiency of management of territories, their financial resources, introduce the most urgent development projects in order to increase the efficiency and effectiveness of the regional management system in Ukraine.

The development of this theory can be confirmed by analyzing the statistical information presented in the article through the accumulation of statistical data from public organizations that deal with the development of regions and local communities. These statistics confirm the effectiveness of the decentralization reform, which is associated with a significant number of successful projects implemented at the initiative of the residents of the territory. The implementation algorithm is as follows: defining the problem of the territory, discussing the prospects for solving this problem with the community, finding the best option, finding financial resources for the implementation of the project by co-financing or allocating funds from the community's budget, analyzing the results and prospects. The implementation of such a concept was recognized by the EU countries, and the decentralization reform was identified as the most successful reform in Ukraine after 2014. Therefore, it is advisable to analyze this hypothesis and confirm or refute the effectiveness of decentralization processes by analyzing its results.

2. RESULTS AND DISCUSSION

In the context of the socio-economic and political crisis, ensuring the implementation of effective regional policies is an important factor in the country's development. In 2014, Ukraine initiated a government decentralization reform, which included the delegation of a number of managerial authority from central authorities to regions and local communities in order to ensure transparency and effective use of funding for economic and social development projects, determine priorities for this development and provide a monitoring and control function by activating the local community. The imbalance in the socio-economic development of the territories and political factors caused the intensification of separatism processes, which led to negative consequences. European practice is to ensure the accessibility of health, education and other social services to the population of both urban and rural areas in equal opportunities and of equal quality. In Ukraine, despite the equality in the payment of taxes, administrative services and other payments, which is the source of the state budget, the population of cities and rural areas has different opportunities for access to quality medicine, education, transport, administrative and public services, social services, etc.

Only the transfer of a number of managerial authority, from central authorities to local communities, which should take responsibility for their own development, including in the area of financing, can make a difference. The essence of decentralization reform, first of all, is the transfer of responsibility to communities for their own future, increasing the importance of the active civic position of each local resident and local government. Thus, the key aspects of process decentralization are [1]: expanding the powers of local self-government bodies, primarily financial ones; financing of local self-government bodies for the implementation of local development projects should be sufficient for the exercise of the authority entrusted by the state to local self-government bodies within the decentralization processes; activation of the local population for the realization of their rights and the development of the local community; determining not only the sphere of influence,

but also the responsibility of local self-government bodies and local communities to ensure the economic and social development of the territory.

To implement this concept, in 2014 was initiated a government decentralization reform – bringing authority directly to the local population through the establishment of amalgamated territorial communities, transferring a number of managerial authority from central authorities [2-3]. The main regulatory documents governing decentralization processes in Ukraine are as follows: European Charter of Local Self-Government¹; Concept of local self-government reorganization and territorial organization of power²; Action plan for its implementation of the Concept of local self-government reorganization and territorial organization of power Ukraine³; Law of Ukraine “On Voluntary Association of Territorial Communities”⁴; Law of Ukraine “On Cooperation of Territorial Communities”⁵; Law of Ukraine “On the Principles of State Regional Policy”⁶; Set of regulatory documents aimed at expanding the powers of local self-government bodies in Ukraine. To implement the fundamentals of decentralization processes fully, as they are represented in the practice of the countries of the European Union, it is necessary to amend the Constitution of Ukraine, the Budgetary and Tax Codes of Ukraine.

In particular, the following issues remain unresolved at the legislative level [4-5]: mechanisms for the establishment and functioning of executive bodies of councils at different levels should be justified by law; to delineate responsibility between the executive bodies of the amalgamated territorial communities and local state administrations in order to avoid processes of duplication of functions or lack of responsibility; to entrench constitutionally the concept of a “amalgamated territorial community” as an administrative territorial unit in Ukraine; to identify mechanisms for the practical implementation of financial decentralization in Ukraine. We will analyze the changes that have been made through the adoption or introduction of amendments and additions to the legal documents regulating the processes of government decentralization in Ukraine (Table 1).

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1. Council of Europe. European Charter of Local Self-Government. (2013, October). Retrieved from <https://rm.coe.int/european-charter-for-local-self-government-english-version-pdf-a6-59-p/16807198a3>.
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 4. Law of Ukraine No. 157-VIII “On Voluntary Association of Territorial Communities”. (2015, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/157-19#Text>.
 5. Law of Ukraine No. 1508-VII “On Cooperation of Territorial Communities”. (2014, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1508-18#Text>.
 6. Law of Ukraine No. 156-VIII “On the Principles of State Regional Policy”. (2014, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/156-19#Text>.

Table 1. Analysis of legislative support for decentralization processes

Document title	Changes in public administration at the regional level	Statistical data
Changes in budget and tax legislation	Financial decentralization, which contributed to the growth of local community budgets	Growth of incomes of local budgets to 165.4 billion UAH since 2014
The Law on Voluntary Association of Communities [11]	Administrative-territorial division, the creation of the institute of headmen as an element of a hierarchical management system in local self-government bodies	878 amalgamated territorial communities were created, bringing together 9 million people
The Law on Cooperation of Territorial Communities [12]	Development of cooperation mechanisms in those issues that are common: waste disposal and transportation, transport, communications, connection, infrastructure development, joint farming, etc.	325 cooperation agreements signed and are implemented
The Law on the Fundamentals of State Regional Policy	State policy is aimed at the implementation of regional development projects, financial and administrative support for ATC	More than 10 thousand regional development projects are implemented with state support

Thus, the development of the legislative framework to ensure the implementation of the mechanisms of decentralization processes has provided the following advantages: regulation of administrative, managerial and financial decentralization processes; intensification of social activity of the community population; financing of regional and local

development projects; ensuring community cooperation within the limits of their authority to implement joint economic and social development projects. Among the main tasks of the reform of government decentralization in Ukraine, the following were identified (Figure 1) [6-7].

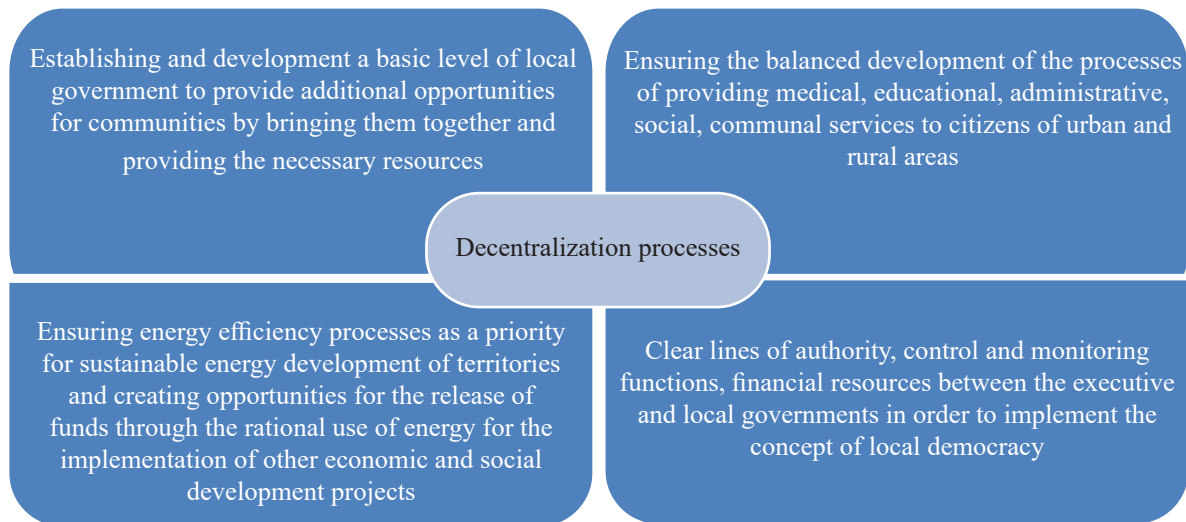


Figure 1. Task of decentralization reform in Ukraine

The implementation of the tasks of the decentralization reform in Ukraine determines the possible future prospects for the development of this reform. An important element in ensuring effective decentralization is the introduction of amendments and additions to legal documents that will allow to develop the achievements of decentralization reform, namely: the constitutional definition of the concept of government decentralization and the concept of communities, the definition of their authority and responsibilities; amending the documents regulating the administrative and territorial structure in Ukraine by defining the community as a separate administrative territorial unit with its rights and responsibilities; demarcation of powers of authorities

of different levels: national, regional, local, definition of authority of executive authorities and local self-government bodies; automation of the system of state monitoring and the register of new administrative territorial units, monitoring of the main indicators of their economic and social development; ensuring the intended use of land within the decentralization reform by defining this process in the provisions of the Law of Ukraine "On regulation of city-building activity in Ukraine"; providing a personnel reserve for community development by developing a concept of training specialists for the development of the amalgamated territorial communities, specialists in local self-government, involving community activists in local

self-development and training to ensure the personnel potential of ATC, motivating officials and representatives of local self-government bodies to work effectively, determination of the electoral legislation at the level of the amalgamated territorial communities: preparatory procedures and the electoral process itself, referendums; legislative delineation of authority between administrative and local self-government bodies.

CONCLUSIONS

The article identifies problematic aspects and unresolved issues of legislative support for the decentralization reform, as well as outlines the prospects for the development of decentralization processes in the context of transformations of the state system in Ukraine. It is determined that the processes of decentralization of power are aimed not only at financial support of local initiatives and projects, but, first of all, at forming a system of responsibility of communities for ensuring their own socio-economic development. The processes of government decentralization in Ukraine, which

began as a result of the need for balanced development of the territories, have significant prospects as a mechanism for effective regional governance.

Accumulating the best European practices of organizing the local self-government system, Ukraine launched a decentralization reform in 2014, which included the delegation of a number of managerial authority from central authorities to local communities. In addition to direct authority, the reform included increasing the responsibility of local communities to ensure their own economic and social development. Such changes provided for amendments to the Constitution of Ukraine and other regulatory legal acts regulating the functioning of local self-government bodies and territorial development. Providing a legislative framework for the conditions for decentralization is the basis for its effective implementation. Thus, proposals have been developed on the need for introduction of amendments and additions to the domestic legislative system in order to legal support the introduction of decentralization reform at the level of the amalgamated territorial communities.

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ПРАКТИКА ВПРОВАДЖЕННЯ ЕЛЕКТРОННИХ АДМІНІСТРАТИВНИХ ПОСЛУГ В УКРАЇНІ

Анотація. Одним із факторів розвитку громадянського суспільства в Україні 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 організаційних та процедурних аспектів надання електронних адміністративних послуг в Україні. З'ясовано значення деяких фундаментальних понять цієї проблематики. Сформульовано авторський підхід до визначення поняття електронних адміністративних послуг, що ґрунтується на власному розумінні цього поняття, з позиції загальнотеоретичного аналізу. Проаналізовано адміністративні механізми впровадження електронних державних послуг. Досліджено особливості класифікації адміністративних послуг в електронному вигляді за видами електронного подання, за сферою діяльності, за формою власності, за споживачами, за місцем отримання з точки зору клієнта та з точки зору залучення в електронний сервіс. Вперше поетапно та хронологічно проаналізовано нормативно-правову базу України з питань надання електронних адміністративних послуг. Здійснено дослідження та порівняння особливостей процедури надання електронних адміністративних послуг за допомогою Єдиного державного порталу адміністративних послуг, порталу державних електронних послуг iGov та українського онлайн-сервісу державних послуг Дія. Розкрито процедуру діяльності центрів надання адміністративних послуг в Україні. Зроблено висновок про те, що першим кроком України в напрямі створення власного інформаційного суспільства шляхом запровадження електронного урядування має стати формування ринку адміністративних та інформаційних електронних послуг

Ключові слова: електронне урядування, інформаційно-комунікаційні технології, електронні послуги, Єдиний державний портал адміністративних послуг, Інтернет

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IMPLEMENTATION PRACTICE OF ELECTRONIC ADMINISTRATIVE SERVICES IN UKRAINE

Abstract. *One of the factors for the development of civil society in Ukraine 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 studying the organisational and procedural aspects of providing electronic administrative services in Ukraine. Authors of this study clarified the significance of some fundamental concepts of this issue. The author's approach to defining the concept of electronic administrative services was formulated based on a personal interpretation of this concept from the standpoint of general theoretical analysis. Administrative mechanisms for implementing electronic public services were analysed. The study investigated the features of classification of electronic administrative services by types of electronic representation, by field of activity, by form of ownership, by consumers, by place of receipt from the standpoint of the client and from the standpoint of involvement in the electronic service. This study is the first to analyse the regulatory framework of Ukraine on the provision of electronic administrative services in stages and chronologically. Authors studied and compared the features of the procedure for rendering electronic administrative services using the Unified State Portal of Administrative Services, the iGov portal of state electronic services and the Ukrainian online service of public services – Diia. The study covered the procedure for the operation of administrative service centres in Ukraine. It was concluded that the first step of Ukraine towards creating its information society through the introduction of e-governance should be the establishment of a market for administrative and information electronic services*

Keywords: *electronic management, information and communication technologies, electronic services, Unified State Portal of Administrative Services, Internet*

INTRODUCTION

The study of the problems of administrative and legal support of access to administrative services within e-governance in Ukraine becomes particularly important in the context of modern European integration processes and the development of the concept of e-governance in Ukraine, the reform of public administration, as well as the development of information technologies. The primary basis of electronic

administrative services is e-governance – a fundamentally new way of exercising state power towards developing democracy using 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 regionally [1, p.100].

The modern state does not manage society but provides it with services. Citizens are not petitioners in relations with public authorities, but consumers of public services [2, p. 150]. 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 [3, p. 524].

The relevance of the introduction of electronic services in Ukraine is explained by the priority of developing the information society and the service state, focused on considering the interests and needs of citizens, improving their quality of life. Defining a new mission and developing a strategy for the activities of public authorities leads to the development of new management functions and ways to render administrative services. The latter forces adjusting administrative processes and regulations, seeking new mechanisms and technologies to render administrative services [2, p. 189]. The introduction of electronic administrative services in Ukraine provides essential advantages for state and local government bodies and consumers of public services, namely: simplifies the processes of developing state information systems and managing state information; provides better compatibility and interaction with other institutions; facilitates the ability to navigate for the consumers and perform online navigation in a set of various public services [4, p. 473].

Notably, the introduction of electronic administrative regulations is an innovative approach to analysing the organisational and functional structure of public authorities and developing new models for describing their operation. As a result, the study of the problems of electronic administrative services within the framework of e-governance in Ukraine is important for the development of Ukrainian science and technology and substantial modernisation of the administrative and legal bases for regulating information relations, in particular, regarding the development and implementation of the national policy for the development of the information society, informatisation and e-governance, which allows implementing a considerable number of tasks of further socio-economic and political development of Ukraine and harmonious entry into the world information society [5, p. 301]. Furthermore, in contrast to the subject of information society development, which has already become conventional, the subject of legal and administrative and organisational support for the provision of public electronic services remains practically understudied in Ukraine [6, p. 1059].

The study of the practice of implementing electronic administrative services in Ukraine and summarising the existing array of developments on this issue is challenging, which explains the lack of research on this subject. Some aspects of this issue have been addressed to a certain extent by such foreign and Ukrainian scientists as A. Al-Refaie [7], M. Csótó [8], M. Kaluti [9], A. Klich [10], V. Margariti [5], S.A. Marzooqi [11], C. Misuraca [6], E.A. Nuaimi [11],

H.M. Park [12], N.A. Qirim [11], A. Ramadna [7], J. Rocha [13], D. Špaček [8], N. Urs [8], V.M. Babaiev [14], O.M. Bukhanevych [15], S.Ya. Danylevych [16], O.P. Dzoban [17], P.S. Klimushyn [18], N. Kozachenko [19], I.S. Kuspliak [20], O.V. Litvinov [21], A.A. Mirzoian [22], L.P. Trebyk [23].

The purpose of this study lies in studying the practice of implementing electronic administrative services in Ukraine based on summarising the available array of developments of well-known Ukrainian and foreign researchers and scientists, as well as in providing the author's concept and conclusions regarding electronic administrative services.

1. MATERIALS AND METHODS

To achieve the formulated goals and objectives, the research used general scientific and special legal methods and means of scientific cognition. This allowed carefully analysing all questions concerning the specific features of implementing electronic administrative services in Ukraine. Thus, the historical method allowed establishing that Ukraine adopted the idea of electronic administrative services from the experience of Western countries, where the doctrine of “new public management” and the orientation of the state/authorities towards the citizen as a client has been flourishing since the 1980s. In 1998, the idea of administrative (managerial) services was first recorded in the Concept of Administrative Reform in Ukraine.

The dialectical method allowed investigating and gaining new knowledge about the content and ideas of electronic administrative services, which constitute one of the e-government structural elements and represent a certain method of finding new approaches to analysing the structure of state processes and seeking new models for describing state activities, which, in turn, make it more convenient, faster, and more efficient. The comparative legal method was used for research and comparison of the regulatory framework, portals and government organisations that have the purpose of implementation and development of electronic administrative services in Ukraine. A vast array was explored: regulatory framework of electronic administrative services starting from the moment of its consolidation by Ukraine as an independent state and finishing with modern realities; portals of electronic administrative services both at the national and regional levels; state organisations, whose purpose is to provide a considerable number of different electronic administrative services.

The synthesis method helped gain new knowledge that the provision of electronic administrative services in Ukraine is the main prerogative of the union of the government and the Ukrainian people and one of the main priorities for the development of e-governance in Ukraine and the world, and the availability of such services is one of the criteria for a full and prominent level of development of Ukraine. Furthermore, this method helped establish that there are many state organisations in Ukraine that successfully render a considerable number of different electronic administrative services, namely electronic administrative services of the State Service for Geodesy, Cartography, and Cadastre of Ukraine; electronic administrative services of the State

Architectural and Construction Inspectorate of Ukraine; electronic administrative services of the Ministry of Ecology and Natural Resources of Ukraine; electronic administrative services of the Ministry of Economic Development and Trade of Ukraine; electronic administrative services of the Ministry of Justice of Ukraine; electronic services of the State Fiscal Service of Ukraine; electronic services of the Pension Fund of Ukraine.

The method of analysis helped establish that the main document governing the activities concerning the provision of administrative services in Ukraine is the Law of Ukraine "On Administrative Services", which defines the legal framework for the implementation of the rights, freedoms, and legitimate interests of individuals and legal entities in the field of administrative services. Moreover, using the analysis method, the authors identified three portals of electronic administrative services in Ukraine, namely the Unified State Portal of Administrative Services (<https://my.gov.ua/>), Portal of State Electronic Services – iGov (<https://igov.org.ua/>) and the Ukrainian online public services portal – Diia (<https://diia.gov.ua/>), where the first one is an official source of information on the provision of administrative services in Ukraine, the second is the undisputed leader in the number of services ordered and received, and the third is a promising portal that will become a universal point of access for citizens and businesses to all electronic public services according to uniform standards.

The method of extrapolation helped establish that the system of electronic administrative services in Ukraine will not be able to function effectively without a reliable and accessible information infrastructure, ensuring effective administration of the system of electronic administrative services, the availability of professional personnel and motivated heads of public administration bodies, eliminating unnecessary bureaucratic obstacles, and the development of useful and high-quality administrative services. 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.

The system method allowed establishing that the first step of Ukraine towards creating its information society through the introduction of e-governance should be the establishment of a market for administrative and information electronic services. It should become the engine that would enable the development of a new paradigm of public administration in developing e-governance, which aims to improve the well-being of the population, increase the competitiveness of Ukrainian enterprises and the state in general, and ensure new priorities for the development of Ukraine. The generalisation method revealed the key objectives in the provision of electronic administrative services in Ukraine, which will positively impact the development of the social state with influential civil society institutions, especially those issues where methods and forms of interaction of public administration bodies with citizens and business entities are of great importance.

2. RESULTS AND DISCUSSION

2.1 *The concept of electronic public service and mechanisms for its implementation*

The legal literature contains different opinions on the term "service". Some scientists believe that a service is an activity aimed at obtaining an intangible result [22, p.136]. That is why it is possible to distinguish certain features inherent in the institution of administrative services: provided at the request of an individual or legal entity; concern the rights and/or obligations of such a person, that is, an administrative service is rendered to ensure the acquisition, change, or termination of the rights and/or obligations of persons; rendered by administrative bodies (primarily executive authorities, local self-government, other state bodies) compulsorily through the exercise of power because the administrative body has a "monopoly" on the provision of a particular administrative service [19, p. 197-198].

Thus, a public service comprises one or more processes that can be performed in various state structures that are endowed with a certain responsibility and have the ability to perform a certain expert analysis. In further decomposition, the process (regulation) can be divided into sub-processes (steps) and operations. Multiple institutions can take part in the same process. The activities of any organisation, including the state one, comprise three levels of processes: 1) primary activity (implementation of the functions of the institution prescribed in the corresponding statutory documents); 2) secondary activity (aimed at improving the main function: information systems and organisation technologies); 3) activity aimed at improving the function (development of the strategy and architecture of information technologies of the organisation) [17, p. 152].

Determination of a modern political mission statement and objectives of a new quality, as well as design of a strategy for government bodies, lead to the development of new management functions and new ways of rendering public services. They aim to adjust administrative services and search for latest information technologies for providing public services. [9, p. 1059]. Most importantly, political goals are formulated at the state level, considering 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 in the end is the attention drawn to technologies that ensure the implementation of administrative services [10, p. 9]. The introduction of administrative services in electronic form is one of the main ideas of e-governance. In general, electronic services are understood as distinct types of tangible and intangible services rendered in electronic form using information and communication technologies, including the Internet [14, p. 96]. L.B. Trebyk noted that electronic administrative services are administrative services implemented using e-governance technologies, when the subject of the request ordered and received an administrative service from the subject of provision as a result of the exercise of their authority in electronic form [23, p. 9].

Proceeding from this, it is still 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, rendered to the subject of appeal by state and local government bodies in electronic form, and has the goal of improving the quality and the process of their provision. [1, p. 99]. It is the provision of electronic administrative services that is the main prerequisite for bringing power closer to the average citizen, meeting their needs and one of the main priorities for the development of e-governance in the world, while the availability of electronic administrative services in a modern state constitutes one of the criteria for its full and high development level.

The mechanisms for providing administrative services in electronic form are different. Thus, P.S. Klimushyn identified the following mechanisms for implementing electronic public services: administrative, institutional, identification, intra-government, single access points, integration, unified architecture of integrated applications. The author understands the administrative mechanisms of implementing electronic public services as their grouping in the corresponding life episodes and business situations [18, p. 4-7].

Of particular interest is the position of I.S. Kuspliak, who suggested dividing electronic administrative services by types of electronic representation, by scope of activity, by form of ownership, by consumers, by place of receipt from the client's standpoint and from the standpoint of involvement in the electronic service:

1. By types of electronic representation: informing; one-way interaction; two-way interaction; conducting transactions.

2. By the scope of activity: information services; consulting services; services for the preparation of political decisions or laws; services for interaction between institutions and organisations; services for providing aid and support; services for public procurement operations; services for the implementation of supervision and control functions by state departments.

3. By form of ownership: services rendered by the central executive bodies and their enterprises; by local state authorities; by local self-government bodies; and by business organisations.

4. By consumers, the services differ for public authorities, citizens, and business organisations as follows: B2B (Business-to-Business) primarily provides various ways of electronic interaction between business organisations; B2C (Business-to-Citizens) is described by the fact that the service consumer is a private person who, for example, purchases goods and services via the Internet; G2B (Government-to-Business) – public procurement operations; G2C (Government-to-Citizens) – various types of electronic

administrative services to the population; G2G (Government-to-Government) – data exchange through electronic exchangers between government actors. This includes internal and interagency exchanges at the national level, as well as exchanges between national, regional, and local levels; C2C (Citizens-to-Citizens) – electronic auctions, bulletin boards, etc.

5. By the place of receipt from the client's standpoint: the first stage – conversion of a public service into electronic form allows considering services from various positions for the client. The second stage – creation of institutions that work on the principle of a “single-window concept”, but without the Internet. The third stage – publication of information and interactive forms for receiving the service on the portal of a public authority, the ability to download and send these forms.

6. From the standpoint of involvement in the electronic service: fully automated and partially automated; fully automated; partially automated [20, p. 120-126].

2.2 Ukrainian experience in the development of electronic administrative services

As for the development of criteria for the quality of administrative services in electronic form, there may be criteria that are defined in the concept of development of the system of providing administrative services by authorities, “which should serve as a model for administrative services in electronic form”. Such criteria are as follows: effectiveness; timeliness; accessibility; convenience; openness; professionalism, etc. [24, p.18].

One of the primary areas of activity on public services in developed countries has been the introduction of information technologies for the provision of services. This applies both to the digitalisation of individual services and to the creation of web portals dedicated to public services [25, p. 11]. The legal foundation for the development of a system of administrative services using the capabilities of special electronic data processing technologies has been laid a long time ago. Thus, for citizens to exercise their constitutional rights to free access to information on the activities of state authorities, as well as to ensure the transparency and openness of their activities, the Procedure for Publishing Information on the Activities of Executive Authorities on the Internet was adopted, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 3¹ and subsequently by the Law of Ukraine No. 2939-VI “On Access to Public Information” of January 13, 2011².

In 2004, a Draft National Target Programme for Reforming Public Administration and Public Service for 2011-2015 was developed within the framework of international technical assistance, posted on the website of the Centre for Adaptation of Public Service to the European

1. Resolution of the Cabinet of Ministers of Ukraine No. 3 “On the Procedure for Publishing Information on the Activities of Executive Authorities on the Internet”. (2002, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/3-2002-%D0%BF#Text>.

2. Law of Ukraine No. 2939-VI “On Access to Public Information”. (2005, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/2709-15#Text>.

Union Standards (the Centre was established and operates under the Main Department of Public Service of Ukraine, in accordance with the Resolution of the Cabinet of Ministers of Ukraine No. 485 of April 14, 2004), and containing measures for the transition of public authorities to paperless (electronic) document management tools and building a system for rendering electronic administrative services¹.

As early as in 2010, the Order of the Cabinet of Ministers of Ukraine approved the Concept of E-government Development in Ukraine, according to which, the purpose of introducing e-governance is to create qualitatively new forms of organising the activities of state authorities and local self-government bodies, their interaction with citizens and business entities by providing access to state information resources, the ability to receive electronic administrative services, apply to state authorities and local self-government bodies using the Internet².

The main document governing the activities concerning the provision of administrative services in Ukraine is the Law of Ukraine “On Administrative Services”³, which defines the legal framework for the implementation of the rights, freedoms, and legitimate interests of individuals and legal entities in the field of administrative services. According to Article 1 of this Law, an administrative service (which can be rendered in electronic form) should be understood as the result of the exercise of power by the subject of rendering administrative services at the request of an individual or legal entity, aimed at acquiring, changing, or terminating the rights and/or obligations of such a person in accordance with the law⁴.

In this regard, the Order of the Cabinet of Ministers of Ukraine No. 386-p of May 15, 2013, which approved Information Society Development Strategy in Ukraine⁵, describes the provision of electronic administrative services. Thus, it is planned to ensure the efficiency and quality of administrative services to the population and businesses rendered using information and communication technologies; the creation of a system of electronic interaction of state bodies; the creation of a unified state portal of administrative services to ensure the provision of administrative services

by executive authorities, other state bodies, local self-government bodies to citizens and organisations⁶.

The entry into force of the Law of Ukraine “On Administrative Services”⁷, laid the foundations and defined the rules for the operation of the administrative services sector, the development of administrative service centres and the All-Ukrainian portal of administrative services. The Law of Ukraine “On Administrative Services”⁸, identified ways to develop the system of administrative services. This Law virtually created the basis for the development of rendering electronic administrative services. To implement this Law, state authorities started developing a legislative framework for rendering electronic administrative services. Thus, many regulations governing the maintenance of the Register of Administrative Services were adopted⁹.

2.3 Ukrainian portals of electronic administrative services

In accordance with Article 17 of the Law of Ukraine “On Administrative Services”, the provision of electronic administrative services and access of subjects to information on administrative services using the Internet are ensured through the Unified State Portal of Administrative Services¹⁰. Effectively, the portal started working in March 2016. This portal has become an official source of information on the provision of electronic administrative services in Ukraine. The information is placed on the portal by the Ministry of Economic Development and Trade of Ukraine based on information received from the subjects of rendering administrative services and/or officials of state bodies, local self-government bodies who have been granted the corresponding access rights to the Unified State Portal of Administrative Services¹¹. In particular, Resolution of the Cabinet of Ministers of Ukraine No. 13 of January 3, 2013, established a mechanism for maintaining the Unified State Portal of Administrative Services, which is conducted to ensure access of subjects to information on administrative services using the Internet and constitutes the official source of information on the provision of administrative services¹².

The Unified State Portal of Administrative Services provides as follows: access to information on administrative

1. Resolution of the Cabinet of Ministers of Ukraine No. 485 “On Establishment of the Centre of Assistance to Institutional Development of Civil Service”. (2004, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/485-2004-%D0%BF#Text>.

2. Order of the Cabinet of Ministers of Ukraine No. 649-p “On Approval of the Concept of E-governance Development in Ukraine”. (2017, September). Retrieved from <http://zakon2.rada.gov.ua/laws/show/2250-2010-%D1%80/ed20110926>.

3. Law of Ukraine No. 5203-VI “On Administrative Services”. (2012, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/2709-15#Text>.

4. *Ibidem*, 2012.

5. Order of the Cabinet of Ministers of Ukraine No. 386-p “On Approval of the Information Society Development Strategy in Ukraine”. (2013, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/386-2013-%D1%80#Text>.

6. *Ibidem*, 2013.

7. Law of Ukraine No. 5203-VI “On Administrative Services”, op. cit.

8. *Ibidem*, 2012.

9. Resolution of the Cabinet of Ministers of Ukraine No. 1274 “On the Register of Administrative Services”. (2011, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1274-2011-%D0%BF#Text>.

10. Law of Ukraine No. 5203-VI “On Administrative Services”, op. cit.

11. Order of the Cabinet of Ministers of Ukraine No. 718-p “On Approval of the Action Plan for the Creation of the Unified State Portal of Administrative Services”. (2013, September). Retrieved from <http://zakon3.rada.gov.ua/laws/show/718-2013-%D1%80>.

12. Resolution of the Cabinet of Ministers of Ukraine No. 13 “On Approval of the Procedure for Maintaining the Unified State Portal of Administrative Services”. (2013, January). Retrieved from <http://zakon3.rada.gov.ua/laws/show/13-2013-%D0%BF>.

services provided rendered to subjects of appeal; access to information on centres and subjects of rendering administrative services; search by keywords in the fields of the description of administrative services; classification and search for services by life situations and categories; download of electronic application forms and other documents by subjects of appeal that must be filled out and submitted for receiving administrative services; submission of an online application for public services; payment of the established fee for the public services to be rendered, using electronic payment systems; tracking the stages of completion for documents on the provision of public services; tracking statistics of visits; data protection (including personal data of subjects of appeal) from unauthorised access, destruction, alteration, and blocking by implementing organisational and technical measures, means, and methods of technical protection of information; delineation and control of access to information that is on the portal, according to the powers of users; registration of events that occur on the portal and relate to its security; presentation of the structure of information resources and user-friendly Ukrainian-language interfaces.

In more detail, the specific features of operation of the Unified State Portal of Administrative Services are regulated by the Procedure for Maintaining the Unified State Portal of Administrative Services No. 13 of January 3, 2013¹. In 2015-2016, the Unified State Portal of Administrative Services was modernised: its interface became more convenient to use (information on administrative services is systematised by topic), user authorisation using an electronic digital signature was introduced, as well as the provision of certain services of central executive authorities through the Portal [26]. Currently, the portal holds all the information necessary to receive a particular service. Effectively, the portal resembles an electronic information bureau, where for each particular service the information is collected regarding the list of documents, the place where one can receive this service, and the forms of documents approved by law. Therefore, the creation of a Unified Portal of Administrative Services should be generally considered as a call sign of the first step towards the development of a full-fledged system for rendering electronic administrative services. Notably, along with the Unified State Portal of Administrative Services, there is the Portal of State Electronic Services – iGov, which was created in June 2015 by a team of volunteers with the support of the E-Government Agency together with the Ministry of Economy and the Presidential Administration. The main purpose of creating this Portal was to obtain certificates and documents in electronic form or pre-order them without having to wait in line [11, p. 9].

The State Electronic Portal iGov can render three types of services, namely: 1. Fully electronic service, i.e., the process of ordering and receiving a service makes provision for the exclusion of a citizen's contact with a state body; 2. Reduced visits to government agencies. Documents are submitted to the state body in electronic form, but to receive a decision, a citizen must come to the state body for a document; 3. Electronic queue, i.e., some services cannot be fully

implemented electronically. This applies, for example, to the service of obtaining a passport or driving licence. Such services make provision for the personal submission of documents and the physical presence of a citizen in a state body. However, in practice, such services force citizens to spend a lot of time in a live queue, which is why an electronic queue was created [12, p. 2477]. In this regard, A.M. Bukhanevych noted that “in general, the idea of creating a portal iGov.org.ua deserves attention, but such a portal should be a Unified State Portal of Administrative Services, which should ensure the provision of electronic administrative services. There are legal grounds for this, which follow from the Law of Ukraine “On Administrative Services” [15, p. 59].

The advantage of using iGov is that many volunteer programmers are involved, who are engaged in spot development of the Portal in their spare time, which saves an extremely large amount of money, since this category of employees is the most paid in any IT project. Taking the cost of services as a basis, one can calculate the costs of developing one service on both portals. In this case, the portal of public services iGov is cheaper, although this is not the final cost, and it cannot be taken as the main one. However, even if the cost of one service is within 20%, the picture will not change because by its nature the Portal is built on volunteering, hence will be less costly.

Furthermore, the iGov Public Services Portal has an indisputable drawback in its activities, which is the lack of legislative approval for working with this portal, since volunteers agree to launch services in their regions. The distribution of these services is uneven, and there is also huge resistance from local authorities, who are often not interested in implementing electronic services. A common feature of these portals is that they are both designed to simplify communication between citizens and civil servants, making the process of ordering services simple and accessible to all citizens of Ukraine, so one should factor in the quantity of services ordered and received by citizens through these portals.

An equally important indicator is the number of services that were rendered through the portal. It is particularly noticeable that the iGov Public Services Portal is the undisputed leader in this category. Despite the number of services ordered and received in general, the portal increases the number of customers using the services by an average of 10-15% every month. This means that citizens' trust in the portal is quite high. In addition, apart from the number of services rendered, the quality of these services is equally important according to the users' opinion. On the iGov Public Services Portal, citizens can rate the service rendered from 1 to 5, as well as leave a review on these services. As for the Unified State Portal of Administrative Services, it is completely impossible to evaluate the quality of services rendered or leave a review, and there is also no counter for the number of services rendered [16, p. 67].

At the same time, on September 27, 2019, the Ministry of Digital Transformation of Ukraine, together with

1. Resolution of the Cabinet of Ministers of Ukraine No. 13 “On Approval of the Procedure for Maintaining the Unified State Portal of Administrative Services”. (2013, January). Retrieved from <http://zakon3.rada.gov.ua/laws/show/13-2013-%D0%BF>.

Fedoriv and Spiilka design büro, presented the digital state brand “Diia”, where the Minister of Digital Transformation Mikhail Fedorov announced the launch of a website and applications for receiving public services online and stated that the first services would be available by the end of 2019, and that by 2022, 100% of public services can be received online. Diia (“Дія” – abbreviation for “Держава і я” – “State and I”) is a Ukrainian application for public services developed by the Ministry of Digital Transformation of Ukraine. This is a mobile application with digital documents and a portal with public services. One of the first services in the app was an E-driving licence and a certificate for registration (logbook) of the vehicle. Diia is the start of building a state in a smartphone. It is what Ukrainians dreamed of – that the state should be efficient, almost invisible, not create problems, but on the contrary be a convenient service. Ukrainians will no longer need to spend time and nerves in endless queues of administrative institutions [27].

As of 2021, the portal renders two types of services: for citizens and for businesses. Citizens are provided with the following services: digital passport; certificates and extracts; environment; security, law and order; family; pensions, benefits, and aid; transport; land, construction, real estate; licences and permits; entrepreneurship. Thus, for example, on April 15, 2020, the Cabinet of Ministers of Ukraine adopted a resolution “On the Implementation of the Pilot Project Regarding the Use of Electronic Display of Information Contained in the Passport of a Citizen of Ukraine in the Form of a Card, and Electronic Display of Information Contained in the Passport of a Citizen of Ukraine for Travel Abroad”. Electronic versions of the ID card and passport are already accessible in the mobile application “Diia”¹.

A digital passport is more reliable than a paper one and no less reliable than a plastic one. Using an electronic passport, one can travel by plane or train within the country, receive postal services, and conduct banking operations. One can also use their passport in the Diia mobile app to confirm their age when buying cigarettes or alcoholic beverages in the store. One can receive medical services, hotel services, or present them to law enforcement agencies. Using a digital passport, one can also use the library, get communication services, enter administrative buildings, and receive public services in the Centres for Administrative Services, on the Diia portal, or to receive funds upon returning goods. The passport data of every citizen who has installed the Diia mobile application is securely protected. The mobile application does not collect or store them, but only displays the information that is available in the registers. All digital documents in the Diia mobile application are valid only on the territory of Ukraine. A foreign passport provides the same rights and opportunities

as a national one. If a citizen does not have a driving licence or ID card, they can verify their identity using a foreign passport, which is available in “Diia” [28].

Businesses are provided with the following services: land, construction, real estate; licences and permits; transport; medicine and pharmaceuticals; extracts and references; business creation [29]. Based on the analysis of these three portals, the state is faced with a choice: 1) to develop the Unified State Portal of Administrative Services; 2) to adopt a volunteer iGov Public Services Portal and continue developing it; 3) to create a promising portal that citizens and businesses would use as a universal point of access to all electronic public services according to uniform standards, where everything is fast, express, and clear, where one can receive the service on demand, and, subsequently, where all departments would be united into a single convenient and effective online system.

2.4 State organisations that provide various electronic administrative services

At present, there are already many state organisations in Ukraine that successfully provide a considerable number of various electronic administrative services. Thus, for example:

1) electronic administrative services of the State Service for Geodesy, Cartography and Cadastre of Ukraine, which provide such services as ordering an extract from the State Land Cadastre on a land plot; ordering an extract on the standard monetary valuation of land; obtaining information about the owners and users of land plots [30, p. 3];

2) electronic administrative services of the State Architectural and Construction Inspectorate of Ukraine: registration of a notice on the start of preparatory work; registration of declarations on the start of preparatory work; registration of a notice on the start of construction work; registration of declarations on the start of construction work; registration of declarations on the object readiness for operation (pilot implementation in the Volynska Oblast) [13];

3) electronic administrative services of the Ministry of Ecology and Natural Resources of Ukraine. In July 2015, the first electronic service in the environmental sphere “Waste Declaration” was presented (menr.in.ua). When rendering this public service, an automated declaration form is provided to minimise errors in the process of filling it out. The system contains an integrated online calculator for waste indicators of a business entity. The business entity receives information on the progress of consideration of the declaration and its registration by e-mail [31];

4) electronic administrative services of the Ministry of Economic Development and Trade of Ukraine. In Q4 2015, the Ministry of Economic Development and Trade of Ukraine launched the Unified State Portal of Administrative Services for test operation (poslugy.gov.ua), which hosted the

1. Resolution of the Cabinet of Ministers of Ukraine No. 278 “On the Implementation of the Pilot Project Regarding the Use of Electronic Display of Information Contained in the Passport of a Citizen of Ukraine in the Form of a Card, and Electronic Display of Information Contained in the Passport of a Citizen of Ukraine for Travel Abroad”. (2020, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/278-2020-%D0%BF#Text>.

first 15 electronic administrative services rendered by this Ministry [7, p. 39];

5) electronic administrative services of the Ministry of Justice of Ukraine. Currently, the number of electronic services rendered by the Ministry of Justice of Ukraine is the largest compared to other ministries and central executive authorities. Through the Electronic Services Cabinet of the Ministry of Justice of Ukraine (kap.minjust.gov.ua) visitors are offered: obtaining documents online from State Registers of the Ministry of Justice of Ukraine; electronic registration actions in State Registers of Ukraine; search for information in State Registers of Ukraine; use of electronic reporting systems for persons engaged in specialised professional activities; participation in electronic auctions of seized property, etc. [32];

6) electronic services of the State Fiscal Service of Ukraine. The State Fiscal Service of Ukraine is one of the first bodies in Ukraine to develop electronic services and services for taxpayers. The web portal of the State Fiscal Service of Ukraine (sfs.gov.ua) hosts many electronic services. The most popular services include Public Information and Reference Resource, Electronic Taxpayer Cabinet, Learn More about Your Business Partner, Verification of the Single Taxpayer Certificate, Electronic Accounting, Register of Policyholders, Cancelled Registration of VAT Payers, Pulse, Online Declaration, Customs statistics, Accredited Key Certification Centre, Electronic Customs, Mass Registration Addresses [33, p. 231];

7) electronic services of the Pension Fund of Ukraine. Electronic services that a user can get on the web portal of the Pension Fund of Ukraine (portal.pfu.gov.ua) after registration are as follows: receiving information from personalised accounting (for working citizens); receiving pension information (for pensioners); forming requests for preliminary preparation of documents; the possibility of filing complaints; making an appointment with the Fund's specialists; receiving information about the status of payments of payers from the Pension Fund of Ukraine (for legal entities and individuals-entrepreneurs) [8, p. 43-47].

At the regional level, local self-government bodies and local executive authorities develop separate electronic portals for rendering administrative services. For instance, the Regional Virtual Office of Electronic Administrative Services of the Dnipropetrovska Oblast; certain electronic administrative services are rendered on the website of the Centre for Administrative Services of the city of Ivano-Frankivsk, etc.

As for the availability of professional personnel, the introduction and implementation of electronic administrative services is impossible without the availability of a suitable number of trained and qualified specialists in the field of e-governance, which, for its part, is a component of public administration. Training of such persons should be

aimed at reorienting the activities of government bodies, at performing the main function in the form of rendering administrative services, namely electronic administrative services, requires a thorough analysis of their powers, improving the function and tasks that make provision for direct communication with potential consumers of services. Furthermore, for civil servants who are actively involved in the provision of services, it is necessary that the centres for retraining and advanced training of employees of state authorities, local self-government bodies, state-owned enterprises, institutions, and organisations design continuous professional development concerning the e-governance issues, namely electronic administrative services.

It is important for the state to monitor training and achieve an understanding of duties in the process of rendering electronic administrative services by a civil servant and a local government official. That is why the Kherson National Technical University has developed a standard for training specialists in the speciality "Electronic governance" of the educational qualification level "Master" and licensed the training of 25 people in full-time education. According to the authors, the training of such specialists will contribute to the development of a unified information space of Ukraine, as well as improve relations in e-governance between the state, businesses, and citizens, and facilitate socio-economic, political, and cultural development of Ukraine.

A major step towards the development of electronic services was the adoption of the Concept of Development of System of Electronic Services in Ukraine in 2016¹, which defines the principal areas, mechanisms, and stages of development of an effective system for rendering administrative and other public services in electronic form in Ukraine. During 2016-2019, the Concept supported optimising the procedures for rendering administrative services, as well as implementing pilot projects to introduce the provision of priority services in electronic form². The authors of this study fully agree that the development of the system of rendering administrative services through information and communication technologies directly depends on the development of the system of rendering administrative services in the country. At the same time, both digitalisation and automation of unified and standardised administrative services can increase the efficiency of government bodies' activities in rendering administrative services to citizens [21].

CONCLUSIONS

The authors found that the best ways to stimulate the completion of the key objectives of electronic administrative services in Ukraine are as follows: development of a step-by-step strategy of public authorities on the introduction of electronic services with monitoring of effectiveness and demand by citizens; improvement of the quality of administrative services and their accessibility for citizens and

1. Order of the Cabinet of Ministers of Ukraine No. 649-p "On Approval of the Concept of Development of System of Electronic Services in Ukraine". (2017, September). Retrieved from <http://zakon3.rada.gov.ua/laws/show/718-2013-%D1%80>.

2. *Ibidem*, 2017.

organisations and development of a system for evaluating the quality of electronic administrative services; orientation of public authorities to the interests of applicants; improvement of the quality and efficiency of administrative processes by focusing on the final result; increase in the transparency of public authorities through the introduction of open electronic administrative services; creation of national industry information systems, as well as improvement of administrative processes in public authorities with the use of information and telecommunications technologies; determination of the rights, obligations, and responsibilities of the parties and officials involved in the provision of electronic administrative services; reduction of opportunities for administrative discretion of decision-makers; parallel existence of the centres of administrative services and unified licensing centres with a clear delineation of the scope of their activities, as basic elements of infrastructure of administrative services, which shall perform the confirmation function for documents received by the citizens from the state registers and databases; development of regional centres for the provision of electronic administrative services to extend service infrastructure of interaction between the subjects of the services; reduction of costs in the interaction of citizens and organisations with public authorities through the introduction of e-government; public monitoring of public authorities' performance of their assigned functions.

It was established that there are many legislative and regulatory documents in Ukraine that provide an opportunity to implement various electronic administrative services, for example:

- the Concept of Administrative Reform in Ukraine;
- the Law of Ukraine “On Administrative Services”;
- the Law of Ukraine “On Access to Public Information”;
- the Resolution of the Cabinet of Ministers of Ukraine “On the Procedure for Publishing Information on the Activities of Executive Authorities on the Internet”;
- the Resolution of the Cabinet of Ministers of Ukraine “On Establishment of the Centre of Assistance to Institutional Development of Civil Service”;
- the Resolution of the Cabinet of Ministers of Ukraine “On Approval of the Procedure for Maintaining the Unified State Portal of Administrative Services”;

– the Resolution of the Cabinet of Ministers of Ukraine “On the Implementation of the Pilot Project Regarding the Use of Electronic Display of Information Contained in the Passport of a Citizen of Ukraine in the Form of a Card, and Electronic Display of Information Contained in the Passport of a Citizen of Ukraine for Travel Abroad”;

– the Order of the Cabinet of Ministers of Ukraine “On Approval of the Concept of E-governance Development in Ukraine”;

– the Order of the Cabinet of Ministers of Ukraine “On Approval of the Concept of Development of System of Electronic Services in Ukraine”.

The modern development of the information society determines the widespread use of information and communication technologies in the public administration system, in particular the introduction of e-governance in the field of public administration in Ukraine, within which various governance services are provided. Proper and effective administrative and legal support of access to management services and e-governance in Ukraine is an urgent need in the context of the development of Ukraine as a democratic and legal state, as well as the evolution of civil society, since electronic administrative services, as a modernised process of public administration and the degree of implementation of its tasks, necessitate the activation of research on the legal settlement of this issue.

Thus, a well-built system of electronic administrative services in Ukraine 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 immense importance.

RECOMMENDATIONS

The value of the subject matter is shown in the fact that one of the most critical issues of modern society is the development and improvement of the level of participation of citizens through information and communication technologies in state affairs of Ukraine. Electronic administrative services, as a modernised public administration process and the degree of implementation of its tasks, necessitate the activation of research on the legal settlement of this issue.

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СУЧАСНА МОДЕЛЬ ДЕРЖАВНОЇ ВИКОНАВЧОЇ СЛУЖБИ В СИСТЕМІ ОРГАНІВ ДЕРЖАВНОЇ ВЛАДИ УКРАЇНИ

Анотація. *Актуальність досліджуваної проблеми зумовлена необхідністю теоретичного обґрунтування місця виконавчого провадження у сучасній правовій системі України та функцій державної виконавчої служби щодо захисту прав громадян і юридичних осіб, а також інтересів країни. Метою статті є розробка сучасної моделі адміністративної діяльності органів державної виконавчої служби. Провідним методом дослідження зазначеної проблеми є моделювання, що дозволяє розглядати цю проблему як цілеспрямований та інформований процес реформування наявної системи виконавчого провадження в Україні. У статті розглянуто основні причини проблемних ситуацій у виконавчому провадженні та запропоновано вичерпні шляхи їх вирішення на основі структури сучасної державної виконавчої служби, створення теоретичних основ виконавчого провадження та внесення конкретних змін до чинного законодавства. Стаття з'ясовує принципи, функції та повноваження державної виконавчої служби в Україні, а також визначає функціональні особливості адміністративної діяльності органів державної виконавчої служби та розкриває зміст адміністративно-правового статусу державного виконавця у змішаній системі примусового виконання рішень. В Україні ще не проведено комплексних досліджень державної виконавчої служби в Україні у змішаній системі прийняття рішень, з акцентом на особливостях її реформування у наш час та формулюванні Концепції. Це визначає актуальність цього дослідження, його наукову та практичну цінність*

Ключові слова: *виконавча процедура, державний орган, права і свободи, адміністративне право*

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CURRENT MODEL OF THE STATE EXECUTIVE SERVICE IN THE SYSTEM OF PUBLIC AUTHORITIES OF UKRAINE

Abstract. *The relevance of the problem under study is due to the need for theoretical justification of the place of executive proceedings in the modern legal system of Ukraine and the functions of the state executive service to protect the rights of citizens and legal entities, as well as the interests of the country. The purpose of the article is to develop a modern model of administrative activity of state executive service bodies. The leading research method for this problem is modeling, which allows us to consider this problem as a focused and informed process of reforming the existing system of executive proceedings in Ukraine. The article presents the main causes of problem situations in executive proceedings and offers comprehensive ways to solve them, based on the structure of the modern state executive service, creating the theoretical foundations of executive proceedings and making specific amendments to the current legislation. The article clarifies the principles, functions and powers of the state executive service in Ukraine, as well as defines the functional features of the administrative activities of the state executive service bodies and discloses the contents of the administrative-legal status of the state executor in a mixed decision enforcement system. In Ukraine is not yet comprehensive research on state executive service in Ukraine in a mixed system of decision-making, with emphasis on the peculiarities of its reform in the present period and the formulation of the Concept. This determines the relevance of this study, its scientific and practical value*

Keywords: executive procedure, state body, rights and freedoms, administrative law

INTRODUCTION

The hallmark of a democratic society and the rule of law is: the free and effective exercise by a person of his/her rights and freedoms. Today, this statement is the axiom of modern civilized progress [1]. Administrative law has a decisive role to play in securing such a change. After all, administrative law is a prerequisite and a means of functioning of public power to ensure the rights and freedoms of the individual and citizen through the execution of laws and other legal acts of the country [2]. Ukraine as a legal state is characterized not only by prevention of the violation of legislation, human rights and freedoms, but also by making of appropriate guarantees for the restoration of these rights. Implementation of values of the western law tradition into the national system of law and law education reforming is crucial for the Ukrainian law science [3-4]. The burden of

making conditions for a sense of security for every citizen rests with the judiciary. However, the decisions made by the court without guarantees of their precise and timely fulfillment, as well as the decisions of other state bodies, lose all sense of the very existence and activity of the courts and bodies producing the decisions [5]. The efficiency of functioning and effectiveness of decisions of all branches of state power, of course, depends on the full and timely fulfillment of its decisions [6]. As S.O. Yakimchuk [7] notes, the ability of the authorities to close the gap between the proclaimed and the accomplished is not only the shortest way to win the respect of their own people, but also a powerful argument for bringing about proper law and order in the country. The above has prompted the legislator to adopt the Law on State Executive Service (1998)¹.

1. Law of Ukraine No. 376-XIV "On State Executive Service". (1998, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/202/98-%D0%B2%D1%80#Text>.

Until now, in Ukraine the executive of court decisions has been entrusted to executive agents. The Law of Ukraine “On State Executive Service” (1998)¹ marked the beginning of a new stage of development of national executive proceedings: the Institute of Executive was liquidated and a new state service was created instead, giving it organizational, financial and procedural autonomy – the state executive service. Complementing the legal status of this service was the provisions of the Law of Ukraine “On Executive Proceedings” (2016)². Today, the State Executive Service is a structured, state-owned, law enforcement organization that is part of the Ministry of Justice (2012)³ and is designed to ensure the implementation of state policy in the field of enforcement of decisions. Based on the fact that the state executive service is an integral part of executive bodies, the activity carried out by it is, by its nature, by-law. Accordingly, the state executive service is a specific element of the state, which enforces decisions, ensures the protection of human and citizens’ rights, and is of great social importance for Ukrainian society. The actors of the executive procedure in Ukraine are the SES bodies, state and private executive agents, parties, representatives of the parties, the prosecutor, expert, specialist, translator, actors of the evaluation activity, who are endowed with procedural personality and carry out their activity in order to enforce the decisions. The stages of the executive procedure are certain interrelated but relatively independent parts of the executive procedure, separated from each other by procedural decisions that unite a set of procedural actions aimed at achieving the closest procedural goal. To improve the regulation of the state executive service in Ukraine, we propose amendments to current legislation.

1. MATERIALS AND METHODS

Philosophical, general scientific and special methods were used in the research process. The dialectical method was used in writing the entire study, and its application made it possible to comprehensively analyze enforcement proceedings as an objectively existing phenomenon and identify its specifics and features. The historical-legal method provided an opportunity to identify the patterns of the social phenomenon of the state executive service and its evolution, as well as the stages and current state of research of this activity in the doctrine of administrative law. With the help of formal-logical methods (analysis, synthesis, generalization, abstraction, etc.) the definitions of definitions of the state executive service are formulated, the norms of the current legislation in this sphere are investigated, and the necessity of making appropriate changes to the legislation of Ukraine on administrative responsibility is substantiated.

The comparative legal method allowed to study the norms of domestic legislation aimed at regulating public relations in the field of enforcement proceedings and compare them with the relevant legislation of other countries in order to take into account this experience in improving the current legislation of Ukraine and identify determinant characteristics of state policy. The application of the structural-system method allowed to single out a group of subjects of executive proceedings in the general system of subjects of this state activity, as well as administrative offenses in this area in the structure of committed illegal acts. Statistical and sociological methods are used to analyze and summarize empirical information related to the research topic. The intersectoral nature of the study led to the use of other scientific approaches: the organic unity of theory and practice, methods of classification and grouping, as well as forms and methods of enforcement proceedings, modeling methods (to develop proposals for improving enforcement proceedings), and hermeneutic method. The rule of law as a principle of the State Execution Service activity determined application of the axiological approach, in particular, taking into account the provision that “The human being, his/her fundamental rights and freedoms are recognized as the fundamental values in a civilized society” [8] and the implicit nature of human rights, that are constantly being developed [9].

2. RESULTS AND DISCUSSION

There is a historical pattern characteristic of the Ukrainian model of the SES regarding the change of its legal status as an independent public administration body to the structural part of the system of bodies of the Ministry of Justice of Ukraine. During the period of independent Ukraine, the transformation occurred several times. At the present stage of its evolution, SES in Ukraine is in the status of part of the system of bodies of the Ministry of Justice of Ukraine, characterized by the definition of its legal status, mainly at the level of by-laws, not laws of Ukraine. The SES in Ukraine is defined as a vertically subordinated system of state bodies in the status of departments, administrations and divisions that are part of bodies of the Ministry of Justice of Ukraine (2012)⁴, which is part of the state apparatus, which directly and on behalf of the state performs its tasks and functions, exercising state-governmental powers in the field of enforcement of decisions.

Features of the national model of the state executive service. The performance of the national executive service is in contrast and far behind the performance of judgments in Western Europe, accounting for 85% of the executive of judgments and other jurisdictional decisions. Similar

1. Law of Ukraine No. 376-XIV “On State Executive Service”. (1998, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/202/98-%D0%B2%D1%80#Text>.

2. Law of Ukraine No. 1404-VIII “On Executive Proceedings”. (2016, June). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T161404.html.

3. Order of the Ministry of Justice of Ukraine No. 512/5 “Instruction on the Organization of Enforcement of Decisions”. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0489-12>.

4. *Ibidem*, 2012.

indicators in Ukraine, as we noted, are in the volume of executed documents from 50 to 65%, and the amounts to be recovered: from 18% to 40%. According to the figures, the level of executive proceedings remains low. This circumstance, as well as the inadequate level of regulatory support for the activity of the State Executive Service of Ukraine, make it necessary to scientifically develop problems of executive proceedings. In Ukraine, the fulfillment of court decisions is vested by law in the state executive service. The main task of the State Executive Service is to determine timely, complete and impartial enforcement of court decisions provided by law. However, it can be seen from the above that the statistical analysis of the current situation with enforcement of court decisions by the state executive service, suggests only disappointing conclusions and confirms the urgent need to reform the system of enforcement of decisions taking into account the realities of the current Ukrainian society and the effective experience of foreign partners abroad. This state of affairs with the enforcement of decisions not only worsens domestic legal foundations, but also damages Ukraine's international reputation. Implementation of decisions of the European Court of Human Rights (2011) [10] notes the existence of major systemic shortcomings which give rise to a number of repeated findings regarding violations of the Convention for the Protection of Human Rights and Fundamental Freedoms¹ that seriously undermine the rule of law. Concerning Ukraine, these problems are related, in particular, to the chronic nonfulfillment of national courts' decisions.

The right to enforce a judgment is an integral part of the right of access to a court provided for in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms². All previous reforms of the executive system were cursory and did not produce the desired results, as evidenced by statistics. Therefore, the ongoing reform of the introduction of a mixed executive system in Ukraine should be the historic stage in the development of the executive system of judgments and decisions of other bodies, which will dramatically change the situation in this area for the better. The new Law of Ukraine "On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies" (2016)³ defines the principles of activity of the state executive service, enhances legal protection and guarantees of the performance of the activity of state executive agents, determines the legal status of private executive agents, regulates the procedures for acquiring and suspending the right to implementation of activities by private executors, establishes peculiarities of financial support for the activities of private executors, procedures for substitution of private executors, introduction and maintaining the Unified Register of private executors of Ukraine. Therefore, the issues of effective

legal protection and real restoration of violated rights and legitimate interests at the present stage of state formation of Ukraine are of primary, if not paramount importance. Due to this special status, the court or other judicial body renews the violated law by satisfying the requirements of the interested party. To date, the overwhelming majority of these requirements are met through special administrative executive measures applied by the State Executive Service of Ukraine.

In order to describe the administrative and legal status of the state executive service, the content of a more general concept – "state body", is of fundamental importance, since the executive service is an executive state body. And only the disclosure of the common features inherent in all, without exception, state bodies, allows analyzing the peculiarities of the state executive service activity, in view of its specificity. In the scientific and educational literature different conceptions about the content of this concept are covered. Adhering to the position of O.H. Predmestnikov [11], a state body is a certain organized group of people, acting in the relevant field, within the scope of its competence and taking part in the exercising of certain state functions. O.O. Olefir [12] defined state body as having its own structure and organized by the state or directly by the people a collective of civil servants, which is endowed with state powers, has a peculiar structure to it, and performs state-organizational, administrative, judicial and other functions, according to its purpose. There are other approaches to defining the concept of a state body, either emphasize the close relationship of this concept with the concept of state apparatus, or reveal specific features of a body of state.

It is fundamental that the public authorities, executing functions and tasks of the state, act on its behalf and in its interests. Hence, there is a need to give these bodies state power authorities, the presence of which allows them to perform qualitatively appropriate activities. But we cannot argue that only state bodies have power in one form or another. As N.S. Horban [13] rightly pointed out, power is not just a state concept. It must exist within any organized group. Another sign of public authority is the appropriate legal means of ensuring the implementation of acts adopted by the State through the use on its behalf of appropriate measures of education, persuasion and encouragement. Such measures are widely used by public organizations, but they differ in the level of importance and social value, which are not peculiar to those applied by public organizations (for example, awarding orders, medals, conferring the honorary title of Ukraine, etc.). An important feature of state-governmental authority is also the presence of the right of the state body to protect against violations acts issued by them on behalf and in the interests of the state. In order to prevent and detect violations of

1. Convention for the Protection of Human Rights and Fundamental Freedoms. (1950). Retrieved from https://www.echr.coe.int/Documents/Convention_RUS.pdf.

2. *Ibidem*, 1950.

3. Law of Ukraine No. 1798-VIII "On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies". (2016, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1403-19#Text>.

the issued act, the state body performs supervisory and control activities for the fulfillment of the requirements of the legal act. All the above actions of state authorities are obligatory in nature and are secured by its authority and power. Thus, the most basic and special features of a body of the state is its belonging to state apparatus and the realization on behalf of the state of its functions. It is for this purpose that it is vested with state-power authorities. Taking into account all the considered special features of a state body, we can say that it is part of the state apparatus, which directly and on behalf of the state performs its tasks and functions, exercising state-power in the relevant field of state activity. We believe that such a definition of a public authority allows it to be distinguished from other organizations and to reflect its specificity.

The essence of the legal regime of executive proceedings and guarantees of human rights respect. The Constitution of Ukraine (1996)¹ defines relevant areas for bodies of the state. It means that certain types of state power, within which these bodies perform functions of legislative, executive and judicial activity. Functional definition of executive power implies the separation of not only purely executive activity, but also the functions of governance and political leadership. The Conception of Administrative Reform in Ukraine (1998)² enshrines the concept of executive power as one of the three branches of state power, which, according to the constitutional principle of separation of state power, is designed to develop and implement state policy to enforce laws, manage public life, primarily the public sector of economy. Thus, the issue of specifying the content of the legal status of a state body needs further solution. Having analyzed the general theoretical provisions of the functioning of the state executive bodies, we consider it possible and expedient to proceed to the analysis of the specifics of the activity of the State Executive Service, to which the Law of Ukraine “On Executive Proceedings” (1999)³ mandates the enforcement of decisions of the court and other jurisdictions. According to the Law of Ukraine “On Executive Proceedings” (1999)⁴ executive proceedings were defined as the final stage of judicial proceedings and

enforcement of decisions of other bodies (officials) is a set of actions of bodies and officials defined in this Law aimed at enforcement of decisions of courts and other bodies (officials) carried out on the grounds, within the powers and in the manner determined by this Law, other normative legal acts adopted in accordance with this Law, other laws, as well as decisions subject to compulsory executive under this Law. According to the Law of Ukraine “On Executive Proceedings” (2016)⁵ executive proceedings as the final stage of judicial proceedings and enforcement of judgments and decisions of other bodies (officials) are defined as the set of actions provided for in this Law of bodies and persons aimed at enforcement of decisions and are carried out on the grounds, within the powers and in the manner determined by the Constitution of Ukraine (1996)⁶, this Law, other laws and regulations adopted in accordance with this Law and decisions that according to this law are subject to be enforced. Comparing the above two definitions, we notice the main difference between them, namely the definition of the Law of Ukraine “On Executive Proceedings” (1999)⁷ – a set of actions of bodies and officials, and in the Law of Ukraine “On Executive Proceedings” (2016)⁸, is the set of actions bodies and persons defined in this Law.

The peculiarity of the current legal status of the state executive service is that it is enshrined in several normative acts of different legal force, some of which contradict each other. Such normative legal acts are the Laws of Ukraine “On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies” (2016)⁹, “On Executive Proceedings” (2016)¹⁰, where the organizational and legal foundations of the activity of the State Executive Service of Ukraine have been formed. The Cabinet of Ministers of Ukraine (2014)¹¹ has approved the regulation on state executive service as part of the Ministry of Justice of Ukraine. The status of the state executive service as a body of executive power is also enshrined in the Presidential Decree of April 6, 2011, which approved the Regulation on the State Executive Service of Ukraine¹². This Regulation (2011)¹³ defines that the State Executive Service of Ukraine is the central executive body, whose activity is directed

1. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-бп#Text>.

2. Decree of the President of Ukraine “On measures to implement the Concept of Administrative Reform in Ukraine”. (1998, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/810/98#Text>.

3. Law of Ukraine No. 783-XIV “On Executive Proceedings”. (1999, June). Retrieved from https://zakononline.com.ua/documents/show/206001__562902.

4. *Ibidem*, 1999.

5. Law of Ukraine No. 1404-VIII “On Executive Proceedings”. (2016, June). Retrieved from http://search.ligazakon.ua/1_doc2.nsf/link1/T161404.html.

6. Constitution of Ukraine, op. cit.

7. Law of Ukraine No. 783-XIV “On Executive Proceedings”, op. cit.

8. Law of Ukraine No. 1404-VIII “On Executive Proceedings”, op. cit.

9. Law of Ukraine No. 1798-VIII “On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies”. (2016, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1403-19#Text>.

10. *Ibidem*, 2016.

11. Resolution of the Cabinet of Ministers of Ukraine No. 442 “On the Optimization of the System of Central Executive Bodies”. (2014, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/442-2014-%D0%BF#Text>.

12. Decree of the President of Ukraine No. 385/2011 “Regulations on the State Executive Service of Ukraine”. (2011, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/385/2011#Text>

13. *Ibidem*, 2011.

and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Justice (2012)¹ of Ukraine, is part of the system of executive authorities and provides for the implementation of state policy in the field of enforcement of decisions of courts and other bodies. The main tasks of the SES of Ukraine according to this regulatory act are:

- 1) implementation of state policy in the field of organization of enforcement of decisions;
- 2) making proposals on the formation of state policy in the field of fulfillment of decisions;
- 3) ensuring timely, complete and impartial fulfillment of decisions according to the procedure established by law;
- 4) exercising educational work concerning fulfillment of decisions.

According to paragraph 1 of the Model Regulation on administrations of the State Executive Service of the Main Territorial Departments of Justice of the Ministry of Justice of Ukraine the Autonomous Republic of Crimea, in the regions, in the cities of Kyiv and Sevastopol (2016)², the Office of the State Executive Service of the Main Territorial Departments of Justice of the Ministry of Justice of Ukraine in the Autonomous Republic of Crimea, in the cities of Kyiv and Sevastopol are bodies of state executive service, which is part of the system of bodies of the Ministry of Justice of Ukraine, reports to the Department of state executive service of the Ministry of Justice of Ukraine (2016) and is a subdivision of the main territorial departments of the Ministry of Justice of Ukraine in the Autonomous Republic of Crimea, in the regions, in the cities of Kyiv and Sevastopol. According to Art. 8 “Legal Status of Employees of State Executives Service Bodies” of the Law of Ukraine “On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies” (2016)³ state executors, heads and specialists of bodies of the state executive service are civil servants. The characteristics of the Ukrainian model of the state executive service as a public authority will be influenced by the peculiarities of the national model of the civil service. According to Ye.V. Grainer [1], one of the main criteria that influence the peculiarities of the formation of the civil service model is the specificity of the historical development of the country concerned. This includes the development of national science and practice of state-building, as well as the experience of borrowing or influencing other states in public administration. There is no doubt that historical, political, social, economic and cultural events are different in each country. This forms a unique society that also influences the activities of government officials – civil servants.

Another aspect, stresses Ye.V. Greyner [1], who defines the peculiarities of the civil service model, is the specificity of the legal system. Taking into account the rather significant difference in the conceptual issues of different legal systems, this accordingly influences the nature of the institution building of the civil service, and especially its normative and legal regulation. And finally, this scholar concludes, the last important factor characterizing the peculiarities of the model of the civil service is the specificity of the state structure of a certain country.

The above features should be reflected in the legal regulation of the civil service. It makes sense to develop a general legal act that would combine the provisions of constitutional, administrative, labor, pension, financial, international and other law with the existing legal framework on civil service. Such an act may be the Civil Service Code of Ukraine⁴. It should be a comprehensive codification act that integrates the rules of the abovementioned areas of law. The structure of the Civil Service Code should be divided into two parts: general and special. In general, it is proposed to reveal the following provisions: the concept of public service; goals, objectives, functions and principles of the civil service; types of public service; the concept of “civil servant”, “position”, “official”; classification of positions; rights, obligations and restrictions on the civil servant’s rights, general principles of formation, implementation and termination of public-service relations; ethics of behavior (code); guarantees for a civil servant; management of the civil service; basic principles of financing; general principles for assessing the professional achievements of civil servants; responsibility of civil servants. In the special part of the Civil Service Code⁵, a number of laws of the appropriate types of public service should be placed, each according to the following scheme: peculiarities of formation, implementation and termination of public-service relations; peculiarities of assignment of class ranks, grades etc.; sources of financing; principles, technologies, procedures for evaluating the professional achievements of civil servants.

Considering the proposed scheme of placement of legal norms defining the legal status of the civil service and considering that the SES in Ukraine is a type of public service, we consider it possible to propose to supplement the Law of Ukraine “On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies” (2016)⁶ with a separate section of the SES, in accordance with the appropriate layout scheme. In view of the above, the Ukrainian model of state executive service in the public authority system will be defined by the following criteria: specificity

1. Order of the Ministry of Justice of Ukraine No. 512/5 “Instruction on the Organization of Enforcement of Decisions”. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0489-12>.

2. Order of the Ministry of Justice of Ukraine No. 1183/5 “On Approval of Typical Provision on Department of State Executive Service of the Principal Territorial Administrations of Justice of Ukraine in the Autonomous Republic of Crimea, in regions, cities of Kyiv and Sevastopol”. (2016, April). Retrieved from <http://zakon2.rada.gov.ua/laws/show/z0617-16/paran9#n9>.

3. Law of Ukraine No. 1798-VIII “On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies”. (2016, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1403-19#Text>.

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

5. *Ibidem*, 2003.

6. Law of Ukraine No. 1798-VIII “On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies”, op. cit.

of the historical development of Ukraine, namely the development of national science and practices of state formation, experience of borrowing or influence of other states in the course of public administration; specifics of the legal system; specifics of the state order. Taking into account scientific conclusions by Ye.V. Greyner [1] and the current legal framework for the activity of the state executive service we can describe its modern national model as a traditional bureaucratic (career or closed) model, since it is based on legislation developed on the basis of the Constitution of Ukraine (1996)¹ in the light of national traditions, practice of state-building, modern reforming the economic and political system, material and financial capabilities.

However, today, with the development and reform of the Institute of Enforcement of Judicial Authorities by leading scientists and practitioners who have paid attention to issues of executive proceedings, its definition and content, it is considered that the national model of the state executive service and executive proceedings defined by law no longer corresponds to their practical nature, due to modern problems of their inefficiency. The laws being currently in force do not contain a definition of the state executive service, which has a negative impact on the definition of the legal status of the state executive service. Taking into account the new historical conceptual stage of the development of the legislation on executive proceedings and the practices of its implementation, in our view there is a need for capital regulation of it at the level of a codified act, namely the Criminal and Executive Code. In the Criminal and Executive Code, in Chapter 3 “General Provisions on Bodies and Persons Enforcing Judgments and Decisions of Other Bodies” (2016)², the first chapter proposes to include the chapter on state executive service, in which the concept of the state executive service will be enshrined. Prior to the adoption of the Executive Code, we propose to accumulate and systematize at the legislative level the rules governing SES activities in a separate section of SES in the Law of Ukraine “On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies” (2016)³. The wording of the rules under the subdivision should be taken into account that the SES can now be defined as a state body that is part of the system of the Ministry of Justice of Ukraine appointed to enforce decisions of courts and other bodies under the legislation of Ukraine.

One of the key terms in the formulation of the concept of state executive service is the term “service”. Today, the State Executive Service uses the term “service” with sufficient conviction. In our view it can be justified by the following: first, the service, as a social concept, is used in the State Executive Service to determine the nature

and type of people’s activities, reflecting the fact of social division of labor; secondly, the service is sometimes referred to as structural units (Department of State Executive Service of the Ministry of Justice of Ukraine (2016), which includes the department of enforcement of decisions; administrations of the state executive service of the main territorial departments of justice of the Ministry of Justice of Ukraine in the Autonomous Republic of Crimea, regions, cities of Kyiv and Sevastopol consisting of departments of enforcement of decisions; district, district in cities, urban (cities of regional level), city-district, inter-district departments of state executive services of the relevant territorial departments of justice) (Ministry of Justice of Ukraine, 2012)⁴; thirdly, by the term “service” we mean an independent agency (unit).

Legal entity of the state executive service as a participant of executive proceedings. One of the most meaningful activities of people, as well as society, is service. This is confirmed by the conclusions of the scholar P.Ya. Stelmashchuk [5], who noted that the concept of “service” is used differently: as a type of human activity, as a social-legal institute, as a system of special bodies of the state, as a spiritual activity. The service consists in the management, implementation of state activities, ensuring of governance, social and cultural service to people. A special type of service is the public service. In the context of the State Executive Service, the concept of “service” reveals the essence of the system of special bodies of the state, which are intended to execute decisions of courts and other bodies, as well as – the type of activity of state executors aimed at executing the relevant decisions. The above points out that the state executive service implements one of the most important types of state activity in forming a professional nucleus in order to fulfill the state’s tasks in the implementation of the function of protection of human rights and freedoms and to ensure timely, complete and impartial enforcement of decisions provided by law. Therefore, when characterizing the public executive service, we should keep in mind that it provides socially useful activity, which, in our opinion, should be regarded as intellectual and aimed at the objective realization of rights, freedoms and legitimate interests as a human being, and society as a whole. An important aspect of this service is that it is a public administration body within the Ministry of Justice of Ukraine (2012)⁵, which has to do with the implementation of a single state policy in the field of enforcement of decisions.

Considering the content of the Regulation on the State Executive Service of Ukraine (2011)⁶, it is necessary to pay attention to the tasks facing the SES, namely:

1. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-бп#Text>.

2. Criminal and Executive Code of Ukraine. (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1129-15/ru/ed20170407#Text>.

3. *Ibidem*, 2016.

4. Order of the Ministry of Justice of Ukraine No. 512/5 “Instruction on the Organization of Enforcement of Decisions”. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0489-12>.

5. *Ibidem*, 2012.

6. Decree of the President of Ukraine No. 385/2011 “Regulations on the State Executive Service of Ukraine”. (2011, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/385/2011#Text>.

1) implementation of state policy in the field of organization of executive of decisions;

2) making proposals on the formation of state policy in the area of executions of decisions;

3) ensuring timely, complete and impartial implementation of decisions in accordance with the procedure established by law;

4) implementation of educational work on executions of decisions.

The purpose of the activity of the State Executive Service is to ensure the activity of fulfillment the decisions of the courts and other bodies in accordance with the laws of Ukraine. This means that it provides for tasks of a particularly significant nature, that is, characterizing the state executive service, in our opinion, it is necessary to proceed from the place occupied by the professional activity of state executors in solving the tasks that lie before them. According to the current legislation, the general principles of the activity of the state executive service and private executors are defined equally. Thus, according to Art. 3 of the Law of Ukraine “On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies” (2016)¹ the task of the state executive service bodies and private executive agents is timely, complete and impartial enforcement of decisions, the execution of which is provided by law. According to Art. 4 “Principles of activity of bodies of state executive service and private executors”² activity of bodies of state executive service and private executors is carried out in compliance with the principles: 1) rule of law; 2) legality; 3) independence; 4) fairness, impartiality and objectivity; 5) the obligation to execute decisions; 6) dispositiveness; 7) publicity and openness of executive proceedings and their fixation by technical devices; 8) the reasonableness of the terms of executive proceedings; 9) the proportionality of measures of enforcement of decisions and the volume of requirements for decisions. There is no consolidated legal rule at the level of the law, which would collect all the legal acts defining the legal status of the SES, this service rights. Being aimed at fulfilling an important function in the mechanism of the state, the activity of employees of the state executive service should receive decent legal regulation at the level of the law, and taking into account the accumulation of a critical mass of legal rules governing executive proceedings at the level of

the codified law – the Criminal and Executive Executive Code³. The above points to the conclusion that SES is a state organization that must ensure the proper protection of citizens’ rights. It is possible to enroll it in the law enforcement forces of Ukraine. The State Executive Service, being part of the Ministry of Justice system, is also part of the country’s executive branch.

CONCLUSIONS

Human rights implementation provides for the courts activity efficiency, including the necessity of the court’s decision execution. Courts’ decisions execution is the guarantee of the human rights implementation. The State Executive Service fulfills this task in Ukraine. Taking into consideration that the State Executive Service is the body of the State Executive Power and should act only within the scope and in manner provided for the law, the national legislation on the executive proceeding stands in need for the improvement through its codification. The Executive Code of Ukraine, including suggested provisions mentioned above, should be adopted. To improve the regulation of the state executive service in Ukraine, we propose amendments to current legislation, namely:

1) to adopt of the Concept of development of the state executive service in Ukraine, which would define the goals, objectives, methods of achieving them and prospects of organizational and legal support of the state executive service, as well as amendments to the Law of Ukraine “On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies” (2016) by supplementing it with a separate section “State Executive Service”, the rules of which will define goals, objectives, functions, rights and responsibilities of the state executive service in Ukraine;

2) to adopt of the Executive Code of Ukraine, which should provide a section “General provisions on bodies and persons executing court decisions and other bodies decisions”, the first chapter of which we propose to define the chapter on state executive service in Ukraine to which it is proposed to move the above rules that determine the legal status of the state executive service in Ukraine. It is the state executive service, while restoring the violated rights and freedoms that should ensure the inevitability of property and other legal responsibility of dishonest debtors in civil and economic circulation.

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МЕТОДОЛОГІЧНІ ЗАСАДИ РЕФОРМУВАННЯ ЮРИДИЧНОЇ ОСВІТИ В УКРАЇНІ: НАУКОВА ПАРАДИГМА ТА СУЧАСНИЙ КОНТЕКСТ

Анотація. У статті досліджено сучасний стан і визначено методологічні засади удосконалення практичної підготовки юристів в умовах реформування юридичної освіти шляхом встановлення особливостей правового регулювання юридичної освіти та її ролі у системі державотворення, виявлення основних проблем сучасної юридичної освіти, а також аналізу іноземного досвіду практичної підготовки фахівців у галузі права. У статті використано загальнонаукові та спеціально-юридичні методи наукового пізнання, серед яких: порівняльно-правовий, філософський і функціональний методи, діалектичний і формально-юридичний методи пізнання, метод аналізу та синтезу. Встановлено, що на сьогодні професійна підготовка майбутніх фахівців у галузі права характеризується диспропорцією між теоретичними знаннями та практичними навичками випускників-юристів, що зумовлює складнощі в їх адаптації до практичної роботи. Обґрунтовано, що реформування системи підготовки правників шляхом підвищення її практичної орієнтованості, визначення державних потреб правничих кадрів різних освітніх рівнів, інтернаціоналізації вищої освіти, впровадження нових спеціалізацій відповідно до потреб різних сфер правничої практики, має стати основою розвитку юридичної освіти в Україні. Акцентовано увагу на необхідності оптимізації системи підготовки юридичних кадрів переважно завдяки запровадженню нових методів навчання, затвердженню нових освітніх стандартів, з урахуванням відповідного прогресивного іноземного досвіду в цій сфері за умови збереження накопиченого досвіду, традицій і принципів української вищої юридичної освіти, що забезпечить формування в майбутніх фахівців стійких практичних навичок правозастосовної діяльності. Встановлено, що в умовах реформування юридичної освіти, важливим є встановлення таких вимог до навчального процесу, які б забезпечували оволодіння студентами не тільки мінімальним обсягом знань, але і практичними навичками, адже практична підготовка студентів є обов'язковим компонентом освітньо-професійної програми для здобуття ступеня освіти. Зокрема, необхідною є переорієнтація змісту та спрямованості навчальних робіт здобувачів юридичної освіти, які мають бути зорієнтованими не тільки на повторення чи відтворення теоретичного матеріалу, а й на вирішення спеціально розроблених практичних ситуацій. Важливим є також питання збільшення строків проходження практики та ефективної співпраці між навчальними закладами та роботодавцями). Підвищення ефективності підготовки фахівців у галузі права шляхом пропорційного співвідношення теоретичного та практичного наповнення навчального процесу на правничих спеціальностях спрямоване на модернізацію моделі вищої юридичної освіти в Україні

Ключові слова: вища освіта, фахівці у галузі права, практичні навички, правнича практика, компетентнісний підхід підготовки юристів

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METHODOLOGICAL FOUNDATIONS OF LEGAL EDUCATION REFORM IN UKRAINE: SCIENTIFIC PARADIGM AND MODERN CONTEXT

Abstract. *The study investigates the current state and defines the methodological foundations for improving the practical training of lawyers in the context of reforming legal education by establishing the features of legal regulation of legal education and its role in the state system, identifying the main problems of modern legal education, as well as analysing foreign experience in practical training of specialists in the field of law. The study uses general scientific and special legal methods of scientific cognition, including comparative legal, philosophical and functional methods, dialectical and formal legal methods of cognition, method of analysis and synthesis. The paper established that the professional training of future specialists in the field of law is currently described by a disparity between the theoretical knowledge and practical skills of law graduates, which complicates their adaptation to practical work. The authors of this study proved that the reform of the legal training system through increasing its practical orientation, determining the state needs of legal personnel of various educational levels, internationalisation of higher education, introduction of new specialisations in accordance with the needs of various spheres of legal practice, should become the basis for the development of legal education in Ukraine. Attention was focused on the need to optimise the system of training legal personnel mainly through the introduction of new teaching methods, the approval of new educational standards, considering the corresponding progressive foreign experience in this field, provided that the accumulated experience, traditions, and principles of Ukrainian higher legal education are preserved, thereby ensuring the development of future specialists with stable practical skills of law enforcement activities. It was found that in the context of the reform of legal education, it is important to establish such requirements for the educational process that would ensure that students master not only a minimum amount of knowledge, but also practical skills because practical training of students is a mandatory component of the educational and professional programme for obtaining an educational degree. In particular, it is necessary to reorient the content and orientation of educational works of applicants for legal education, which should be focused not only on repeating or reproducing theoretical material, but also on solving specially developed practical situations. The issue of increasing the duration of internships and effective cooperation between educational institutions and employers is also important. Improving the effectiveness of training specialists in the field of law through a proportional ratio of theoretical and practical content of the educational process in legal specialities is aimed at modernising the higher legal education model in Ukraine*

Keywords: *higher education, specialists in the field of law, practical skills, legal practice, competence-based approach to training lawyers*

INTRODUCTION

Education is a strategic resource for improving people's welfare, ensuring national interests, and strengthening the authority and competitiveness of the state in the international arena. At the same time, one of the most important keys to success in the process of building a state governed by the rule of law in Ukraine, humanising socio-economic relations, forming new life orientations of the individual,

is a high-quality legal education, that is, the training of educated, highly moral, highly qualified practising specialists in the field of law, who have a deep sense of responsibility for the fate of the country and its socio-economic prosperity. Thus, there is currently next to no sphere of functioning of society and the state that could do without specialists in the field of law.

In recent years, the leading approach to determining the quality of education has become the competence approach, which allows fully focusing on the identification of the results of training of a future specialist, including in the field of law. At the same time, the competence approach to understanding the quality of higher education is most often combined with the development concept, which helps develop the criteria for the quality of higher education that meet the modern goals of professional education, as well as the requirements of society, the individual, and the labour market [1, p. 43-44]. Thus, according to the Standard of Higher Education in Speciality 081 "Law" for the First (Bachelor's) level of Higher Education, approved by the Order of the Ministry of Education and Science of Ukraine No. 1379 dated 12.12.2018¹, the general competences of a graduate of legal specialities include, among other things, the ability to apply knowledge in professional activities in standard and individual non-standard situations, the ability to work independently, as well as work in a team of colleagues in the speciality. For its part, special (professional, subject) competences in the field of law according to the Standard include, in particular, the ability to apply knowledge in practical activities when modelling legal situations, the skills of logical, critical, and systematic analysis of documents, consulting on legal issues.

The specific feature of legal science as a field of professional activity is that theoretical knowledge and practical skills in it are interrelated and closely intertwined. Practical training of students is a mandatory component of the educational and professional programme for obtaining an educational degree [2, p. 15]. Immersion in a particular professional reality becomes an important experience on the path to obtaining a higher legal education. However, the problem of professional training of future lawyers is manifested in the disparity between theoretical and practical frameworks in favour of the former, while practical skills are increasingly valued, and the adaptation of a graduate lawyer to practical work is becoming increasingly more difficult.

The analysis of recent research and publications demonstrates constant attention to the issue of legal education from the standpoint of its development in the context of modern challenges, functions performed, and defining the main tasks. Scholars such as Yu.H. Barabash [3],

O.A. Bilichak [4], I.B. Ivankiv [5], K.O. Kalachenkova [6], V.V. Komarov [1], N.S. Kuznetsova [7], R.A. Maidanyk [8], O.V. Petryshyn [7], V.S. Ryzhykov [2], O.Ya. Rohach [9], V.Ya. Tatsii [1], and others, have devoted their studies to the issues of modernising the model of higher legal education and training of professional lawyers. Therewith, considering the close interrelation between legal theory and practice, their influence on the development of the professional culture of bearers of the legal profession, further scientific study requires the issue of practical content of the educational process in legal specialities in order to increase the effectiveness of training specialists in the field of law.

The purpose of this study was the identification of methodological foundations for improving the practical training of lawyers in the context of reforming legal education, which is a mandatory component of the corresponding educational and professional programme, by establishing the features of legal regulation of legal education and its role in the state system, identifying the main issues of modern legal education, as well as analysing foreign experience in practical training of specialists in the field of law.

1. MATERIALS AND METHODS

The research methodology was determined by its purpose and involved identification of the methodological foundations for improving the practical training of lawyers in the context of reforming legal education, which is a mandatory component of the educational and professional programme for obtaining an educational degree. For this study, the regulatory framework was drawn up by the Law of Ukraine "On Education"², the Law of Ukraine "On Higher Education"³, the Law of Ukraine "On Scientific and Technological Activities"⁴, Standard of Higher Education in Speciality 081 "Law" for the First (Bachelor's) level of Higher Education, approved by the Order of the Ministry of Education and Science of Ukraine⁵, Draft concept of legal education development, published by the committee of the Verkhovna Rada of Ukraine on Education, Science, and Innovation⁶ etc. The study used general scientific and special legal methods of scientific cognition. The main method was comparative legal method, which allowed identifying and analysing various approaches to the practical training of specialists in the field of law. Philosophical and functional

1. Order of the Ministry of Education and Science of Ukraine No. 1379 "On Approval of the Standard of Higher Education in Speciality 081 "Law" for the First (Bachelor's) level of Higher Education". (2018, December). Retrieved from <https://mon.gov.ua/ua/npa/prozatverdzhennya-standartu-vishoyi-osviti-za-specialnistyu-081-pravo-dlya-pershogo-bakalavrskogo-rivnya-vishoyi-osviti>.

2. Law of Ukraine No. 2145-VIII "On Education". (2017, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/2145-19/ed20170905#Text>.

3. Law of Ukraine No. 561556-VII "On Higher Education". (2014, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1556-18#Text>.

4. Law of Ukraine No. 848-VIII "On Scientific and Technological Activities". (2015, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/848-19/ed20151126#Text>.

5. Order of the Ministry of Education and Science of Ukraine No. 1379 "On Approval of the Standard of Higher Education in Speciality 081 "Law" for the First (Bachelor's) level of Higher Education", op. cit.

6. Draft concept of legal education development. (2020, November). Retrieved from http://kno.rada.gov.ua/news/main_news/75465.html.

methods allowed outlining the prerequisites for the development of an effective mechanism for improving the professional training of lawyers and identify the interrelation of its elements.

The dialectical method of cognition accompanied the entire research and enabled the consideration of trends in the development and improvement of educational standards, expanding opportunities for cooperation, and exchanging experience between Ukrainian and foreign educational structures in the context of reforming legal education. The use of the dialectical method of cognition allowed considering the main features of the most effective teaching methods that develop the future lawyer's creative thinking, ability to solve complex practical situations, analyse current legislation and the practice of its application. The formal legal method was applied upon the analysis of general and special competences of a graduate of legal specialities, which provide an opportunity to apply knowledge in professional activities.

Among other methods of research of the subject under study, the method of analysis and synthesis was used, which helped investigate the correlation of theoretical and practical content of the educational process in legal specialities in order to increase the effectiveness of training specialists in the field of law. The presented scientific ideas of the authors in the context of the modern development of legal education include targeted, methodological, content, legal, and effective components.

2. RESULTS AND DISCUSSION

2.1 Legal regulation of legal education and its role in the state system

The legislation of Ukraine on higher education is based on the Constitution of Ukraine¹ and consists of the laws of Ukraine “On Education”², “On Higher Education”³, “On Scientific and Technological Activities”⁴ and other regulations, international treaties of Ukraine concluded in accordance with the procedure established by law. Thus, in particular, the Law of Ukraine “On Higher Education” establishes the main legal, organisational, financial grounds for the functioning of the higher education system, creates conditions for strengthening cooperation between state bodies and business with higher education institutions on the principles of autonomy of higher education institutions,

combining education with science and production to prepare competitive human capital for high-tech and innovative development of the country, self-fulfilment of the individual, ensuring the needs of society, the labour market and the state in qualified specialists.

According to Paragraph 5, Part 1, Article 1 of the Law of Ukraine “On Higher Education”⁵, higher education constitutes a set of systematised knowledge, competences and practical skills, ways of thinking, professional, ideological, and civic qualities, moral and ethical values, other competences obtained in a higher educational institution (scientific institution) in the corresponding field of knowledge for a certain qualification at the higher education levels, which are higher in complexity than the level of full general secondary education. For its part, the foundation of the legal profession and the key to the professional competence of a lawyer is a legal education. As O.Ya. Rohach fairly noted, law is a social regulator of public life, which is developed and functions through the consciousness and will of the people [9, p. 26]. Therefore, the level of development of any legal system is largely determined by the legal awareness of the people who create it professionally [7, p. 424; 10, p. 266]. The main basic source of professional legal consciousness in modern civilised society is higher legal education.

The social importance and role of legal education in the state system was further emphasised by the judicial reform. The Constitution of Ukraine considers higher legal education as qualification requirements for candidates for judicial positions. In particular, Article 127 of the Constitution of Ukraine⁶ indicates that a citizen of Ukraine, not younger than thirty and not older than sixty-five years, who has a higher legal education and at least five years of professional experience in the field of law, is competent, virtuous, and speaks the state language can be appointed to the position of a judge. Similar requirements for higher legal education are established in Article 148 of the Constitution of Ukraine⁷ for judges of the Constitutional Court of Ukraine. That is, the Fundamental Law of Ukraine clearly linked legal education, predominantly its content, with an important constitutional function – the function of justice, which constitutes a virtual confirmation of the special mission of legal universities for the functioning of the state mechanism in terms of implementing the principle of justice [3].

1. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed19960628#Text>.

2. Law of Ukraine No. 2145-VIII “On Education”. (2017, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/2145-19/ed20170905#Text>.

3. Law of Ukraine No. 561556-VII “On Higher Education”. (2014, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1556-18#Text>.

4. Law of Ukraine No. 848-VIII “On Scientific and Technological Activities”. (2015, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/848-19/ed20151126#Text>.

5. Law of Ukraine No. 561556-VII “On Higher Education”, op. cit.

6. Constitution of Ukraine, op. cit.

7. *Ibidem*, 1996.

2.2 Main problems of modern legal education

Admittedly, in the conditions of modern transformations, an important task is to ensure the quality of legal education [11, p. 68]. This is evidenced by the draft concept for the development of legal education published by the Committee on Education, Science, and Innovation of the Verkhovna Rada of Ukraine¹. In particular, it notes that the goal of legal education includes the development of competences necessary for understanding the nature and functions of law, the content of theoretical foundations (doctrines), principles, and basic legal institutions, the application of law, as well as the limits of legal regulation of public relations.

Although in many cases purely theoretical training at law faculties is critically disconnected from the content and level of practical knowledge that should be useful to a young lawyer, provided that he or she holds their first position, as well as the fact that representatives of legal professions are in no way involved in the formation of curricula, determining the content and methods of teaching academic disciplines and certifying applicants for a master's degree in law, the authors of the Draft Concept for the Development of Legal Education focus on the practical orientation of legal education, which is consistent with the provisions of the Constitution of Ukraine² on professional legal aid (Articles 131-132), professional activity in the field of law (Article 127) and the legal profession (Article 131). Therefore, the main task should be to ensure that the state standard of the speciality is filled with such content that would meet the above constitutional requirements. When developing the standard of education and the standard of educational activity, one should consider both the amount of knowledge and competences that persons engaged in professional legal activities should possess, and the requirements for the personal qualities of such persons in terms of the ability to freely shape their professional position in difficult legal situations [3].

Notably, in 2018, the expert group on legal education of the Directorate for Human Rights, Access to Justice and Legal Awareness of the Ministry of Justice of Ukraine conducted a study aimed at determining the knowledge, skills, and abilities of graduates of law faculties or higher educational institutions. The results of this study are important in for the development of the national policy of the Ministry of Justice of Ukraine and the Ministry of Education and Science of Ukraine, and can also serve as the basis for higher education institutions to change their educational programmes and curricula, increase the requirements for the functioning of the internal system of ensuring the quality of education [12]. 41 law firms, 2 non-legal companies, and 33 central state executive authorities took part in this survey. One of the main problems of legal education, according to experts, is the discrepancy between the knowledge and skills of graduates of law faculties and

higher educational institutions to the needs of the legal market [12], since a considerable number of respondents expressed dissatisfaction with the quality of training of young lawyers.

A number of legal education issues were also highlighted in the so-called “White Paper on the Reform of Ukrainian Legal Education” [13], including, most importantly, the lack of a unified state standard in the legal field, imperfect curricula, organisation of lectures and seminars, writing scientific papers, including dissertations, unsatisfactory (insufficient) practical component of the educational process.

Thus, the development of a high-quality and practical aspect of legal education is hindered by the current presence of numerous theoretical courses and at the same time the lack of disciplines that teach students practical skills in the curriculum of training specialists in the field of law and a low degree of cooperation between institutions of professional legal education and enterprises (institutions, organisations). This leads to one of the constant problems for graduates – the lack of practical skills acquired. Representatives of the legal business also focus on the problem of training lawyers [14, p. 614], stating that graduates of legal institutions of higher education mostly do not even have primary practical skills. Thus, in higher educational institutions for training specialists in the field of law, which are non-profit organisations created to engage in educational activities in accordance with curricula and state educational standards [15], conventional forms of training usually take place, that is, lectures and seminars (practical) classes, which, however, are not always filled with information reflecting trends and processes that take place in the field of law enforcement [8, p. 112].

Although teaching has started engaging students in direct discussion with the teacher, this is not yet an established practice in educational institutions, where “as usual” lectures are held with an article-by-article breakdown of regulations, and then – a survey on theoretical issues at a seminar. Notably, the material on certain legal subjects is better absorbed upon modelling problem situations, preparing corresponding documents, reviewing the practice of activities (decisions) of national and international courts, summarising the legal conclusions of the Supreme Court, as a result of which practical law enforcement skills are developed in students along with skills for critical and systematic thinking. It is quite obvious that the article-by-article theoretical study of legislation is better learned independently; at the same time, the teacher is responsible for explaining the nuances, existing problems in certain areas, as well as monitoring the assimilation of the material. After all, education should focus on the development of skills and abilities, and not just knowledge, but with the caveat that narrowing the role of education exclusively to meet

1. Draft concept of legal education development. (2020, November). Retrieved from http://kno.rada.gov.ua/news/main_news/75465.html.

2. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed19960628#Text>.

the requirements of the employer should also be evaluated critically [5, p. 75].

Admittedly, a lawyer should receive a basic foundation of essential legal knowledge and skills that should be inherent in both a lawyer and a judge or a civil servant [16, p. 803]. At the same time, it is necessary to understand that in Ukrainian universities, for the most part, based on the results of training, a graduate has broad universal knowledge, but, at the same time, lacks mastery of specifics in a particular field of law enforcement. This, for its part, does not meet the requirements of the legal services market, the main need of which nowadays is the presence of an in-depth special legal knowledge and professional competences [17].

2.3 Foreign experience in practical training of specialists in the field of law

One of the means to solve these issues is to borrow progressive foreign experience in this area, provided that the accumulated experience, traditions, and principles of Ukrainian higher legal education are preserved. Thus, in Germany, the system of professional training of lawyers makes provision for the development of legal practitioners [18]. For this, students study law in two stages: after the first (theoretical) stage, they take an exam to test their knowledge in the most important professional disciplines, and the person is awarded the qualification “Candidate of Legal Science”; after the second (practical) stage, students take an exam that demonstrates the knowledge and skills acquired during practice, and according to its results, the graduate gets the opportunity to apply for the position of a judge. After the exam, a young specialist in the field of law can also choose to work as a prosecutor, notary, lawyer, etc. At the same time, the term of study at the university is usually four years, and the training programme makes provision for practical training in the judiciary, mastering basic negotiation skills, conducting conciliation procedures, mediation, interrogation techniques. The duration of practical training in the civil or criminal court, in the prosecutor's office, in the executive authority should not be less than three months, and for an advocate lawyer – not less than nine months [6]. In the UK, higher legal education is also two-stage: three-year university studies and one-year or two-year practical training (LPC) to obtain the status of a lawyer. Studying at the university is practical in nature, students are focused on future work in certain firms. Furthermore, after receiving diplomas, one must complete an internship in a law firm (*training contract/pupillage*) [6]. In other words, obtaining a legal education in European countries is more practically oriented, compared to studying in legal specialities in Ukraine.

Legal education in the United States is also considerably focused on instilling sustainable law enforcement skills in future professionals. For this purpose, special teaching methods proven by practice – the methods of Langdell and Socrates – are widely used. Most often, the Langdell method is chosen (the method of considering a court case),

which lies in focusing on the primary sources of legislation, methods of analysing a court case, and legal interpretation of case law [19]. The Socratic method is also used, when a student is invited to discuss a court case, express their thoughts on the order of its consideration and the court's decision. Having completed the cycle of such classes, lectures are held that allow summarising the theoretical knowledge gained during the training [4, p. 64].

The development of practical law enforcement skills in the United States is ensured by attracting students to work in law clinics. Furthermore, it is common practice for law school students, mostly senior students, to get a job in law firms as a “summer lawyer” during the holidays. The most successful students of law schools are engaged in preparation of reviews of judicial practice. As a rule, every law school has a periodical that publishes such reviews. Therefore, gifted students are often invited to the editorial boards of such journals. After completing their training, such specialists are in great demand in the labour market [20, p. 148].

Thus, the development of legal education in Ukraine by reforming the system of training lawyers, considering the experience of training specialists in the field of law in the USA and European countries, should focus on increasing its practical orientation, developing scientifically sound forecasts of state needs of legal personnel of various educational levels, internationalisation of higher education, introduction of new specialities in accordance with the needs of various areas of legal practice, etc. It is appropriate to improve the practical training of lawyers by approving new educational standards, expanding opportunities for cooperation, exchanging experience between Ukrainian and European educational structures, etc.

2.4 Main areas for improving the level of practical training of lawyers

As an effective model for acquiring practical skills, applicants for higher legal education can use the experience of the National School of Judges of Ukraine in training judges, employees of court offices, in particular regarding the active use of interactive teaching methods (mini-lecture, discussion in small groups, role-playing game, etc.). In this aspect, it is advisable to introduce binary classes more widely in higher education institutions, which would be conducted together by a teacher and a part-time practitioner. Such a combination of the practical experience of one of the teachers and the deep theoretical knowledge of the second teacher would help increase the level of practical training of applicants for higher legal education. Thus, in particular, in the Draft Concept for the Development of Legal Education¹, it is assumed that to ensure that students obtain practical skills, the scientific and pedagogical staff of law schools should be equipped with at least 20% of teachers-practitioners.

An important area for improving the level of practical training of specialists in the field of law is also the

1. Draft concept of legal education development. (2020, November). Retrieved from http://kno.rada.gov.ua/news/main_news/75465.html.

introduction and activation of legal clinics in higher education institutions, which provides an opportunity for law students to directly apply and assimilate the acquired knowledge in all areas of legal practice and teach them to navigate the legal profession. At the same time, as a rather progressive trend, one can also consider the organisation of various law schools of a purely practical designation, which provide practical training for young lawyers to work in a particular field of legal practice. Thus, one of the most successful projects in Ukraine in this area, according to the general recognition of the legal market, is Legal High School – a project created by legal business specialists who know exactly all its needs, first of all the requirements for the quality of personnel training [17]. Only the best lawyers-practitioners, specialists in their field – experienced partners of law firms, restructuring specialists, judicial lawyers, tax consultants, chief lawyers of multinational and large Ukrainian companies – are involved in teaching at Legal High School. However, the responsibility for high-quality training of future lawyers should admittedly be assigned primarily to higher education institutions that are licensed by the state to train specialists in the speciality 081 “law”.

An important vector of reforming legal education, in particular in terms of its organisational component, is the problem of passing academic and pre-graduate internships because in most cases students must independently take care of the place of internship, and the requirement to submit reports on passing is often just a formality. Therefore, to strengthen the practical component during the master's programme, it is mandatory to complete an industrial internship of at least 30 credits of the unified credit transfer system, which in time terms is approximately one academic semester. Thus, it is currently important to introduce some elements of dual education in the training of lawyers, combine the efforts of higher education institutions and practical structures in the reform of higher legal education by concluding cooperation agreements with law offices, law associations, notaries, etc. and engage in on-the-job training and internships on their bases.

When preparing applicants for higher education at the Master's level of higher education, it is also apt to form a selective block of academic disciplines for a particular speciality in educational and professional programmes, giving preference to those academic disciplines that would contribute to the development of practical skills and abilities. In general, as for the list of academic disciplines that are taught at law faculties, it is worth noting that their number and diversity is a positive indicator. However, this can be considered as a positive feature, provided that the student has the right, at their discretion, to choose both a speciality in the subject area and particular training courses of interest to them. In this context, the problem of imperfection of working curricula, which are compiled and approved based on curricula by educational institutions, and thanks to which the educational process is organised, becomes of particular importance.

In the end, the curriculum is a statutory document that defines the scope of disciplines, the sequence of their

teaching/study, the forms of conducting training sessions, and the forms of monitoring the assimilation of material. As noted in studies of the state of higher legal education in Ukraine, the curricula of law faculties are currently “overloaded” with non-legal disciplines, i.e., those that have nothing to do with law and the practice of its application. The problematic nature of this situation manifests itself upon comparing the curricula of European legal educational institutions with the curricula of the corresponding Ukrainian universities (institutes, faculties). The authors of the study pointed out that the curricula of European, in particular German universities comprise mandatory and optional disciplines, which are 100% purely legally oriented. But the curricula of Ukrainian educational institutions contain exclusively compulsory subjects, and 58% of them do not have any or have a very indirect relation to law [13]. Therefore, the need to fill the educational process with disciplines that are maximally related to law would considerably increase the effectiveness of training specialists in the field of law, who would not only be in demand by employers, but would also be capable of performing any tasks in the field of law.

CONCLUSIONS

The process of development of the rule of law state should be based on the dynamic development and close interrelation of legal theory and practice, their impact on the development of the professional culture of the bearers of the legal profession. To date, Ukraine experiences some issues concerning the practical training of future lawyers, primarily caused by the specific features of the organisation of the legal education system, the specific features of recognising their professional “suitability” for practical work, as well as the low level of interaction between educational institutions and employers.

Overcoming the substantial gap between legal education and social practice should be carried out based on a competence model for training lawyers. Strengthening the practical orientation of training is associated with combining the training of applicants for legal education with professional activities in the formats of volunteering, providing free legal aid, legal clinics, internships, etc. At the same time, the modernisation of legal education based on a competence-based approach and the strengthening of the practical component in the training of lawyers should not lead to the rejection of fundamental higher legal education. In any case, the main focus in the process of reforming legal education in Ukraine should be placed primarily on changing approaches to teaching academic disciplines, using the most effective teaching methods that develop the future lawyer's creative thinking, ability to solve complex practical situations, analyse current legislation and practice of its application.

To introduce an effective component of the educational process in the training of specialists in the field of law, it is necessary to reorient the content and aim of educational works of applicants for legal education, which should be focused not only on repeating or reproducing theoretical material, but also on solving specially developed practical

situations that are as close as possible to the realities of law enforcement activities. The issue of increasing the duration of internships or introducing two-stage training of lawyers and effective cooperation between educational institutions and enterprises (institutions, organisations), following the example of European countries, also remains important. In any case, in the context of reforming legal education, it is

important to establish such requirements for the educational process that would ensure that students master not only a minimum amount of knowledge, but also practical skills. It is the search for a balanced approach to the ratio of theoretical and practical content of the educational process in legal specialities that will considerably increase the effectiveness of training specialists in the field of law.

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ПРОБЛЕМИ ЮРИДИЧНОЇ НАУКИ В КОНТЕКСТІ СУЧАСНИХ ДЕРЖАВОТВОРЧИХ ПРОЦЕСІВ В УКРАЇНІ: ВИКЛИКИ І ЗАВДАННЯ

Анотація. У статті досліджено проблеми юридичної науки в контексті сучасних державотворчих процесів в Україні через призму конституційної реформи та забезпечення конституційного правопорядку. Наголошено, що однією з основних причин суспільно-політичної кризи, економічних негараздів і соціального регресу є недосконале законодавство, яке часто не відповідає потребам українського суспільства, європейським принципам і міжнародним стандартам. З іншого боку, очевидним та історично підтвердженим є той факт, що прийняття нової Конституції або внесення змін до чинної та удосконалення законодавства саме собою не означає реального правопорядку. Більше ніж чверть століття Україна залишається в стані перехідної держави. Зазначено, що оцінка впливу конституційного законодавства, яке обумовлює практично всі реформи в державі, виявила такі його пріоритети: створення сприятливих умов для формування нового конституційного (державного та суспільного) устрою; визначення умов формування нової системи економічних відносин; закріплення нових принципів організації і функціонування державного та суспільно-політичного життя; фактичне втілення в життя положень Основного Закону; подальша конституціоналізація усіх елементів правової системи; визнання авторитету норм міжнародного права. Щодо останнього зазначено, що проголошені в Конституції України правові ідеї, норми і принципи, положення про права та свободи людини і громадянина мають відповідати міжнародним стандартам, адже ставши членом Ради Європи, Україна взяла на себе зобов'язання імплементувати європейські стандарти прав людини, верховенства права та демократії. Саме зміни до Конституції України мають забезпечити той фундамент демократичних змін і побудови європейської демократичної країни, який дозволить розбудувати Україну як незалежну європейську державу, де кожен українець матиме своє гідне місце та буде відчувати себе захищеним. Зроблено висновок, що сучасній юридичній науці притаманна наявність низки наукових методологічних підходів, що дає змогу всебічно підійти до дослідження права та законодавства у різних вимірах. Це об'єктивно обумовлюється постійним ускладненням суспільних відносин, зокрема міжнародних, та вимагає більш глибокого з'ясування змісту цієї категорії та перспектив її подальшого розвитку. Цей процес буде ефективним лише в тому випадку, якщо він здійснюється із врахуванням специфіки права і, відповідно, принципів його пізнання. Безсумнівно залишається також те, що лише методологічно обґрунтовані дослідження права дадуть змогу сформувати цілісну внутрішньо узгоджену теорію права, яка може бути застосована в теорії держави і права, інших галузях права, а також в ході державно-правового розвитку, зокрема і в Україні.

Ключові слова: конституційно-правовий порядок, правова реформа, система законодавства, державно-правове явище, конституційна реформа

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PROBLEMS OF LEGAL SCIENCE IN THE CONTEXT OF MODERN STATE-BUILDING PROCESSES IN UKRAINE: CHALLENGES AND TASKS

Анотація. *The article examines the problems of legal science in the context of modern state-building processes in Ukraine through the prism of constitutional reform and ensuring the constitutional order. It is emphasised that one of the main causes of the socio-political crisis, economic unrest and social regress is imperfect legislation, which often does not meet the needs of Ukrainian society, European principles and international standards. On the other hand, it is obvious and historically confirmed that the adoption of a new Constitution or amendments to the current and improvement of legislation does not in itself mean a real law and order. For more than a quarter of a century, Ukraine has remained in a state of transition. It is noted that the assessment of the impact of constitutional legislation, which determines almost all reforms in the state, revealed the following priorities: the creation of favourable conditions for the formation of a new constitutional (state and social) system; determining the conditions for the formation of a new system of economic relations; consolidation of new principles of organisation and functioning of state and socio-political life; actual implementation of the provisions of the Basic Law; further constitutionalisation of all elements of the legal system; recognition of the authority of international law. Regarding the latter, it is stated that the legal ideas, norms and principles proclaimed in the Constitution of Ukraine, provisions on human and civil rights and freedoms must meet international standards, because by becoming a member of the Council of Europe, Ukraine has committed itself to implement European human rights standards, the supremacy of law and democracy. It is the amendments to the Constitution of Ukraine that should provide the foundation for democratic change and the construction of a European democracy that will allow building in Ukraine an independent European state, where every Ukrainian will feel dignified and protected. It was concluded that modern jurisprudence is characterised by a number of scientific methodological approaches, which allows a comprehensive approach to the study of law and legislation in different dimensions. This is objectively due to the constant complication of social relations, including international ones, and requires a deeper understanding of the content of this category and the prospects for its further development. This process will be effective only if it is carried out taking into account the specifics of law and, accordingly, the principles of its knowledge. There is also no doubt that only methodologically sound research of law will allow forming a holistic internally consistent theory of law, which can be applied in the theory of state and law, other areas of law, as well as in the course of state and legal development, including in Ukraine*

Ключові слова: *constitutional legal order, legal reform, system of legislation, state-legal phenomenon, constitutional reform*

INTRODUCTION

One of the prerequisites for the functioning of the modern state, the transformation of state-power relations is the legal support and the relevant legal order, which, in turn,

requires scientific and methodological support. Today, the Ukrainian state and its legal system are experiencing a period of comprehensive reforms due to the need to overcome

the deep socio-economic and political crisis. In general, the reform of the state system is still far from complete and needs scientific and methodological support and support. First of all, it should be noted that the basis of any transformation in the field of state-building and law-making is legal reform in general and constitutional reform in particular [1].

Constitutional reform is the most important state and legal phenomenon, which is a set of legal, organisational and political measures taken to qualitatively change the current or adopt a new Basic Law of the state and on its basis – the gradual renewal of all legislation in the state and the state itself [2]. Within the framework of constitutional modernisation there is a dynamic renewal of social relations, their modification is provided in accordance with the constitutional goals, principles and norms. In this aspect, constitutional modernisation can be seen as a concept close in essence to the concept of “constitutional reform”, the content of which contains all the diversity of constitutional transformations, implemented in different forms, by different methods and means. This process is the content of the legal order. It is at the level of the Constitution of Ukraine as the Basic Law of society and the state that the fundamental legal principles and norms that determine the order of organisation and functioning of all branches (legislative, executive and judicial) and institutions of state power, as well as the interaction of society, individual and state are constituted. Therefore, the fundamental task of the Ukrainian state is to modernise the domestic legal system, to bring it into line with international and European standards [3; 4].

After all, it is known that its progress will depend on the extent to which legal regulation will meet the objective needs of the socio-economic development of society and the state. In this aspect, it is important to ensure the constitutional order. At present, Ukraine is at the stage of improving the main provisions of the Constitution of Ukraine¹, as some of its provisions do not meet the objective needs of the development of Ukrainian society, remain declarative due to the lack of a mechanism for their implementation. However, it seems that the main cause of the socio-political crisis, economic unrest and social regress is the constitution and legislation, which do not meet the needs of Ukrainian society, European principles and international standards. On the other hand, it is obvious and historically confirmed that the adoption of a new Constitution or amendments to the current and improvement of legislation does not in itself mean a real law and order. For more than a quarter of a century, Ukraine has remained in a state of transition.

According to many scholars, until recently, attempts to carry out legal reforms in Ukraine were aimed primarily at consolidating the power of those who were at the helm of the state. Democratisation of society, protection of human rights, interests of the country were not in the forefront

and were not aimed at legal reform. The main thing was to gain power to control financial flows. Reforms were prepared behind the scenes, without widespread discussion in society. Legal reforms have not been tied to socio-economic transformations, without which they were not carried out properly.

In constitutional and legal research on this issue, the term “constitutional reform” refers not only to partial changes in the constitution but also a change in the foundations of social order, and, depending on the position on changing the constitution, these changes are not always considered progressive. From the standpoint of the very “existence” of constitutional reform, it is necessary to have socio-economic, political, organisational, legal and spiritual preconditions for its implementation. Thus, constitutional reform should be considered as a process that acquires holistic systemic characteristics as a result of the interaction of socio-economic, political, legal and other processes, the systemic properties of which arise in the process of such interaction. This allows identifying the various links between constitutional reform and the external environment in which it takes place. In addition, this must take place in the paradigm of modern law, which must be constitutional in its essential dimension.

It should be emphasised that the constant development of public relations requires appropriate changes not only in the Constitution of Ukraine and legislation, but also in all elements of the social, including state and legal systems. In addition, the issue of completing reforms and filling the constitutional content of the constitutional provisions that define Ukraine as a democratic, social, legal state, where a person is the highest social value, where his rights and legitimate interests are respected, remains relevant. This issue is attracting more and more attention in the framework of modernisation of the national legal system and harmonisation of Ukrainian legislation with international and European law. The reformed Basic Law must comply with generally accepted international standards, principles and requirements of international human rights law, as well as take into account the recommendations and conclusions of the European Commission for Democracy through Law (Venice Commission), the Parliamentary Assembly of the Council of Europe, developments and trends of the modern constitutionalism.

1. TRANSFORMATION OF THE METHODOLOGY OF MODERN LEGAL SCIENCE

Today’s realities pose a number of problems to legal science, the effective solution of which directly depends on the philosophical and methodological ability of this science. In addition, the processes that characterise the modern type of civilisation – a new planetary worldview, multipolar culture, the formation of new ways of communication and values, the search for alternative ways of life and worldview –

1. Constitution of Ukraine. (1996, June). Retrieved from <https://rm.coe.int/constitution-of-ukraine/168071f58b>.

primarily relate to jurisprudence, as they involve the formation of legal consciousness and legal field, without which it is impossible to affirm values, human rights and freedoms and legal regulation in general [5].

In this context, it should be noted that the methodology of domestic jurisprudence since Ukraine's independence and until now has undergone significant changes due to the recognition and constitutional consolidation of political, economic, ideological diversity as a basis for public life, the constitutional order in the state. Accordingly, the beginning of the 21st century was characterised by a rapid transition to the demonopolisation of the tools of scientific knowledge. This is undoubtedly a positive fact, but according to the right words of Professor M.P. Rabinovich, methodological pluralism should not turn into methodological anarchism [6]. In addition, recourse to new methodological approaches must be based on the principle of additionality, rather than changing one view to another, where approaches and methods must complement each other to holistically reflect the legal reality and develop productive knowledge about it [7].

Changes in the methodology of legal science are primarily related to the significant expansion of the so-called personal (anthropological) approach and the actualisation of the practical approach, i.e. interpretation and evaluation of state and legal phenomena as tools, levers, means of meeting human needs, social communities, society in general. It is important to involve a phenomenological approach in the study of law, which makes it possible to present it as a phenomenon that, combined with moral principles and values, legal heritage, principles of humanism, world human rights standards, etc. leads to decentralisation of law, approximation of natural and positive law, contributes to the openness of legal systems, their ability to interpenetrate.

Using a value-based approach is associated with scientific and cognitive, which aims to discover the laws of operation of the object, bringing various phenomena under general concepts. Therefore, the value approach exists objectively and is based on the need to obtain two types of information about the object: scientific and value [8]. Given the rapid global integration processes and the signing of the Association Agreement between Ukraine and the EU¹, a civilisational approach is relevant to the study of law, as the definition of law and features of its functioning in countries belonging to different legal families in different periods of world civilizations significantly enriches scientific research, allows achieving a higher level of generalisation.

Thus, modern legal science is characterised by the presence of a number of scientific methodological approaches, which allows a comprehensive approach to the study of law in different dimensions. This is objectively due to the constant complication of social relations, including international ones, and requires a deeper understanding of the content of this category and the prospects for its further development. This process will be effective only if it is carried out taking into account the specifics of law and, accordingly, the principles of its knowledge. There is also no doubt that only methodologically sound research of law will allow forming a holistic internally consistent theory of law, which can be applied in the theory of state and law, other areas of law, as well as in the course of state and legal development, including in Ukraine.

Regarding the system of legislation of Ukraine, it is necessary to state its constant improvement. In particular, a number of normative legal acts have been adopted for almost 30 years. Among them: the Constitutional Treaty; Constitution, which was periodically amended. On the other hand, it should be noted that indirectly the process of improving the Constitution of Ukraine is ongoing. This is the activity of the Constitutional Court of Ukraine on the interpretation of the norms of the Constitution of Ukraine. Since the adoption of the Constitution of Ukraine, the Constitutional Court of Ukraine has adopted more than 70 acts (decisions) of official interpretation of the Constitution.

In addition, 24 codes have been developed and adopted. Regarding the substantive analysis of these acts, it is necessary to pay attention to the following facts: today the Criminal Code of Ukraine, adopted in 1960² and the Criminal Code of Ukraine of 2001³, are in force at the same time; Economic and Procedural Code of Ukraine of 1991⁴ and Economic Code of Ukraine of 2003⁵. The Housing Code of Ukraine, adopted in 1983⁶, and the Code of Labour Laws of 1971⁷ are still in force. Analysis of the content of the two codes (adopted before 1991 and 2001) shows the urgent need to modernise them in connection with the intensive development of public relations and the objective need to ensure real legal regulation of the relevant areas of public relations.

Improving the current system of legislation of Ukraine is a prerequisite for reforms of the state system and their completion. As already mentioned, the effectiveness of reforms, including legal ones, depends on their scientific substantiation. In this regard, among the current problems of legal science at the present stage, the following should be noted:

1. Association Agreement between Ukraine and the EU. (2017, September). Retrieved from <https://www.kmu.gov.ua/en/yevropejska-integraciya/ugoda-pro-asociacyu>.
2. Criminal Code of Ukraine. (1960, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.
3. Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.
4. Economic and Procedural Code of Ukraine. (1991, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/1798-12#Text>.
5. Economic Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15#Text>.
6. Housing Code of Ukraine. (1983, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/5464-10#Text>.
7. Code of Labour Laws. (1971, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/322-08#Text>.

1. First of all, this is a problem of legal understanding. The methodology of domestic jurisprudence has undergone significant changes since the proclamation of Ukraine's independence and has led to the expansion of the tools of scientific knowledge. In addition, there was a rejection of the dominance of positivism and statism. A human was recognised as the highest social value. Discussions continue on determining the relationship between right and law, the rule of law and its relationship with the rule of right (as a result of amendments to the current Constitution of Ukraine, this principle was removed from its text). The role of judicial precedent in the legal system of Ukraine remains completely uncertain, despite significant scientific achievements in this area.

2. It is also important to clarify the problems of ensuring human and civil rights and freedoms, as this section of the current Constitution of Ukraine is the most criticised and remains unreformed. In this aspect, the mechanisms of guaranteeing rights and freedoms need to be clarified.

3. Ukraine's integration into the European legal space also requires constant scientific substantiation of the problems of adaptation and harmonisation of Ukrainian legislation with EU law. From the end of the 20th century, Ukrainian jurisprudence faced the problem of clarifying the essence, principles and content of European law and its interaction and relationship with international and national law.

4. In connection with the amendments to the Constitution of Ukraine in the field of justice, the adoption of a number of regulations in their development and the ambiguous practice of implementing these innovations, understanding requires the transformation of a four-tier judicial system to three-tier and the formation of a number of new institutions (including NABU, the Anti-Corruption Prosecutor's Office, the liquidation of the HCSU, the Supreme Administrative Court, the Supreme Judicial Council, but maintaining the specialisation of the judiciary; the creation of separate High Anti-Corruption Courts and the High Court of Intellectual Property, etc.).

5. Special emphasis should be placed on the necessity to research in the field of constitutional proceedings, namely the activities of the Constitutional Court of Ukraine in connection with the significant improvement of the legal regulation of its activities and the introduction of the institute of a constitutional complaint. The problem of non-enforcement of court decisions and access to justice needs special attention. It is a well-known fact that Ukraine's leading position in the European Court of Human Rights is because of the number of appeals by Ukrainians for protection of violated rights.

6. Studies of the essence, content, institutions of civil society institutions and their interactions with the state remain relevant. The problems of civil society development first arose with Ukraine's independence and have been in the field of view of scientists and statesmen for more than 25 years.

Thus, now, as during the entire period of Ukraine's independence, legal science faces a number of challenges

in terms of scientific and methodological support of state-building and law-making processes, on the one hand. On the other hand, it must be acknowledged that today, as never before, the state demonstrates a residual attitude to legal science, as well as to science in general. Reforms are taking place in the direction of achieving European standards in this area, affecting the organisation and content of legal science and education. Practice shows the ambiguity of these processes and the emergence of risks of losing scientific schools, the destruction of certain scientific areas, the outflow of the best scientific staff and more. Nevertheless, it should be emphasised that leading Ukrainian scientists prepared and adopted a number of legal acts (laws, regulations, orders, strategies, programs, concepts), prepared many highly qualified specialists, defended hundreds of dissertations, indicating their potential and readiness in the future not to stand aside from state-building processes in Ukraine.

2. DEVELOPMENT OF THE LEGAL SYSTEM THROUGH THE PRISM OF CONSTITUTIONALISATION OF THE LEGAL ORDER

The process of constitutionalisation of the legal order in the conditions of constant economic, political and social changes can be successful only if the state pursues a consistent, scientifically sound and internally consistent legal policy, which is aimed at achieving such legal goals that are important for human and his fundamental rights and freedoms. Accordingly, such a human-centred policy is able to ensure the rule of law only based on a strategic approach. Acting as the best way to achieve balance in the legal system, legal strategies eliminate the contradictions that arise in modern law. In addition, the content of legal strategies allows assessing the state of human rights, or analyse the changes taking place in the judiciary. They provide the guidelines necessary to achieve a balance of private and public interests, to eliminate contradictions between current law and legal practice, law and legal awareness.

The implementation of a strategic approach in the process of constitutionalisation of the legal order can be most successful, provided that strategic planning should not include the modernisation of the state mechanism as a whole, but the reform of individual functionally separate subsystems. Therefore, it is important to note that the state of law and order, in addition to traditionally significant factors, is particularly influenced by the processes of reforming the state and relevant socio-economic structures. It is in the existing legal order that not only the quality of legal social institutions is practically manifested but also the real legal policy of the state, which is the basis of legal progress in Ukraine.

Today, Ukrainian society is seriously concerned about the legal order in the country. Despite all the efforts of the state, so far it has not been possible to significantly stop the growth of crime, to ensure full respect for human and civil rights and freedoms. Thus, after assessing the main trends in human rights violations in Ukraine in recent years,

human rights activists have concluded that the main efforts of the state are spent on military conflict and the fight against corruption, and human rights are suffered instead. That is, one of the fundamental criteria of legal progress is significantly levelled – its value base, which, in turn, affects the level of its effectiveness.

In addition, this state of affairs causes a deviation from the strategic direction of reforms, and, consequently, from their ultimate goal. Perhaps one of the reasons for this is the imperfection of the reform proposals themselves. In addition, reforms are “put” upon the disorganisation and disorder in public life, and do not improve the situation at all. In the authors’ opinion, it is necessary to start not with reforming, but with bringing order to the legal system, and only after that – to start reforming the legal system as a whole. It is natural in this regard that the course of establishing a strong democratic order is widely supported by the majority of citizens. This is confirmed by the fact that the focus on people, “human resources” is the main goal and a decisive factor in legal progress, as the practical significance of all actions of public administration is ultimately determined by the results of the social system. Achieving a high level of law and order requires a concerted joint effort of society as a whole.

First of all, it is worth noting that the current situation in the legal sphere (the state of constitutionalisation of law), in the authors’ opinion, is characterised by the following negative features: lack of rational legal policy, systematic decisions of public authorities; lack of optimal economic and political conditions for the development of the legal system as a whole and its individual elements; low level of legal awareness of legal entities and their negative attitude to the current legislation; conservatism and inertia of all subjects of the legal system. All these circumstances are a serious obstacle to legal progress.

Reform is closely linked to a change of government, political system, state policy, ideology, change of political course. In such situations, there is a need to improve regulations. And it is necessary to make changes not in separate laws, all legal sphere needs system updating. After all, the legislation reflects the state of public relations and when this relationship changes, it must change too. Otherwise, it will inhibit the development of social relations, which can lead to political and social stratification of society, to the confrontation of its social groups and strata.

Dissatisfaction with the content and results of domestic legislation is expressed today not only by professional lawyers but also by ordinary citizens. There is a noticeable increase in the number of adopted regulations, which, on the one hand, are increasingly covering new areas of public relations, expanding the scope of their action, on the other – they increasingly prescribe models of good behaviour. Despite this intensification of official regulation, the social reality demonstrates the low effectiveness of the latter: the level of law and order, legal awareness, behaviour and activities of all subjects of law leaves much to be desired. Therefore, the purpose of state

policy in this area is to adjust the tasks and functions of law enforcement agencies, the introduction of new principles of service, new criteria for evaluating the work of law enforcement to increase protection of human rights and freedoms and the interests of society and the state from unlawful encroachments.

Obviously, the priorities of all reforms are the person, the family, society, the state. This leaves a certain imprint on the main elements of the concept of legal reform, for which the following values have been chosen:

1) the issue of legal support for a number of important areas of formation and functioning of statehood and the development of a full-fledged civil society;

2) legislative support of the human rights system in society, first of all real guarantees of the rights and legitimate interests of the person;

3) strengthening and protection of the constitutional order;

4) public administration reform, including improvement of the system of state registration of public associations and other legal entities and control over their activities;

5) creation of an integrated legal framework for the organization and operation of the judicial system and the judiciary;

6) formation of the legal framework and institutional reform of the law enforcement system to strengthen the fight against crime;

7) development of principal directions and forms of implementation of local self-government reform;

8) development of the system of legal education, including the improvement of the system of legal education and legal science;

9) conducting legal expertise in rule-making and law enforcement practice, etc.

These areas of legal reform are very important, but the central task (main project idea) of the reform is, in our opinion, to provide legal and organizational guarantees of human rights and freedoms, which are the basis for the constitutionalization of law in general and the rule of law in particular.

The rule of law and legal reform are ideologically and directly linked to the constitution, which directly defines these rights and freedoms. The “matrix” of their content is contained not so much in the concept of reform as in the country’s constitution. It is the main guideline and criterion of legal progress – a person, a person, a citizen, their rights and freedoms. In this sense, it is the rights of man and citizen that can serve as an indicator that reveals the true purpose of a particular legal reform. The scope of human and civil rights and their implementation show the true intentions of the state authorities to reform various spheres of society. At the same time, human and civil rights cannot be considered as an absolute category, as the strategic goal of any legal reform is to harmonize the legal development of the state with social needs [9]. At the same time, the reform process contains both existing risks and positive trends. The role of law here can be twofold: it can

both accelerate and slow down social development, due to the variability of the content and scope of human rights. Therefore, the question arises: why is it necessary to carry out legal reform?

First, the Constitution of Ukraine (Article 1) states that Ukraine is a social, legal state, and this “political and legal application” requires some confirmation by organizational, legal and material means. Secondly, the state of human rights, the rule of law and other important components of civil society are such that it is not the responsibility of public authorities not to try to change the situation in these areas for the better. Thirdly, it is better to make changes to the legislation systematically, on the basis of a single project, which requires planning and coordinated actions of the state within the conceptual document and legal acts that develop it. Fourth, since the effectiveness of most institutional and sectoral reforms depends on the implementation of constitutional reform in Ukraine (in areas: decentralization of power and local self-government, judicial reform, human rights), it is advisable to ensure the comprehensiveness of such reforms while coordinating the expected results of institutional and sectoral reforms. With the draft National Strategy in the field of human rights¹ and the Sustainable Development Strategy “Ukraine – 2020” [10]. Thus, it is obvious that in connection with the economic, political and social transformations in the country and in the world, the issue of reforming national legislation in the context of the constitutionalisation of law is quite relevant.

Based on the Constitution of Ukraine, domestic legislation in substantive terms should express the sovereign will of the people of Ukraine, be aimed at ensuring human rights and freedoms and decent living conditions, strengthening the democratic, social and legal state and the development of civil society. Constant improvement of legislation, which is considered a regularity of modern society, is a necessary prerequisite for approximation of existing legal norms to the needs of today, their compliance with the urgent needs of the rule of law, increasing the role and authority of the constitution. That is why the importance of the tasks of improving domestic legislation is that it meets the conditions and demands of modern society as adequately as possible, consolidates its legal basis, legal legitimacy and legal order.

At the same time, taking into account the fundamental importance of constitutional law (in relation to other branches of law), there is a need to substantiate the possibility of implementing the constitutional foundations in current sectoral legislation and organisational and legal models with strict constitutionalisation of state and public life. In view of this, an important step in the legal support of reforms is the constitutional reform, the implementation of which is part of a broader problem of reforming the

Ukrainian state and society, the entire legal system.

As O. Skrypniuk [11] notes, if to try to study legal reform as a certain holistic process that has a common basis and a common goal (regardless of the sphere of social and legal relations it is implemented), it should be recognised that such a general goal can and should be the constitutional reform, or, more precisely, the constitutional reform, because it is at the level of the Constitution of Ukraine as the Basic Law of society and the state constitute fundamental legal principles and norms that determine the organisation and functioning of all branches of government (legislative, executive and judiciary), all its institutions, as well as the order of interaction of society, individual and state [12]. That is, constitutional reform is, so to speak, an integral part of the ontology of the legal system of any state. At the present stage of legal development, the fundamental tasks of the Ukrainian state are to modernise the Ukrainian legal system, the main purpose of which is to lay the foundation of statehood and achieve legal progress.

Modern legal development is determined by changes in foreign policy priorities, improvement of public administration and government, features of the political regime and socio-economic development. It is, in fact, about developing and improving the most effective constitutional model of the mechanism of public administration. As the practice of the Constitutional Court of Ukraine shows, in its activity the provisions of the Constitution of Ukraine in the process of interpretation are constantly developing. Accordingly, constitutional norms must have a permanent regulatory effect on all components of the legal system. Their constitutionalisation can be called one of the manifestations of the direct effect of the constitution, aimed at harmonising social relations and the implementation of the rule of law. Therefore, for the true semantic integrity of the legislation fundamental principles are not enough, the semantic unity of the foundations of the constitutional order is required.

Obviously, such unity does not appear by itself, it is formed in a long and contradictory process of elaboration of basic legal norms by formulating the relevant constitutional provisions. This process should include reviewing existing legislation, repealing obsolete regulations, creating new laws, improving the legislative process and legislative techniques. The implementation of such full-scale reforms is possible not only by amending the Basic Law, but primarily through a new conceptual attitude to the constitution. This process is quite complicated, because the adoption of a new constitution does not complete the constitutional transformation. That is, the difficulty is not to rewrite the constitution, but the need for a new approach to it, to its status in society, in the legal system. This should be not just a textual change, but a revision of all legal regulation, mechanism of action and effective implementation of the provisions of the Basic Law.

1. Decree of the President of Ukraine No. 501/2015 “On approval of the National Strategy in the field of human rights”. (2015, August). Retrieved from <http://hrstrategy.com.ua/documents/versions/2#cts854f6aee45f58e>.

According to M.V. Savchin [13], the constitution lays the foundations for the implementation of state policy based on the principles of justice, morality, rationality, balance, interaction and subordination of various political forces in society on the basis of law. Decoding and implementing the constitution is modernisation. The Constitution of Ukraine is indeed a positive form of decoding natural and legal principles, as the application of the provisions of its text is constantly being improved, as evidenced by the practice of the Constitutional Court of Ukraine. However, the content of constitutional reform cannot be reduced only to the problems of updating the constitution as a normative legal act or its individual provisions. Thus, the implementation of constitutional reform goes beyond procedural issues and tasks of legal technique [3].

The process of constitutional and legal modernisation requires a clear identification of priorities, the implementation of which allows for a thorough development of the current Constitution of Ukraine. The assessment of the impact of constitutional legislation, which determines almost all reforms in the state, revealed the following priorities: creating favourable conditions for the formation of a new constitutional (state and social) system; determining the conditions for the formation of a new system of economic relations; consolidation of new principles of organisation and functioning of state and socio-political life; actual implementation of the provisions of the Basic Law; further constitutionalisation of all elements in the legal system; recognition of the authority of international law.

Regarding the latter, it is worth noting that the legal ideas, norms and principles proclaimed in the Constitution of Ukraine, provisions on human and civil rights and freedoms must meet international standards, because by becoming a member of the Council of Europe, Ukraine has committed itself to implement European standards of human rights, rule of law and democracy [14]. It is the

amendments to the Constitution of Ukraine that should provide the foundation for democratic change and the construction of a European democratic country that will allow building in Ukraine an independent European state, where every Ukrainian will have his or her worthy place.

CONCLUSIONS

Thus, the proclamation of Ukraine as a democratic state, ensuring the rights and freedoms of an individual, the principle of separation of powers and the rule of law require a detailed review of all elements of the legal system, which should aim primarily to improve existing legislation. Improvement of legislation is a gradual addition, change, update of regulations, their sections, articles, regulations and terms, associated with the need to bring legislation in line with the development of public relations and international standards. However, the reform is not only and not so much in the development and adoption of new laws, but in the institutional changes and innovations that need to be implemented and tested. And changes to the legislation are needed to legally support these changes and innovations. In essence, this is a necessity caused by the development of social relations and the tasks set by the state.

Legal support of reforms must be timely, complete, reasonable. Without this, the reform as such will not take place, or the bills will have to be hastily supplemented and changed. Instead, the lack of effective reform programs in the transition period will lead to the deterioration and stagnation of all spheres of public life. The consequence of poor legal support of reforms is the inhibition of state-building legal processes, the violation of law and order in society. The reform must be objectively necessary, deeply thought out, it requires detailed programming, caution in the relevant calculations, legal expertise based on modern scientific and methodological approaches, i.e. there must be scientific support.

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ДЕРЖАВНЕ УПРАВЛІННЯ В СИСТЕМІ ОСВІТИ: ТЕОРЕТИЧНІ ТА МЕТОДИЧНІ ПІДХОДИ ТА ПРАКТИЧНІ РЕКОМЕНДАЦІЇ

Анотація. У статті проведено аналіз перспектив підвищення ефективності державного управління в освіті. Насамперед, було проаналізовано поняття «державне управління», визначено його відмінності та схожість з поняттям державного управління. Було визначено перспективу вивчення процесів державного управління навчальним процесом, враховуючи його орієнтацію на суспільні потреби та орієнтований на людину підхід. Поняття державного управління теоретично позначається як сукупність процесів управління державними системами з метою забезпечення цілей сталого розвитку шляхом реалізації функцій організації, виконання, порядку та контролю. Ці функції схематично представлені та описані в статті. Для продовження аналізу були визначені тенденції розвитку системи освіти в Україні та за кордоном. Проаналізовано проблемні аспекти та визначено перспективи їхнього виправлення. Водночас, було встановлено, що основними процесами, які потребують вдосконалення системи державного управління в освіті, є організаційні, фінансові, репутаційні та цифрові процеси. Був розроблений алгоритм підвищення ефективності впровадження процесів державного управління освітніми процесами з урахуванням основних вимог суспільства до системи освіти

Ключові слова: суспільство, державне управління, освітній процес, інноваційний розвиток, соціальне управління

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PUBLIC ADMINISTRATION IN THE EDUCATION SYSTEM: THEORETICAL AND METHODOLOGICAL APPROACHES AND PRACTICAL RECOMMENDATIONS

Abstract. *The analysis of the prospects for improving the efficiency of public administration in education is conducted in the article. First of all, the concept of “public administration” was analyzed, its differences and similarities with the concept of public governance were determined. It was decided to determine the perspective of the study of public administration processes by the educational process, taking into account its orientation to public needs and a human-centered approach. The concept of public administration is theoretically designated as a set of processes for managing public systems in order to ensure the goals of sustainable development through the implementation of the functions of organization, execution, order and control. These functions are schematically presented and described in the article. To continue the analysis, trends in the development of the education system in Ukraine and abroad were identified. The problematic aspects have been analysed and prospects for their correction have been identified. Having analyzed, it was determined that the basic processes that require improvement in the public administration system in education are organizational, financial, reputation, and digitalization processes. An algorithm was developed to increase the implementation of the processes of public administration of educational processes, taking into account the basic requirements of society for the education system*

Keywords: *society, public governance, educational process, innovative development, social management*

INTRODUCTION

Reformatting the socio-political and economic guidelines of Ukraine in the direction of implementing the European integration vector of the country's development poses new challenges to society. First of all, the reform and transformation of the education system is required in order to keep the domestic research and educational space in the standards and norms of the European Union. Ensuring the competitiveness of not only education, but also economic

sectors in European markets is possible only through qualitative transformations and changes. Ukrainian education has mainly state and public forms of implementation, therefore, the issue of its reform lies mainly on the system of public administration, and the high social role of education determines the importance of its reforms for the state and society. Thus, it should be noted that reforms of higher education are of great socio-economic importance and contribute to

the formation of strategic guidelines for the development of the state.

The relevance of the subject under study led to attention to its solution by many authors. In particular, I.V. Zastrozhnikova and Yu.O. Ulianchenko [1] analyzed the system of state regulation of education for the formation of innovations and innovative approaches, is determined that the priority of the domestic educational space is the formation of European integration processes. The processes of participation of teachers in the development and implementation of mechanisms for regulating the education system are important, in particular, which are tested by V.P. Sadkov [2] at the International Scientific and Practical Conferences. In the context of the need to ensure innovative development, issues of commercialization and financing of the education system are raised by A.O. Cherkhata and L.V. Solod in their monograph [3]. The strategic tasks of the education system for the formation of the intellectual potential of the country are defined in the work of R.I. Zhovnovach, Yu.V. Malakhovskiy and M. Mohamed [4]. The role of education at the modern stage of the development of society is emphasized in the study of V.H. Kremin [5].

Topical issues of public administration in the higher education system are analyzed in the works of S.H. Natroshvili [6], H.M. Kolomiets and I.I. Pominova [7]. However, since the education system must respond to changes in social priorities and requirements, it is appropriate to determine the impact of the latest trends in social development on educational processes and to determine the mechanisms of public administration that should be implemented in order to ensure the implementation of these processes.

According to the relevance of the study, its purpose is determined, which is to determine the mechanisms of public administration of the education system for the implementation of the tasks and priorities of social development.

To achieve the purpose, a number of scientific, practical and theoretical objectives have been identified, in particular the following:

- to analyze the processes of public governance and public administration, to determine specific characteristics;

- to identify general trends and tendencies in the development of the education system in the world and in Ukraine;
- to determine the legislative basis for ensuring the educational process;
- to develop recommendations to improve public administration in the education system at the national level.

1. THE DISTINCTIVE FEATURES OF THE PUBLIC ADMINISTRATION SYSTEM AND PUBLIC ADMINISTRATION

The education system is a priority for the development of any state. It is education that guarantees the provision of innovative development, technologization of production processes, entrepreneurial activity, investment attractiveness. Education is the basis for the formation of a spiritual society, compliance with ethical standards and rules. So, one of the important priorities of the development of society is precisely the formation of the foundations of an effective state policy in education.

The formation of approaches and mechanisms for the management of the education system at the state level, first of all, requires the theoretical justification of the concepts of public governance and administration, the determination of their differences and the specifics of implementation in practice. In a broad sense, the concept of management should be considered as a set of interconnected actions to implement the function of planning, organization, motivation and control in order to transfer the object of management to a qualitatively new level [1]. Administration is understood as the process of managing certain systems [2]. The concept of public administration and public governance has similar origins – implementing the function of social management. However, the processes of public governance, first of all, consider the processes of organizing the implementation of public decisions, and the public administration system is aimed specifically at the implementation of public tasks [3]. The comparative analysis of the distinctive features of the public administration system and public administration, carried out in the study, is presented in Table 1 [4; 5].

Table 1. Comparative analysis of differences in the system of “public governance” and “public administration”

Characteristics	Public governance	Public administration
Basis for implementation	Implementation of government decisions	Realization of public priorities and needs
System object	State power	Public power, social processes
Implementation of basic functions	Management	Process management and coordination
Directions to object	Government agencies, enterprises, organizations	Society
Development vector	Only national	Eurointegration
Priority	State institutions, state authority system	Democratic values, sustainable development of society
Sources	Social governance	Social governance
Regulation	Force of laws and other regulations	Force of laws and other regulations
Scope of implementation	Social, economic, political, geopolitical, public interest	Social, economic, political, geopolitical, public interest

So, if public governance basically considers the processes of execution of state decisions, then public administration consists in the implementation of public priorities, therefore, the object of the system is public processes and

public power. The public administration processes can be presented in the form of the following diagram in a comprehensive manner (Figure 1) [5-7].

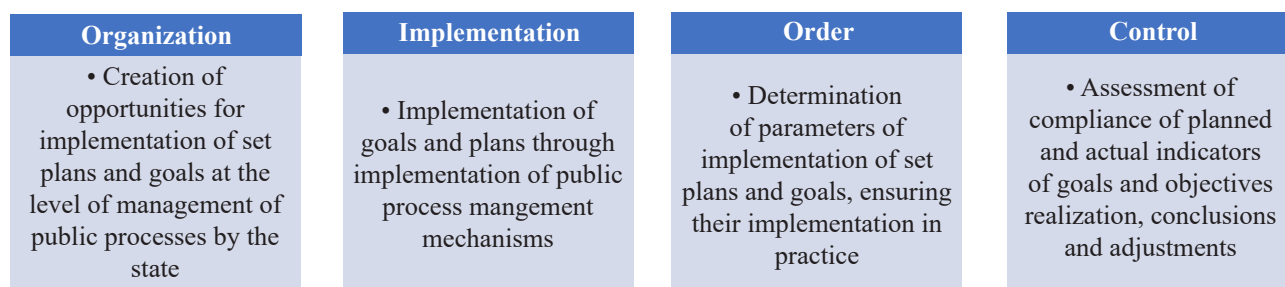


Figure 1. Public administration processes

Thus, considering eurointegration vectors of development of the Ukrainian society, and identification as an European integration priority the interests of the Ukrainian society, we consider it expedient to consider the issue of public administration in an education system, considering its high public function and a social role, and human-centered approach to realization of functions of public administration.

2. THE SINGULARITIES OF THE EFFECTIVE SYSTEM OF FINANCING EDUCATION AS AN IMPORTANT ELEMENT IN MINIMIZING THE NEGATIVE FACTORS IN THE EDUCATION SYSTEM

Analysis of development trends is important to ensure effective management of the system. Considering the education system as an object of management, it is appropriate to specify that the Ukrainian educational system is at the stage of transformation and reform. Transferring to the market basis of economic activity, Ukraine began to develop in the face of new public priorities and challenges. Thus, education was faced, firstly, with the need to reorient to new social needs that would satisfy the requirements of world standards, providing opportunities to compete with Ukrainian graduates and the economy as a whole in world economic markets. Secondly, education began to develop in the context of commercialization, which sets additional public priorities to ensure the possibility of its existence in the face of economic risks.

It is especially important to ensure the high competitive advantages of education in the conditions of quarantine measures and the development of online learning, because in these conditions the domestic education system no longer just competes within the country, or with educational institutions of neighboring countries, but comes to competitive conditions with educational institutions around the world. The effectiveness of the reforms carried out in the education system in Ukraine can be assessed by the resulting indicators of graduates of educational institutions (the level of their basic training, knowledge and skills, opportunities for applying the acquired skills).

Analyzing statistics, it should be noted that more than 65% of schools in Ukraine are located in rural areas.

These schools are characterized by a number of problems, in particular:

- transport accessibility for pupils;
- the absence of highly qualified teachers, teachers should combine the teaching of several non-major disciplines due to the lack of teaching staff in some schools, a number of teachers do not have the necessary training to hold lessons;
- low level of development of the material and technical base;
- lack of high-quality Internet access, which is the basis for obtaining modern information and organizing the training process in quarantine conditions;
- insufficient funding for educational institutions.

A positive point is that the number of schools that are equipped with barrier-free space has grown to 70% since 2017, which allows students with special needs to socialize and study in school groups. The average age of a teacher in Ukraine is 50 years. This indicates that Ukrainian youth do not join the teaching staff of schools, which is due to the complexity of this profession, the attitude of society to pedagogical processes with the creation of a certain negative image associated with low wages and low living standards of teachers. Thus, the problem of training personnel for the education system, improving the image of the teacher's profession, its popularization among young people, ensuring the social and legal protection of teachers, solving bullying issues is urgent.

The implementation of an effective system of financing education is an important element in minimizing the negative factors in the education system and ensuring its development. According to the State Statistics Service of Ukraine [8], the expenditures of the state budget in the education system are distributed as follows (Table 2). Thus, the highest rate of financing is observed in the higher education system, due to the high level of average wages, high rates of payment for public services, as well as the need to maintain and modernize the material and technical base. However, it should be noted that higher education has a number of problems of financial development. A large number of higher educational institutions do not allow rational allocation of budget funds to exactly where the quality of the provision of educational services is high, and the direction is of high relevance to society.

Table 2. State budget expenditure on the education system in Ukraine

	Total	Education services	Secondary activities within educational institutions	Medical services	Food services	Admin. services	Secondary education-related activities	Equipment	Transport services	Administrative office	Financial services
Preschool education	33 068 638,5	23 233 448,4	8 857 344,8	17 220,4	3 953 292,0	4 886 832,4	977 845,3	830 593,3	11 244,9		136 007,1
Primary education	44 798 923,5	34 547 963,4	8 944 523,6	18 377,3	2 167 559,1	6 758 587,2	1 306 436,5	1 127 072,8	19 664,3	86 470,7	73 228,7
First stage of secondary education	47 881 923,7	36 925 506,7	9 560 073,4	19 642,0	2 316 727,5	7 223 703,9	1 396 343,6	1 204 636,4	21 017,6	92 421,4	78 268,2
Second stage of secondary education	12 302 882,2	9 487 717,4	2 456 385,3	5 046,8	595 264,8	1 856 073,7	358 779,5	309 521,8	5 400,3	23 747,0	20 110,4
Post-secondary non tertiary education	11 160 730,2	7 619 361,9	1 881 446,7	4 129,7	436 333,8	1 440 983,2	1 659 921,6	256 906,5	11 988,8	17 006,7	1 374 019,6
Higher education	61 340 811,4	56 109 525,6	2 253 903,8	5 393,0	1 534 895,2	713 615,6	2 977 382,0	532 803,6	5 378,9	139 534,0	2 299 665,5
Doctorate	3 446 110,4	3 197 067,6	130 552,0	55,5	1 309,4	129 187,1	118 490,8	51 799,6	2 446,6		64 244,6
Total	214 000 019,9	171 120 591,0	34 084 229,6	69 864,7	11 005 381,8	23 008 983,1	8 795 199,3	4 313 334,0	77 141,4	359 179,8	4 045 544,1

In 2019, the Ministry of Education developed a new methodology for determining the amount of funding for higher education institutions, related to the assessment and analysis of performance indicators of educational and research processes, and the calculation of funding volumes in accordance with rating indicators. There is a high rate of funding in school systems, but, the lack of rational mechanisms for organizing the educational process, especially in rural areas with small school classrooms and lack of capacity to provide high levels of instruction in these schools, demonstrate the need to find mechanisms to modernize the education system, taking into account current trends in social development, new challenges and the need to ensure the competitiveness of Ukraine's intellectual potential in world economic markets.

According to statistics, governments around the world spend \$9.9 billion every day on education, which is the second indicator of spending in the world after health care (it is important to take into account that the data were identified during the pandemic). The basic indicator for assessing the level of education at the macro level is the Education Level Index, the methodology for which has been developed by the United Nations. The indicator is based on data related to the literacy rate of the adult population of the country, as well as the total proportion of people receiving education [9]. This indicator is one of the main indicators

for the identification of the Human Development Index as the basic category of social development of mankind. This shows that today society identifies education as a basic priority for the sustainable development of mankind. Germany, Australia, New Zealand and Denmark have the highest Education Level Index. Poor African countries, such as Niger, Eritrea, Chad, Mali, Burkina Faso have the lowest rates. Ukraine is in 46th place of this rating among 189 countries assigned an index [9].

The level of education, basic reading and writing skills remains very low in many countries. The world trends in education are as follows:

- increasing the commercialization of education processes;
- reduced access to education in certain regions of the world due to military-political conflicts and quarantine activities in the pandemic;
- the threat of loss of basic reading and writing skills by several generations in a number of countries due to the lack of any access to education in the absence of Internet access in the pandemic;
- politicization of educational processes in order to influence the world vision of the younger generation;
- lack of real effective mechanisms for ensuring the educational process in the poorest countries as an opportunity to bring this country to a qualitatively new socio-economic level.

3. THE CHARACTERISTIC OF THE EFFECTIVENESS OF THE PUBLIC ADMINISTRATION SYSTEM IN EDUCATION

The basic concepts and priorities of education development are defined in the United Nations Concept of Sustainable Development¹ and other international documents of the United Nations, and its structural units, in particular United Nations International Children's Emergency Fund (UNICEF) and United Nations Educational, Scientific and Cultural Organization (UNESCO). Ukraine has ratified the main international regulatory documents that regulate world norms and standards for the provision of quality education. Today, in the conditions of reforming of domestic educational space within an eurointegration vector of development changes were made and restated a number of key regulatory documents, such as Law of Ukraine "About Education"², Law of Ukraine "About Complete General Secondary Education"³, Law of Ukraine "About the Higher Education"⁴, Law of Ukraine "About Professional Education"⁵, Law of Ukraine "About Scientific and Scientific and Technical Activity"⁶. Amendments and additions to basic legislation in the education system have contributed to the ratification of international norms and standards for the quality of education.

The basic rights of a citizen to access education are covered in the Constitution of Ukraine⁷, in particular Art. 53 determines: "Full general secondary education is compulsory. The state shall ensure the accessibility and free availability of preschool, full general secondary, vocational and higher education in state and public educational institutions; development of preschool, full

general secondary, extracurricular, vocational, higher and postgraduate education, various forms of education; granting state scholarships and benefits to pupils and students. Citizens have the right to receive free higher education in state and public educational institutions on a competitive basis. Citizens belonging to national minorities are guaranteed, in accordance with the law, the right to study in their mother tongue or to learn their mother tongue in state and public educational institutions or through national cultural societies".

By identifying the ratification by Ukraine of international documents in the field of education as a priority of European standards for the implementation of the educational process, ensuring the right of citizens to education in the Constitution of Ukraine⁸, was determined the relevance of finding mechanisms to solve modern problems of education by ensuring the rational implementation of the public administration system. During the analysis of the system of public administration of the educational process, an algorithm for implementing mechanisms of public administration by education was developed, taking into account the requirements of the society, it is presented in the Figure 2.

So, as a result of the study, an algorithm to increase the effectiveness of the public administration system in education, which includes organizational measures, processes for improving the image of Ukrainian education, digitalization processes as a priority of development, as well as ensuring the implementation of the quality control function of the educational process by applying the public was proposed.

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8. *Ibidem*, 1996.

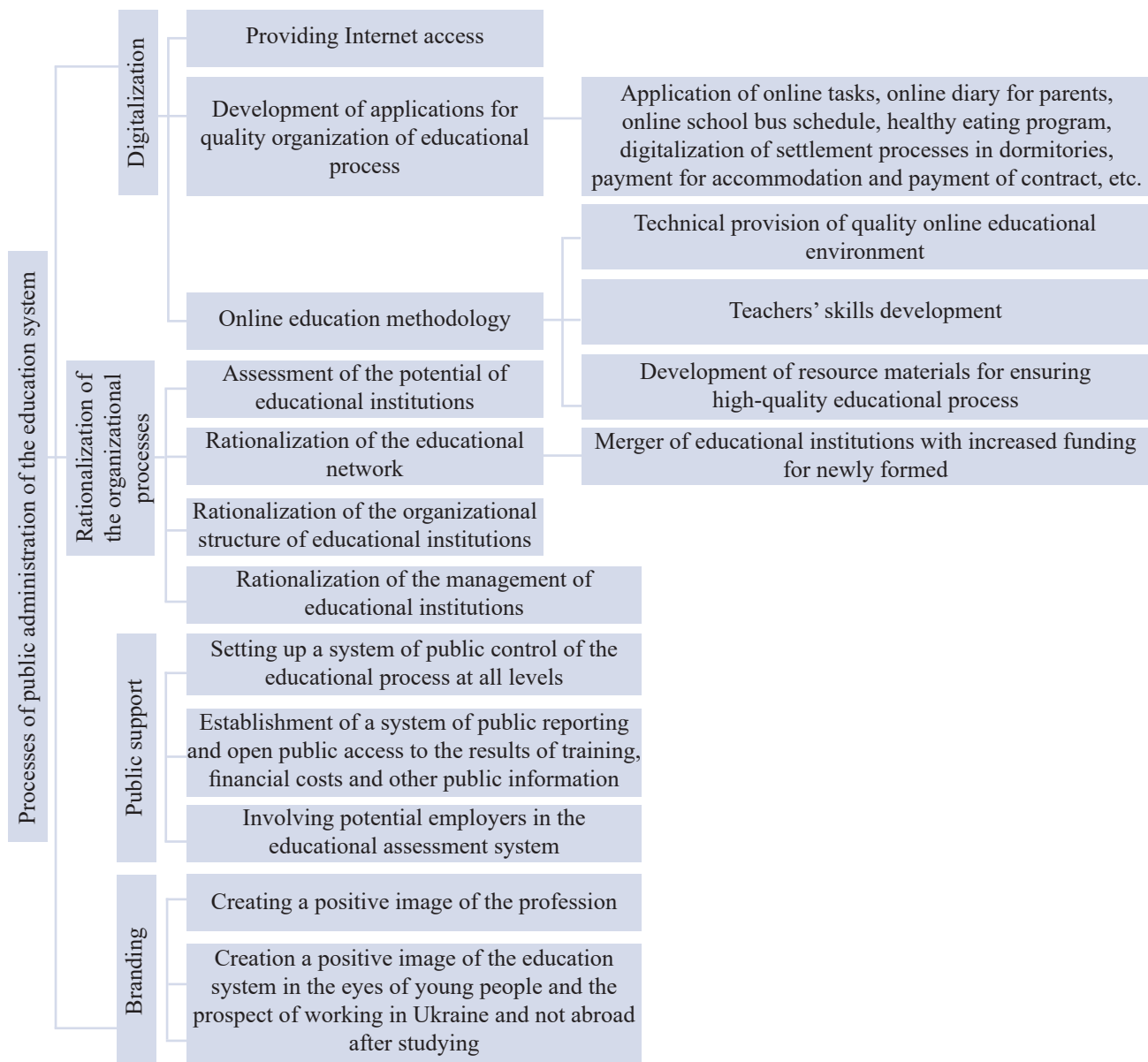


Figure 2. Algorithm for improving the efficiency of the public administration system in education

Note: developed by the authors

CONCLUSIONS

As a result of the study, differences between the processes of public governance and public administration were identified. The analysis showed that public administration is based on public needs and requirements, based on a human-centered approach of management mechanisms. Given the high social role of the education system, it is appropriate to analyse the system of public administration of the educational process by finding mechanisms to increase its effectiveness. The analysis of trends in the development of education has identified the main problematic aspects, which are the inefficient organization of the educational process, financial problems, the need to improve the image of teachers and the education system in general, the relevance of digitalization processes, especially in the quarantine measures.

The analysis of the world experience in the development of the education system recognized the high potential

of Ukraine in increasing the competitiveness of the national economy by realizing intellectual potential through increasing the efficiency of the education system. The right of a citizen of Ukraine to access education is defined at the level of the Constitution of Ukraine. Legislation prepared and implemented, taking into account educational reforms aims to ratify international standards and standards for the quality of education in order to determine its competitive advantage. Through an analysis of the shortcomings of the education system and the objectives that Ukrainian society poses to education, an algorithm to increase the effectiveness of public administration of the educational process by introducing digitalization mechanisms, rationalizing organizational processes, branding and attracting the public to all areas of educational activity was developed.

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ПАРАДИГМА РЕФОРМУВАННЯ ВИЩОЇ ЮРИДИЧНОЇ ОСВІТИ В УКРАЇНІ В КОНТЕКСТІ ПРАКТИЧНОЇ ПІДГОТОВКИ СТУДЕНТІВ-ПРАКТИКІВ

Анотація. *Актуальність дослідження обумовлена тим, що існує особливий суспільний запит щодо якості правничої освіти, забезпечення відповідності змісту юридичної освіти сучасним вимогам ринку праці та завданням професійної діяльності правників. Метою статті є розгляд методологічних, науково-теоретичних, законодавчих, освітніх, навчально-методичних засад щодо практичної орієнтованості освітнього процесу з підготовки правників як парадигми реформування вищої юридичної освіти та визначення форм організації освітнього процесу, спрямованих на покращення якості юридичної освіти. Методологічна база дослідження сформована з урахуванням філософських, загальнонаукових та спеціально-наукових методів наукового пізнання. Запропоновано концептуальні підходи щодо впровадження в освітній процес вищих юридичних навчальних закладів можливих навчально-методичних форм організації практичної підготовки студентів з урахуванням елементів Болонського процесу та формування єдиного освітнього простору за європейським вектором розвитку України. Розглянуто методологічні, науково-теоретичні, організаційно-правові, навчально-методичні засади до загального розуміння практичної підготовки студентів правників у освітньому процесі, її функціонального призначення в умовах здійснення реформи юридичної освіти як складової правової реформи в Україні. Наголошується на необхідності збереження і подальшого розвитку фундаментальної вищої юридичної освіти та поєднання її зі сформованими національними і зарубіжними доктринами права та практичною орієнтацією освітнього процесу як парадигми реформування юридичної освіти в Україні. Зроблено висновок про те, що формування практичних навичок та вмінь у здобувача юридичної освіти відбувається в освітньому процесі завдяки різноманітним формам навчально-методичної організації освітнього процесу. Зокрема, розглянуто особливості проведення практичних занять з використанням кейс-методів та вирішенням казусів, а також бінарних занять, проходження практики, роботи в юридичній клініці, здійснення дуальної освіти, участі в судових дебатах тощо. Практична цінність дослідження полягає в тому, що в статті доведено, що в освітньому процесі доцільно зберігати національні традиції вищої юридичної освіти та запроваджувати нові, прогресивні форми організації освітнього процесу, спрямовані на підвищення якості вищої юридичної освіти, яка б відповідала вимогам ринку праці та викликам, що стоять перед сучасним демократичним суспільством, глобальним тенденціям розвитку та завданням професійної діяльності правників у різних сферах*

Ключові слова: *правник, освітній процес, практична орієнтованість, кейс-метод, юридичні клініки, дуальна освіта*

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PARADIGM OF REFORMING HIGHER LEGAL EDUCATION IN UKRAINE IN THE CONTEXT OF TRAINING PRACTISING STUDENTS

Abstract. *The relevance of the study was explained by a special public demand for the quality of legal education, ensuring compliance of the content of legal education with modern requirements of the labour market and the tasks of professional activity of lawyers. The purpose of the study was to consider methodological, research and theoretical, legislative, educational, and methodological foundations regarding the practical orientation of the educational process of training lawyers as a paradigm for reforming higher legal education and determining the forms of organising the educational process aimed at improving the quality of legal education. The methodological framework of the study was formed considering philosophical, general scientific, and special scientific methods of scientific cognition. Conceptual approaches to the introduction of possible methodological forms of organising practical training of students into the educational process of higher legal educational institutions were proposed, considering the elements of the Bologna Process and the development of a unified educational space according to the European vector of development of Ukraine. The study considered methodological, scientific and theoretical, legal, and methodological foundations for a general understanding of the practical training of law students in the educational process, its functional purpose in the context of implementing the reform of legal education as a component of legal reform in Ukraine. The study emphasised the necessity of preserving and further developing fundamental higher legal education and combine it with the established national and foreign doctrines of law and the practical orientation of the educational process as a paradigm for reforming legal education in Ukraine. It was concluded that the development of practical skills and abilities of a legal education applicant occurs in the educational process due to various forms of methodological organisation of the educational process. In particular, the authors considered the features of conducting practical classes using case methods and solving incidents, as well as binary classes, practical training, working in a law clinic, performing dual education, taking part in court debates, etc. The practical value of this study lies in the fact that it proved the advisability of preserving the national traditions of higher legal education in the educational process and introducing new, progressive forms of the educational process aimed at improving the quality of higher legal education, which would meet the requirements of the labour market and the challenges facing a modern democratic society, global development trends and tasks of professional activity of lawyers in various fields*

Keywords: *lawyer, educational process, practical orientation, case method, legal clinics, dual education*

INTRODUCTION

The development of Ukraine as a democratic, social and legal state, the establishment of the constitutional order and strengthening of civil harmony, ensuring the exercise of human and civil rights and freedoms necessitate the development of higher legal education as one of the key constitutional requirements for judges, as well as in cases stipulated

by law, and other legal professions (prosecutors, lawyers, notaries), holding positions in state and local government bodies, public entities, and other subjects providing legal services in the field of public and private law.

Analytical study of the current state of higher legal education in Ukraine demonstrated that in the conditions

of rapid changes in socio-economic, state-legal and political phenomena occurring in Ukrainian society and the state, considering the European dimensions of the development of a single educational space, considering the elements of the Bologna declaration, national higher legal education is in a state of transition from one system to another. On the one hand, the educational process retains stereotypical opinions on the methodological, educational, organisational, and pedagogical foundations of training lawyers in higher legal educational institutions with a focus mainly on students' obtaining of fundamental theoretical knowledge, on the other hand, selectively, at their own discretion, higher educational institutions introduce the latest forms of organisation of training lawyers into the educational process, with a practical orientation of curricula, which make provision for the involvement of practitioners in teaching, students' participation in lawsuits, the organisation of student legal clinics, etc.

At the same time in the implementation of new forms of the educational process with a focus on the practical component in the preparation of students, there are system problems of state-legal, educational and methodological, financial and other nature that require decisions at the state level, starting with planning the training of lawyers for the final certification of graduates and employment. The first attempts to solve these problems were already made after two draft laws "On Legal Education and General Access to the Legal Profession" (Registration No. 7147 of September 28, 2017)¹ and "On Legal Education and the Legal Profession" (registration number 7147-1 of October 17, 2017)² were submitted to the Verkhovna Rada of Ukraine in 2017, which defined the specific features of the practical orientation of the educational process in the training of lawyers, and which were withdrawn in 2019. Subsequently, the Draft Concept for the Development of Legal Education³ was submitted to the Verkhovna Rada of Ukraine, which is under consideration by the corresponding committee of the Parliament. This means that old and recent problems on the development of legal education remain relevant for scientific and theoretical understanding and development of practical models for the modernisation of legal education, including improving the practical orientation of curricula in law schools, and this is one of the important tasks of the state at the present stage of its development and implementation of reforms in many spheres of public life.

The legal literature has already expressed opinions on the areas of higher legal education reform. In particular, the Ukrainian legal literature has investigated both general issues of reforming Ukrainian legal education in the scientific studies by Yu. Barabash [1], A. Boiko [2], V. Komarov [3], O. Kot [4], N. Kuznetsova [5], S. Pohribnyi [6], V. Tatsiy

and V. Komarov [7], and the specific features of teaching certain academic disciplines in the context of reforming legal education in the scientific studies by A. Hryniak [8], A. Dovhert [9], O. Kokhanovskaya [10], M. Pleniuk [11], R. Stefanchuk [12], and other legal scholars. In foreign literature, the modernisation of legal education is also the subject of heated discussions, in particular, in the studies of John Land [13], R.J. Wilson [14], V.A. Woodruff and A. Baker [15].

However, the issues of practical orientation of training lawyers in the context of reforming higher legal education indicate the need to further identify problematic aspects in the practical training of lawyers, in the acquisition of practical skills, abilities and research of provisions for determining areas, approaches to the development of professional competences of lawyers and forms of organising the educational process to improve the quality of higher legal education.

The purpose of this study was a consideration of methodological, scientific and theoretical, legislative, and educational foundations regarding the practical orientation of the educational process of training lawyers as a paradigm for reforming higher legal education and determination of the forms of the educational process aimed at improving the quality of legal education.

1. MATERIALS AND METHODS

Consideration of the practical orientation of training lawyers as a paradigm for reforming higher legal education is impossible without the use of the main tools of the methodology of legal science. The methodology of legal science is considered as a system of methodological principles, techniques, means, and methods of scientific cognition, which is used to obtain data in the study of state-legal reality in the context of legal practice tasks [16, p. 157].

The methodological framework for studying the practical orientation of the educational process of training lawyers comprised the dialectical method, axiological, and institutional approaches. The dialectical method allowed considering the practical orientation of training lawyers in the development of various forms of practical training of lawyers and identify the features of their individual types. The establishment of the possibilities of applying an axiological approach to the analysis of the practical orientation of training lawyers can consider the features of the axiological approach in state studies, which is defined as a general research strategy, united by a single idea, the essence of which is manifested in the knowledge of the state through the lens of relative value orientations (assessment of the compliance of the specific historical manifestation of the state with the value orientations of the individual and society) and absolute value principles of the state [17, p. 52]. Thus,

1. Draft Law of Ukraine No. 7147 "On Legal Education and General Access to the Legal Profession". (2017, September). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62613.

2. Draft Law of Ukraine No. 7147-1 "On Legal Education and the Legal Profession". (2017, October). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62728.

3. Draft Concept for the Development of Legal Education. (2020, November). Retrieved from <http://kno.rada.gov.ua/fsview/75465.html>.

the general strategy of studying the practical orientation of training lawyers in Ukraine is united by a single idea, the essence of which is manifested in improving the quality of higher legal education through the lens of relative value orientations (assessment of compliance of the state of higher legal education with the requirements of the labour market and the challenges and requirements of society) and absolute value principles of development of the lawyer as a person. Axiological and institutional approaches provide an opportunity to consider such basic categories as higher legal education, legal competences, and the educational process in combination and unity. General scientific methods of analysis and synthesis, induction and deduction contributed to the development of judgements and opinions on the practical orientation of the educational process in the context of higher legal education reform.

The basis of the special scientific level of research on the practical orientation of training lawyers was developed by historical legal and comparative approaches. The comparative legal method allowed establishing the advisability of preserving the national traditions of higher legal education in the educational process and introducing new, progressive forms of the educational process aimed at improving the quality of higher legal education, which would meet the requirements of the labour market and the challenges facing a modern democratic society, global development trends and tasks of professional activity of lawyers in various fields.

As an empirical material of the study, the study used the analytical materials on the results of educational measurements, national surveys of the state of development of legal education in Ukraine, namely the Report on the results of the analytical study “Knowledge and skills of graduates of law faculties and institutions of higher education through the prism of compliance with the needs of the labour market”¹ conducted by the expert group on legal education of the Directorate for Human Rights, Access to Justice and Legal Awareness of the Ministry of Justice of Ukraine in 2018, the results of national surveys of lawyers, employees of the court staff and jurors in 2019 [18].

2. RESULTS AND DISCUSSION

2.1 Doctrinal approaches to practical training of students in the conditions of legal education reform in Ukraine

Law of Ukraine No. 1556-VII “On Higher Education” of July 1, 2014² defines the quality of higher education as the compliance of the conditions of educational activities and learning outcomes with the requirements of legislation and standards of higher education, professional and/or international standards (if any), as well as the needs of stakeholders

and society, which is ensured by implementing internal and external quality assurance procedures.

As noted by V. Tatsiy and V. Komarov, “the competency model of training lawyers involves bridging the substantial gap between legal education and social practice. Strengthening the practical orientation of training is also associated with combining the training of applicants for legal education with professional activities in the formats of volunteering, providing free legal aid, legal clinics, internships, etc. Modernisation of legal education according to a competence-based approach, strengthening the practical component in the training of lawyers should not lead to the rejection of fundamental higher legal education, which is pertinent to the best traditions of the Ukrainian law school” [7, p. 50-51].

This is confirmed by sociological studies that were conducted to determine the basic competences of graduates of law faculties or higher educational institutions. Report on the results of the analytical study “Knowledge and skills of graduates of law faculties and institutions of higher education through the prism of compliance with the needs of the labour market”³, conducted by the expert group on legal education of the Directorate for Human Rights, Access to Justice and Legal Awareness of the Ministry of Justice of Ukraine in 2018, according to employers, a graduate of the law faculty should have the skills to draw up procedural documents (25.3%), the ability to logically express their opinion and have communication skills (25.3%). Almost an equal number of respondents indicate the need for analytical, critical, and logical thinking skills (9.6%), skills in working with the legislative framework, data registers and relevant software, skills in quick search and processing of information (8.4%), interaction with clients (7.3%). In addition, graduates of law faculties should be proficient in a foreign language at the proper level, in particular, be able to draw up documents in a foreign language, and master translation techniques (7.3%). No less important are the skills and abilities to resolve conflicts and organise working hours (6%). As is evident, it is practical skills and information and communication competences that employers put first when determining the requirements for future lawyers. It is quite possible to agree with this, without forgetting that the professional activity of a future lawyer requires them to be also a well-mannered, educated person, but, admittedly, practical training of a law student should be a priority in the content of legal education.

Yu. Barabash notes that considerable efforts need to be made for the methodological updating of the content of teaching in law schools. Only when legal education gets a different “practically oriented sounding” will we be able to

1. Report on the results of the analytical study “Knowledge and skills of graduates of law faculties and institutions of higher education through the prism of compliance with the needs of the labour market”. (2018). Retrieved from https://uba.ua/documents/ZVIT_Jurosvita.pdf.

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

3. Report on the results of the analytical study “Knowledge and skills of graduates of law faculties and institutions of higher education through the prism of compliance with the needs of the labour market”. (2018). Retrieved from https://uba.ua/documents/ZVIT_Jurosvita.pdf.

lay the foundation of a new philosophy of certification of graduates of the end-to-end master of law curriculum as the first important step in accessing the legal profession. This means that it is necessary to discuss not only the creation of new selection filters, but also to work hard to ensure that a young lawyer has a sufficient level of not only theoretical knowledge, but also basic skills to fulfil oneself in various areas of legal practice [19].

Issues of practical orientation of training lawyers are also relevant for foreign law schools. Thus, R.J. Wilson notes that the origin, growth, and recognition of clinical law education worldwide is the greatest innovation in the pedagogy of law schools – and, admittedly, in student education – since Socrates' “science”, the case method was brought to Harvard by Christopher Columbus Langdell [14].

Back in the 19th century, Langdell attempted to create a scientific method based on primary legal materials, which, in his opinion, were the decisions of higher courts. The idea was to understand the principles underlying the solution. According to Langdell, the primary materials would be decisions of higher courts, conveniently edited so that students could understand the logic of reasoning and the principles applied by the judge. The classroom is a laboratory. Scientific methodology requires the student to conduct an experiment, and not just observe how the teacher does it. For this reason, the teacher had to make the student understand the case and understand the judge's reasoning, emphasising his principles. The role of the teacher was not to explain these principles, but to help students find them through correctly formulated questions [20].

In addition, foreign literature emphasises that American law schools should better organise work on preparing students for legal practice. Teaching students to “think like an advocate” is still necessary, but not enough to make students act like an advocate faster after completing their training. Training lawyers is particularly difficult because lawyers work on many types of issues, both in dispute resolution and negotiation. Some legal disputes are resolved during the trial, but most are resolved through other processes in the “shadow of the law”. Although the legacy of the Langdell system has developed in law education in recent decades, it is quite difficult to combine legal doctrine, practical skills and clinical experience in the learning process. It is elementary to recognise general problems of legal education; their solution can be quite difficult, and there is no universal answer to this issue [13].

The above-mentioned doctrinal approaches to understanding the practical component in the training of lawyers in states with different legal systems demonstrate that in modern conditions of global challenges, the problem of increasing the practical orientation of training lawyers is a transnational issue. As noted above, in Ukraine, these problems are supposed to be solved first at the conceptual level with the definition of strategic and operational goals for reforming legal education as a component of legal reform.

In particular, according to the draft concept for the development of legal education¹ strategic goal 5 provides as follows:

- increase in the volume of practical training of lawyers to 30 ECTS credits and quality assurance of its completion, which will be based on the principles of joint monitoring by the law school, practice bases and relevant professional legal communities;

- promotion of the development of legal clinics in the form of separate structural divisions of higher educational institutions and introduction of training courses on legal clinical practice into the educational process;

- active introduction of innovative forms and methods of teaching into the educational process: cases, training court sessions, etc.;

- involvement of representatives of legal communities in teaching individual courses or conducting classes for applicants for legal education;

- promotion of participation of applicants for higher legal education in training internships in public authorities, courts, notary offices, prosecutor's offices, the bar, and other entities of public and private law;

- assistance and support, in particular material support, for the participation of applicants for higher legal education in court debate tournaments (*moot court*);

- gradual introduction of elements of a dual form of education into the system of training lawyers;

- the widest possible involvement of applicants for legal education in applied scientific research, participation in student scientific societies, etc.

The analysis of the forms of practical training of lawyers in modern conditions given in the Concept does not raise any special objections. At the same time, the implementation of the above-mentioned forms of training lawyers can have a positive effect if students acquire theoretical knowledge of law. In this regard, V. Komarov fairly argues that the basis of fundamental higher legal education should not be pragmatic, highly specialised knowledge, but methodologically important and stable one. Legal education will only be fundamental when it is based on the corresponding concepts of science. At present, unfortunately, there is a substantial gap between the level of legal education and legal science. It is necessary to combine the legal science with legal education. The foundation of legal education should be based on the achievements of Ukrainian and world scientific thought, which would help improve the depth of higher legal education. Fundamental higher legal education should provide a specialist with basic, system-forming, methodologically significant knowledge that originates from understanding and covers the primary essence of legal phenomena. This also applies to other competences focused on the results of training and mastering a certain practical experience [3, p. 24].

Agreeing with this opinion, it is worth adding that a future lawyer should not only acquire practical skills and abilities, for example, of drawing up legal documents,

1. Draft Concept for the Development of Legal Education. (2020, November). Retrieved from <http://kno.rada.gov.ua/fsview/75465.html>.

procedural documents, but also be knowledgeable in law, be capable of having a tolerant conversation on professional topics, while commanding both a high professional and cultural level. In this regard, N. Onishchenko emphasised that structurally, “knowledge of law” lies in the opportunity to thoroughly investigate, study legal provisions and, accordingly, master that knowledge to the required extent and at the necessary level (to protect rights, freedoms, and legitimate interests). Thus, the first step – familiarisation with the legal material. The study of legal provisions involves many aspects of doctrine and practice, law-making, and legal implementation. Admittedly, such a study involves both instrumental and essential components. Therefore, knowledge of law is the assimilation of diverse legal knowledge by a person to use it in all spheres of life for the most complete exercise of rights, freedoms, and legitimate interests. This process is defined by the following tasks: 1) establishment and development of legal knowledge of a person in the field of public administration; 2) education of respect for law as a social value and for the principles of lawfulness; 3) development of needs and skills to actively protect their rights, freedoms, and legitimate interests in accordance with the procedure established by law [19].

Investigating the problems of high-quality training of law students as a component of legal reform, N. Kuznetsova noted that during training, a lawyer should acquire the skills of logical, critical, and systematic analysis of documents, understanding their legal nature and significance, skills of consulting on legal issues, namely possible remedies for the rights and interests of clients, in accordance with the requirements of professional ethics, proper compliance with the provisions regarding non-disclosure of personal data and confidential information, skills of independent preparation of draft law enforcement acts. The graduate should have the ability to critically and systematically analyse legal phenomena and apply the acquired knowledge in professional activities [5, p. 66-67].

The above scientific and theoretical approaches to understanding the practical training of students with the need for them to acquire fundamental knowledge in law suggest that the development of practical skills and abilities of an educational applicant occurs in the educational process due to its various forms, and, most importantly, during practical classes, internships, while working in a legal clinic, taking part in court debates, etc. Practical training is an established form of training lawyers, which in modern conditions causes more problems in organising it and monitoring its completion by applicants for legal education. Therefore, it is advisable to expand the existing practice base, which would facilitate the completion of its various types (introductory, educational, industrial, etc.), considering the specific features of providing legal aid and acquiring skills of professional activity of lawyers in various fields.

2.2 Case-method and solution of isolated cases as a form of training lawyers in the context of its practical orientation

Article 1 of the Law of Ukraine “On Higher Education”¹ defines an educational (educational-professional, educational-scientific, or educational-creative) programme as a unified set of educational components (academic disciplines, individual tasks, practices, control measures, etc.) aimed at achieving the learning results provided for in such a programme, which entitles the student to a certain educational or educational and professional qualification(s). Thus, it is the content of the curriculum for training lawyers that determines the general orientation of the educational process within a particular speciality, including speciality 081 “Law”, namely teaching students the rules of legal argumentation, which can take place in practical classes and other forms of training. In this regard, N. Kuznetsova fairly noted that the entire educational process is focused precisely on the development of students' well-established skills in this technique – the technique of legal argumentation. On the one hand, the judicial system should work out common standards of judicial decision (admittedly, considering the specific features of each jurisdiction and the relevant instance), on the other hand, general and special legal educational institutions should develop a methodology for the development of appropriate skills and abilities for writing such decisions by students [5, p. 70].

The development of proper skills and abilities for preparing legal and procedural documents by applicants for higher education occurs during practical classes, so it would be advisable to conduct practical classes in academic disciplines in certain branches of law using the *case method*, which has become widespread in law schools in foreign countries. According to foreign literature, this method originated in the 1870s, when it had an extremely specific field of application – legal science. Harvard Law School has used it to teach this subject, studying past court cases. [21] This method is actively used in the educational process [22]. The essence of the case method is that students are invited to comprehend a real professional situation, the description of which reflects a practical issue and substantiates the complex of previously acquired knowledge. The main in this problem is the absence of unambiguous solutions. The purpose of the case method is to involve students in a situation where they need to make a decision [23, p. 124]. Admittedly, the use of the case method in solving practical problems in civil law differs from the method of solving a practical problem in criminal law or procedure.

The theory of a model incident is based on the possibility and necessity of applying a legal provision to an indefinite number of cases covered by a single legal idea. Systematisation of legal incidents into standard groups helps clarify the content and features of the application of particular legal provisions. The technique of solving a legal

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

incident in a particular branch of legal discipline has several features. The most substantial differences can be identified between the method of solving an incident in criminal and civil law. Firstly, when resolving an incident under criminal law, it is mandatory to analyse the subjective component of the offender's behaviour. The compensatory function of civil law and the need to restore the violated property and / or personal non-property sphere of the victim due to the latter allows ignoring the degree and nature of the fault of the delinquent or the person who violated the contractual obligation. In all cases, this does not affect the amount of liability. In addition, the science of criminal law and civil law define the category of guilt itself differently. There are different presumptions of guilt in civil and criminal law. Secondly, the resolution of an incident under criminal law is limited by the need to apply the Criminal Code of Ukraine. Civil law has a broader system of sources compared to criminal law. Thirdly, a substantial difference between the resolution of an incident in criminal and civil law is the possibility of applying an analogy in civil law, as well as the possibility of an expansive interpretation of civil law provisions [24, p. 29-30].

Draft Concept for the Development of Legal Education¹ is directed towards the involvement of representatives of legal communities in teaching individual courses or conducting classes for applicants for legal education. In this area, it is advisable to conduct binary practical classes with the participation of practitioners and a teacher of a higher educational institution in solving isolated cases, especially if the decision-making on them lies in the plane of, for instance, substantive and procedural law.

2.3 Legal clinics and other forms of training lawyers in the context of its practical orientation

Applicants for higher education also acquire practical skills while working in legal clinics. Today in Ukraine, the education through legal clinics is organised based on the Model Regulation on the Legal Clinic of a Higher Educational Institution of Ukraine, approved by Order No. 592 of the Ministry of Education and Science of Ukraine dated 03.08.2006² (hereinafter referred to as “the Model Regulation on the Legal Clinic of a Higher Educational Institution of Ukraine”), Paragraph 1.1 of which states that the legal clinic is a structural division of a higher educational institution of III-IV accreditation levels, which trains specialists in the field of “Law”, and is created as a basis for practical training and conducting training practice for senior students. According to Clause 2.1 of the Model Regulation on the Legal Clinic of a Higher Educational Institution of Ukraine³, the purpose of the legal clinic is to increase the level of practical knowledge, skills, and abilities of students of legal specialties; to ensure access of representatives of socially vulnerable groups of society to legal aid; to

develop a legal culture of citizens; to educate and train students in the spirit of adherence to and respect for the principles of the rule of law, justice, and human dignity; to expand cooperation of higher educational institutions that train legal specialists, with judicial, law enforcement, justice, state and local authorities, with other institutions and organisations; to introduce elements of practical training of law students in the field of legal services into the educational process.

Notably, legal clinics are widely used in foreign countries. Moreover, they can provide legal aid directly to certain segments of the population [25], or they can be used as a method of teaching [26], since, for example, research indicates that legal clinics of law schools can play an important role, in particular, in improving the level of education in the field of human rights, clinical education in human rights can be considered as a successful method, described by accessibility and acceptability [27].

Paragraph 2.3 of the Model Regulation on the Legal Clinic of a Higher Educational Institution of Ukraine³ makes provision that in accordance with the purpose and objectives of the legal clinic of the higher educational institution, for its full and effective functioning, the management of the legal clinic and the higher educational institution organises and ensures as follows: a special course on the basics of legal clinical practice, which covers the basics and functions of legal clinics, and also focuses on the main aspects of legal practice; theoretical and practical classes on the results of the legal clinic; legal education, legal explanations, and other educational and practical activities; free legal aid on the protection of rights and freedoms of people and organisations from all branches of law in accordance with the current legislation of Ukraine; work with documents of a legal nature and databases; preparation and distribution of publications for the population on topical legal issues; cooperation with representatives of state and non-state bodies and organisations; research-to-practice conferences, seminars, trainings, and other events on topical legal issues; work on systematisation and analysis of judicial practice of Ukraine, decisions of the European Court of Human Rights, solving legal issues in law enforcement agencies, state authorities, and local self-government; cooperation with other legal clinics of higher educational institutions of Ukraine and outside the state. Further development of legal clinical education in Ukraine will certainly contribute to the practical orientation of the educational process of training lawyers, as well as improving the quality of higher legal education.

Admittedly, the introduction of a dual form of education would contribute to the practical orientation of the educational process. However, questions arise regarding the training of lawyers in this area. Part 6, Article 49 of the Law of Ukraine “On Higher Education”⁴ stipulates a dual

1. Draft Concept for the Development of Legal Education. (2020, November). Retrieved from <http://kno.rada.gov.ua/fsview/75465.html>.
2. Order of the Ministry of Education and Science of Ukraine No. 592 “On Approval of the Model Regulation on the Legal Clinic of a Higher Educational Institution of Ukraine”. (2006, August). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0956-06#Text>.
3. *Ibidem*, 2006.
4. *Ibidem*, 2006.
5. Law of Ukraine No. 1556-VII “On Higher Education”. (2014, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1556-18#Text>.

form of higher education as a way for full-time applicants to receive education, which provides for on-the-job training in enterprises, institutions, and organisations to acquire certain qualifications in the amount of 25 to 60 percent of the total volume of the curriculum based on an agreement. On-the-job training provides for the performance of official duties in accordance with the employment agreement. Dual education is carried out based on a contract between an institution of higher education and an employer (enterprise, institution, organisation, etc.), which provides for procedure for employment of a higher education applicant and remuneration of their work; scope and expected results of training a higher education applicant in the workplace; obligations of the institution of higher education and the employer regarding the implementation by the applicant of higher education of an individual curriculum at the workplace; procedure for evaluating the results of training obtained at the workplace.

It is worth agreeing with V. Horodovenko, according to whom before the introduction of dual education in the legal profession, education should be approached prudently. This is explained by the fact that most positions in the legal profession are appointed by persons based on the results of competitive selection. It is advisable to introduce some elements of dual education in the training of lawyers, in particular, the conclusion of cooperation agreements with law firms and law associations, notaries, etc. and conducting industrial practice, internships on their bases [19].

Admittedly, the dual form of education is progressive in the context of obtaining professional education, but it is also possible to introduce certain elements of dual education in the training of lawyers, in particular, to provide jobs and create opportunities for professional activities, for example, in free legal aid centres, in territorial communities to provide future lawyers with certain types of legal services for free primary legal aid in accordance with agreements concluded with the educational institution (providing legal information, providing advice and explanations on legal issues, drawing up applications, complaints and other documents of a legal nature (except for documents of a procedural nature)). All these actions, however, will become possible after appropriate changes to the current legislation of Ukraine governing the grounds and procedure for providing free legal aid.

The participation of applicants for legal education in model court debates and model court sessions proved their effectiveness regarding the acquisition of practical skills and abilities in the context of the practical orientation of training lawyers. Model court debates and model court sessions contribute to the establishment and development of such practical skills as public speaking and critical thinking, the ability to formulate, argue, and defend the legal position, the ability to draw up procedural documents, present oneself as a specialist during a court speech.

Reproduction for educational purposes of the judicial process provides an opportunity for its participants to feel and critically evaluate their professional skills and abilities, to determine the further area of their improvement. Important in this context is the support of participants in the educational process by professional associations of lawyers, practitioners, judicial authorities, etc. Thus, the experience of the Seventh Administrative Court of Appeal is positive, which approved the regulation on holding model court sessions with students of higher educational institutions¹.

CONCLUSIONS

Summing up the above, one can draw a general conclusion that for reasons of an objective and subjective nature, there is a need for qualitative changes in the legal education system considering the future accession of Ukraine to the unified European educational space, which determines the need to develop and implement in the educational process of higher legal educational institutions methodological, theoretical, legal, and educational foundations for reforming legal education, the component of which is practical training of students and providing them with access to the profession. In this regard, it is worth supporting the work that has commenced on the preparation and adoption of the Concept for the Development of Legal Education, which defines strategic and operational goals, the achievement of which will raise legal education to the European level of educational training of lawyers for the state and society.

Consequently, the modernisation of higher legal education towards practical orientation of training lawyers is one of the important tasks of the state at the present stage of its development and implementation of reforms in many spheres of public life. The problem of increasing the practical orientation of training lawyers is a transnational problem. It is advisable to preserve the national traditions of higher legal education in the educational process and introducing new, progressive forms of the educational process aimed at improving the quality of higher legal education, which would meet the requirements of the labour market and the challenges facing a modern democratic society, global development trends and tasks of professional activity of lawyers in various fields. The development of practical skills and abilities of a legal education applicant occurs in the educational process due to various forms of the educational process: during practical classes using case methods and solving incidents, in particular, by conducting binary classes; during practical training; while working in a legal clinic; by participating in court debates, etc.

The problems discussed in this study do not cover all aspects of legal education reform. Therefore, the study of various forms of practical training of students in law universities of Ukraine and foreign law schools is one of the critical areas of legal education in the future.

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ВІДПОВІДАЛЬНІСТЬ ЗА ШКОДУ, ЗАВДАНУ ВИКОРИСТАННЯМ ТЕХНОЛОГІЙ ШТУЧНОГО ІНТЕЛЕКТУ

Анотація. *Технології штучного інтелекту, що останнім часом набувають стрімкого розвитку, поряд із беззаперечними перевагами створюють і низку небезпек, реалізація яких спричиняє завдання шкоди. Відшкодування такої шкоди викликає запитання щодо суб'єктів, власне діяння, яким шкоду було завдано, причинно-наслідкового зв'язку тощо. Ускладнює ситуацію і недосконалість нормативного регулювання відносин з використання технологій штучного інтелекту та недостатність чи неоднозначність судової практики з відшкодування шкоди, завданої використанням цифрових технологій. Тому метою цієї публікації є окреслення підходів до застосування юридичної відповідальності за шкоду, спричинену використанням технологій штучного інтелекту. У статті на підставі системного аналізу з використанням діалектичного, синергетичного, порівняльного, логічно-догматичного та інших методів аналізується стан правового регулювання відповідальності за спричинення шкоди використанням технологій штучного інтелекту та обговорюються підходи до застосування юридичної відповідальності за шкоду, завдану використанням цих технологій. Зокрема робиться висновок, що незважаючи на декілька резолюцій, прийнятих Європейським парламентом, відносини з використанням технологій штучного інтелекту та застосування юридичної відповідальності за шкоду, спричинену штучним інтелектом не здобули остаточного нормативного врегулювання. Зараз лише формується нормативна база та створюються правила поведінки у сфері цифрових технологій. Перед державами, у тому числі й Україною, стоїть завдання приведення законодавства у галузі використання технологій штучного інтелекту у відповідність до міжнародних нормативно-правових актів з метою захисту прав та свобод людини і громадянина та забезпечення відповідних гарантій під час використання таких технологій. Одним із пріоритетних напрямів гармонізації законодавства є вирішення питання режимів юридичної відповідальності за шкоду, спричинену використанням технологій штучного інтелекту. Такими режимами на сьогодні є суворі відповідальність та відповідальність за принципом вини. Втім, здатність того чи іншого режиму виконувати функції стримування та компенсації шкоди, спричиненої використанням технологій штучного інтелекту, спонукає до наукової дискусії*

Ключові слова: *зобов'язання, делікт, електронна особа, цивільне право, ІТ технології, відшкодування шкоди*

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LIABILITY FOR DAMAGE CAUSED USING ARTIFICIAL INTELLIGENCE TECHNOLOGIES

Abstract. *Artificial intelligence technologies, which have recently been rapidly developing, along with indisputable advantages, also create many dangers, the implementation of which causes harm. Compensation for such damage raises questions regarding the subjects, the act in itself which caused the damage, the causality, etc. The situation is also complicated by the imperfection of statutory regulation of relations on the use of artificial intelligence technologies and the insufficiency or ambiguity of judicial practice on compensation for damage caused using digital technologies. Therefore, the purpose of this publication is to outline approaches to applying legal liability for damage caused using artificial intelligence technologies. Based on a systematic analysis using dialectical, synergetic, comparative, logical-dogmatic, and other methods, the study analysed the state of legal regulation of liability for damage caused using artificial intelligence technologies and discusses approaches to the application of legal liability for damage caused using these technologies. In particular, it was concluded that despite several resolutions adopted by the European Parliament, relations with the use of artificial intelligence technologies and the application of legal liability for damage caused by artificial intelligence have not received a final statutory regulation. The regulatory framework is merely under development and rules of conduct in the field of digital technologies are still being created. States, including Ukraine, are faced with the task of bringing legislation in the field of the use of artificial intelligence technologies in line with international regulations to protect human and civil rights and freedoms and ensure proper guarantees for the use of such technologies. One of the priority areas of harmonisation of legislation is to address the issue of legal liability regimes for damage caused using artificial intelligence technologies. Such regimes today are strict liability and liability based on the principle of guilt. However, the ability of a particular regime to perform the functions of deterring and compensating for damage caused using artificial intelligence technologies encourages scientific discussion*

Keywords: *obligations, tort, electronic identity, civil law, IT technology, compensation for damages*

INTRODUCTION

At present, the problem of liability for damage caused using artificial intelligence technologies is actively discussed among scientists. Quite polar opinions are expressed, and various arguments are given favouring a certain approach. In general, the issue of liability for damage caused by artificial intelligence is placed in the context of the essence of artificial intelligence and determining its place in the structure of legal relations. Thus, there are three main approaches to determining the legal status of artificial intelligence: 1) its perception exclusively as an object of civil relations, which should be subject to the legal regime of

things; 2) its perception exclusively as a subject of civil relations, a carrier of subjective rights and obligations, capable of acting independently and realising and evaluating the significance of their actions and the actions of other persons; 3) differentiated determination of the place of robots in the structure of civil relations, where they can be both subjects and objects of civil relations [1]. At the same time, it is suggested that non-autonomous or partially autonomous robots should be considered as tools used by subjects of legal relations – the manufacturer, owner, software developer, user, state authority, military chief, etc. Accordingly, legal

liability for causing losses or other negative consequences should be assigned proportionally to the developers of robots, their owners and users. However, the issue of legal liability of autonomous robots is undetermined, that is, they virtually cannot be held accountable for themselves and for actions or inaction by which they damage third parties [2, p. 160]. There is also a position that the person responsible for the damage caused by artificial intelligence (hereinafter referred to as “AI”) should be identified based on who caused the action or inaction of AI, which ultimately caused damage, and the level of autonomy of AI [3, p. 194-195].

Therefore, the solution of the issue of liability for damage caused using AI technologies is impossible without establishing the essence of AI because, as O.V. Kokhanovska notes: “the explanation of the phenomenon of virtuality is important from the standpoint of finding the correct legal approaches to solving issues of guilt and legal liability, protection of rights when it comes to damage caused by a person – a living being and an automaton created by it, a robot or artificial intelligence” [4, p. 147]. However, science has not yet developed a unified approach to understanding the essence of AI. It can only be stated that AI is perceived at least in the following meanings: 1) “weak artificial intelligence” – AI focused on solving one or more tasks that a person performs or can perform; 2) “strong artificial intelligence” – AI focused on solving all tasks that a person performs or can perform; 3) “artificial superintelligence” – AI 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 subjective experiences [5]. And the role that AI plays is blurring borders, democratising experience, automating work, and distributing resources [6].

In April 2018, within the framework of the EU strategy for AI development, a group of high-level experts designed seven key requirements for AI: 1) mediation and supervision of human activities: AI systems should ensure a fair society, supporting freedom of human rights and fundamental rights, and not reduce or restrict the human right to make decisions; 2) reliability and security: algorithms should be stable, reliable, and sufficient to eliminate errors or inconsistencies during all phases of the life cycle of AI systems; 3) confidentiality and data management: citizens should have full control over their data, while data relating to them should not be used to damage or discriminate against them; 4) transparency: AI systems should be traceable; 5) diversity, non-discrimination, and fairness: AI systems should consider the full range of human abilities, skills, and requirements and ensure accessibility; 6) social and environmental well-being: AI systems should be used to enhance positive social change and increase environmental responsibility; 7) accountability: mechanisms should be put in place to ensure responsibility for AI systems and their results¹.

Given the ambiguity of the interpretation of the essence of AI, and as a result, the lack of a unified concept of liability for damage caused using AI technologies, there is a need to discuss the issue of legal liability for causing damage to AI. Therefore, *the purpose of this publication* is to outline approaches to applying legal liability for damage caused using artificial intelligence technologies.

1. MATERIALS AND METHODS

The understanding and application of law should be based on a socially determined approach to perform the social functions assigned to it. The improvement of the law should ideally be subject to a common sense of justice and based on a combination of different interests, both private and the entire society. The system of modern Ukrainian law to a considerable extent uses the methodology of Soviet law, which is objectively not designed to serve the state and liberal law. Consequently, the departure from positivism, dogmatism, and ideologisation creates the need, on the one hand, to critically approach the previously used methods of cognition and transformation of reality, and on the other hand, to develop innovative approaches to the application of the principles of building and organising theoretical and practical activities.

The principles, techniques, means, and methods of research are determined by the essence of the phenomena and processes under study. The study of artificial intelligence and relations on the use of digital technologies should consider the comparative novelty of such an object of research activity, and therefore use both long-known and widely used techniques, and new methodological tools that are not familiar to legal science. Therefore, when studying legal liability for damage caused using artificial intelligence technologies, it was advisable to use such general techniques as dialectical, Aristotelian, synergetic, comparative, as well as the logical-dogmatic method of interpreting law as a special method of scientific cognition, including the method of hermeneutics.

The dialectical method of research, which allows analysing various social phenomena in their development, was used to study the contradictions of approaches to the application of a particular regime of legal liability for damage caused using artificial intelligence technologies and to establish causality between the understanding of the essence of artificial intelligence and legal liability regimes. Synergetics, considering development as self-development of complex systems, proves that each such system has not a single line of development, but many such lines. Therefore, the use of the synergistic method allowed considering not a single line of development of responsibility relations, but also to conduct research factoring in their multidimensional nature.

Using the Aristotelian method, judgements regarding the application of legal liability for damage caused using

1. Artificial intelligence: Commission takes forward its work on ethics guidelines. (2019, April). Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1893.

artificial intelligence technologies were justified by provisions based on proven theories. And the use of the comparative method allowed analysing and identifying the contradictions of the proposed approaches to compensation for damage caused using artificial intelligence technologies. The comparative method also allowed studying the state of legal regulation of liability for damage caused using artificial intelligence technologies and concluding on the insufficiency of such statutory regulation and a need for updating national legislation considering current global trends in this area.

The logical-dogmatic method of scientific research helped identify obvious attributes (aspects, characteristics) of legal phenomena without delving into internal essential connections. It was aimed at cognising the dogma of law, which solves the problems of systematisation, interpretation, and application of law, as well as the development of law. However, the change of the worldview, legal understanding and, as a result, of the methodological approaches to the study of legal phenomena, as well as an increase in the fluidity of the dogma of law, require complementing the dogmatic method with the method of hermeneutics, which involves expansion of the researcher's intelligence, feelings, and intuition on the subject of cognition. The main idea of hermeneutics is that the essence of any socio-legal phenomenon can be understood only in the context of the historicity of its existence. Given the above, the use of the logical-dogmatic method along with the method of hermeneutics allowed considering the regimes of legal liability for damage caused using artificial intelligence technologies through the lens of their perception by interstate institutions and researchers. In particular, using such techniques, an attempt was made to interpret the regimes of legal liability through the analysis given in the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics, European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence¹ and scientific literature on conditions of legal liability.

The main stages of the study of legal liability for damage caused using artificial intelligence technologies were as follows: 1) the hypothesis that compensation for damage caused using artificial intelligence technologies should be based on the conventional principles of legal liability – strict liability and liability on the principle of guilt, considering the specific field of activity – digital technologies; 2) analysis of the state of legal regulation of relations on the use of artificial intelligence technologies and liability for damage caused using such technologies; 3) study of doctrinal approaches to the application of legal

liability regimes for damage caused using artificial intelligence technologies and the effectiveness of their performance regarding the functions of deterrence and compensation of such damage; 4) formulation of the conclusion that liability for damage caused using artificial intelligence technologies depends on the level of risks of artificial intelligence systems.

2. RESULTS AND DISCUSSION

2.1 Legal regulation of liability for damage caused using artificial intelligence technologies

On October 20, 2020, the European Parliament approved the resolution with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL))². The introduction of this resolution states that *in order to efficiently exploit the advantages and prevent potential misuses of AI-systems and to avoid regulatory fragmentation in the Union, uniform, principle-based and future-proof legislation across the Union for all AI-systems is crucial. Technology development must not undermine the protection of users from damage that can be caused by devices and systems using AI. The question of liability in cases of harm or damage caused by an AI-system is one of the key aspects to address within this framework.*

Prior to the approval of the said 2020 resolution, the regulation of liability for damage caused by AI was partially implemented by the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL))³. In fact, in a 2017 Resolution, the European Parliament, given that the more autonomous robots, the less they can be considered simple tools in the hands of other entities (such as the manufacturer, operator, owner, user, etc.), questioned the sufficiency of conventional liability rules to ensure clarity of the legal liability of various entities regarding liability for actions and inaction of robots, when the cause cannot be traced to a particular human actor and the unresolved question remains whether it was possible to avoid actions or inaction of robots that caused damage. It was suggested that the autonomy of robots raised questions concerning their nature in the light of existing legal categories, or whether a new category should be created with its specific features and consequences. Therewith, it was noted that under the current legal framework, robots by themselves cannot be held liable for actions or inaction that cause damage to third parties; at the same time, the existing liability rules cover cases where the cause of the robot's action or inaction can be traced back to a particular human agent, such as the manufacturer, operator, owner, or user, and whether this agent could have foreseen and avoided harmful behaviour of the robot. Furthermore,

1. European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

2. *Ibidem*, 2020.

3. 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?redirect.

manufacturers, operators, owners, or users may be strictly responsible for the robot's actions or inaction. If a robot or AI can make autonomous decisions, conventional rules will not be sufficient to impose legal liability for damage caused by the robot, since they do not allow identifying the party responsible for providing compensation and require the party to compensate for the damage it has caused. In addition, in this resolution, the European Parliament stated a need to design new, effective, and modern rules that should correspond to technological developments and innovations that have recently emerged and are used on the market both in the field of contractual and non-contractual liability, since conventional rules of contractual liability are not applicable, and Directive 85/374/EEC¹, which covers non-contractual liability, can only cover damage caused by manufacturing defects of the robot, provided that the injured person can prove the actual damage, product defect and causality between the damage and the defect, so the rules of strict liability or no-fault liability may be insufficient. In paragraph 59 of Resolution 2017, the European Parliament called on the Commission, when conducting an impact assessment of its future legislative tool, to study and analyse the creation of a specific legal status for robots in the long term, so that at least the most complex autonomous robots can be established as having the status of electronic persons responsible for compensation for damage they may cause, and possibly the application of electronic identity to cases where robots make independent decisions or otherwise interact with third parties independently.

In 2020, *Policy Department C*, at the request of the *European Parliament's Committee on Legal Affairs*, conducted a study that resulted in recommendations regarding AI civil liability. The study notes that to date, the only possible fundamental and universal reasoning for artificial intelligence systems is that there is no philosophical, technological, or legal grounds to consider them anything other than artefacts generated by human intelligence, and hence products. From an ontological standpoint, all advanced technologies are not subjects, but only objects, and there is no reason to grant them rights and bring them to legal responsibility. Even considering the existing liability standards, it is always theoretically possible to identify a person who can be found responsible for losses caused by using the device. But from a functional standpoint, one can define some conditions under which it is advisable to assign a fictitious form

of legal personality to a certain class of applications, as is currently the case with corporations. However, if the concept of electronic personality should be understood as a way to recognise the possibility for a machine to get rights or be burdened with responsibilities, in the light of its internal features – intelligence, the ability to learn and modify itself, autonomy, unpredictability of its result – which cause it to differ from other objects, such a proposal should be ignored and objected to [7, p. 9, 38].

In fact, this approach was developed in the above-mentioned 2020 resolution², which noted no need for a complete review of well-functioning liability regimes, but rather for specific and coordinated adjustments to liability regimes to avoid a situation where persons who suffer damage or whose property is damaged find themselves without compensation. For 30 years, *Product Liability Directive*³ has proved to be an effective means of obtaining compensation for damage caused by a defective product, but it needs to be revised to adapt it to the digital world and the challenges facing new digital technologies, thus ensuring a prominent level of effective consumer protection, as well as legal certainty for consumers and businesses, while avoiding high costs and risks. However, *Product Liability Directive* should be updated in parallel with the Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety⁴.

The current civil legislation of Ukraine contains no special provisions that would regulate the issues of liability for damage caused using AI technologies. However, given the rapid development of digital technologies, the urgent need to protect human and civil rights and freedoms, democratic values, as well as provide proper guarantees during the use of such technologies, relations on the use of AI are gradually gaining legal regulation. Thus, on December 2, 2020, the Cabinet of Ministers of Ukraine approved the Concept of Development of Artificial Intelligence in Ukraine⁵, where one of the principles of development and use of artificial intelligence technologies, adherence to which fully complies with the principles of the Organisation for Economic Cooperation and Development on artificial intelligence issues, defines the principle of assigning responsibility for their proper functioning to organisations and persons who develop, implement, or use artificial intelligence systems in accordance with these principles. And bringing the legislation in the field of artificial intelligence technologies in line

1. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. (1985, July). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31985L0374>.

2. European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

3. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, op. cit.

4. Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety. (2001, December). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0095>.

5. Order of the Cabinet of Ministers of Ukraine No. 1556-p “On Approval of the Concept of Development of Artificial Intelligence in Ukraine”. (2020, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1556-2020-%D1%80#Text>.

with international regulations is one of the priority areas for implementation of the Concept.

As part of the recodification of civil legislation of Ukraine by the Working Group as one of the areas of updating the statutory array of the Civil Code of Ukraine¹ (hereinafter referred to as “the CCU”) it is proposed to develop the provision on the “digital rights” of a person as a type of personal non-property rights that create the possibility of realising interests in the field of digitalisation; more clearly regulate the features of the implementation and protection of personal non-property rights, which are endowed with persons who have special legal statuses (legal modes), in particular, a digital (electronic) person; supplement the current CCU, among other things, with provisions on 1) compensation for damage caused by malicious software; 2) compensation for damage caused by robotics and artificial intelligence [8, p. 18, 51].

Thus, the statutory regulation of relations on the use of artificial intelligence technologies in general and the application of legal liability for damage caused by artificial intelligence in particular is at the stage of development. Several resolutions adopted by the European Parliament established the principles of legal liability and laid down conceptual provisions for compensation for damage caused by artificial intelligence. At the same time, it is the right of any country to supplement the current national legislation in the field of application of artificial intelligence technologies. Such an update of legislation should consider current global trends, including regarding the liability for damage caused by AI, and at the same time allow covering future technological developments, including developments based on free and open-source software, since, as noted in the 2020 resolution², any future-oriented civil liability legal framework should inspire confidence in the safety, reliability, and consistency of products and services, including digital technologies, to strike a balance between effective and fair protection of potential victims of damage, while providing sufficient free opportunities for businesses, especially for small and medium-sized ones, to develop new technologies, goods, or services. This would help build trust and create stability for investment because, ultimately, the goal of any liability system should be to provide legal confidence for all parties, whether it is the manufacturer, operator, victim, or any other third party. Therefore, the authors of this study tried to outline approaches to the application of legal liability for damage caused using artificial intelligence.

2.2 Legal liability for damage caused using artificial intelligence technologies

Liability plays an important dual role in everyday life because on the one hand, it guarantees that a person who has suffered damage or danger of causing it has the right to

claim and receive compensation from the party regarding which it is proved that it is liable for such damage or loss, and, on the other hand, it creates economic incentives for individuals and legal entities to prevent damage or losses, or bear the risk of having to pay compensation³.

At present, there is a rather ambiguous situation with compensation for damage caused using AI technologies. Scientific publications offer various approaches to bringing to legal responsibility for such damage – from applying the rules of compensation for damage caused by a source of increased danger to assigning responsibility to the AI itself – an electronic person. This diversity of opinions is explained by the comparative novelty of relations on the use of AI, and, as a result, the lack of statutory regulation of these relations and the lack of well-established judicial practice in dispute resolution. Consequently, legal liability for damage caused using AI technologies is on the agenda of the entire legal community. As Virginia Dignum pointed out, tools are needed to integrate moral, social, and legal values with technological development in AI. Responsibility is fundamental to the understanding and research of AI, in particular, in the context of subject composition, for example, who is to blame if a self-driving car harms a pedestrian: a hardware designer; a software developer that allows the car to decide on the path; the power that lets the car on the road; the owner who can personalise the decision-making system in the car according to his or her preferences; the car itself because its behaviour is based on its self-training, or perhaps all these subjects together [9]. According to Mohammad Bashayreh, the basis of the new liability regime should be the distribution of risk as proportionate responsibility, when participants in relations on the use of AI technologies agree to bear the risk of unpredictable AI behaviour [10]. After all, the behaviour of AI systems depends, among other things, on the following factors: 1) data from third-party developers (if any) to train it, some of which may be open to algorithmic choices made by researchers and developers; 2) how users can provide data to the system during its use; 3) how algorithms (some of which may be probabilistic in nature and therefore difficult to evaluate and fully control) are designed to adapt or possibly ignore some input data; 4) how people can make decisions by receiving instructions from AI, in particular behavioural effects, as people become overconfident or change their attitude towards risk when using AI for decision-making [11].

Along with questions on whether AI or an autonomous system will be brought to legal responsibility, whether the person who bears such a legal obligation should be responsible for negligent or criminal actions of AI (the programmer of the algorithm or its inventor/owner), the question of the possibility of AI to file a claim is also raised [12].

According to Jean-Sebastien Boghetti, different

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

2. European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

3. *Ibidem*, 2020.

liability regimes may apply depending on the circumstances and legal systems. The author makes a general distinction between sector-specific modes and non-specific sector modes. Thus, when AI is used in an area of activity covered by such a specific regime, a sector-specific liability regime is applied, for example, a special (strict) liability regime in case of damage caused by a road accident. Non-specific sector regimes are quite different in this respect. Each country has its rules, but there are two types of regimes that can be found in most (Western) legal systems and the application of which can at least be provided for in case AI causes damage: liability for goods and liability for guilt [13, p. 95]. This refers to strict liability (damage is compensated regardless of guilt) and liability based on the principle of guilt. Next, the authors analysed these liability regimes.

According to the rules of strict liability, a party who causes damage to another compensates for it, regardless of who is at fault. In general, there are doubts in science regarding the capability of strict liability to create effective incentives for subjects to avoid causing damage. Tort law has two main statutory goals: compensation to victims of a tort and deterrence of future tort behaviour [14, p. 443]. Giuseppe Dari-Mathiaci and Francesco Parisi noted that strict liability, as well as lack of liability, cannot provide an effective outcome in terms of stimulating risk reduction. This is explained by the fact that in the system of strict liability, the causer of damage must bear both the costs of preventive measures and the expected amount of damage, and therefore minimise the amount of these costs. This ensures an effective level of precautionary measures, but only for the damage causer. There are no incentives for the victim to prevent damage since they always receive compensation. In the absence of liability, the situation becomes the opposite. The rules of liability, depending on the fault, determine the level of due diligence and verify whether the relevant party has accepted this level of discretion or not. Accordingly, both parties to the legal relations are motivated to take all measures necessary to prevent the damage caused or, if it is impossible to avoid it, reduce the amount of damage caused [15]. According to Emiliano Marchisio, the idea that civil liability should have a deterrent function implies that the obligation to compensate for damages is imposed on the person whom legal systems define as the addressee of such deterrence. This paradigm has remained virtually unchanged over time and has developed two main strategies for distributing liability for damages: liability for guilt and strict liability. The concept of guilt has in some cases been conceptually replaced by the concept of strict liability simply to increase deterrence, even in cases where guilt could not be assessed positively in court, to encourage producers and other professionals to increase investment in security. This approach is supported by scientists, and even complex studies at the supranational level have considered

and continue to consider the deterrent function together with the compensation function as the central function of civil liability [16].

Holding liable for damage caused using AI technologies under the rules of compensation for damage caused by a source of increased danger, albeit logical, has its drawbacks. In the previous publication [3], covering legal issues and risks of using AI technologies, it has already been noted that when it comes to compensation for damage caused by a source of increased danger, such damage occurs in the case of using a certain vehicle, mechanism, equipment, which, although they can get out of human control, however, cannot make autonomous decisions. A distinctive feature of AI is its ability to make decisions unassisted. Therefore, this refers not only to the lack of submission to a person's control, but also to the unpredictability of its actions and causing damage. Accordingly, since such harm is unpredictable, its infliction is not covered by the concept of activities that create an increased danger to the environment, in the interpretation of *Principles of European Tort Law* [3, p. 194-195]. The norms of strict liability oblige an individual or legal entity that uses AI, or on whose behalf AI acts, to bear responsibility for damage inflicted, regardless of whether such behaviour was planned or envisaged [17, p. 385].

In the 2020 Resolution¹, the European Parliament noted that, proceeding from the legal challenges that AI systems pose to existing current civil liability regimes, it appears reasonable to establish a general strict liability regime for autonomous high-risk AI systems. Responsibility should be assigned to the operator, regardless of where the operation takes place and whether it is performed physically or virtually. This approach is based on risk assessment, which can cover several levels of risk, and should be based on clear criteria and a suitable definition of high risk and provide legal certainty. At the same time, an AI system poses a substantial risk when its autonomous operation implies a considerable potential for causing damage to one or more individuals randomly and exceeds reasonable expectations. When determining whether an AI system is high-risk, it is also necessary to consider the sector where significant risks can be expected, and the nature of the measures taken. The significance of the risk potentially depends on the interaction between the severity of the possible damage, the probability of causing damage or losses, and how the AI system is used. All high-risk AI systems should be exhaustively listed in the Annex to the proposed Regulation², which should be reviewed at least once every six months. If all activities, devices, or processes controlled by AI systems that cause damage or create danger are not listed in the Annex to the proposed regulation, compensation for damage should be made in accordance with the rules of liability for guilt. The injured person can at least benefit from the presumption of guilt on the part of the operator, who should be able to justify

1. European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

2. Annex to the Resolution: Detailed Recommendations for Drawing Up a European Parliament and Council Regulation on Liability for the Operation of Artificial Intelligence-Systems. (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

themselves by proving that they have performed their duty of due care. If several operators cause damage, they must be jointly and severally liable, but each operator will have the right to recover part of the compensation from other operators, proportionately to their liability, provided that the injured person has been provided with full compensation.

Thus, the Resolution 2020¹ established two modes of liability for damage caused by AI: 1) strict liability for damage caused by high-risk AI systems; 2) liability on the principle of guilt if the damage caused by AI is not classified as high-risk AI systems. Procedural issues of prosecution, as well as issues of the amount of penalties and limitation periods for such types of claims, fall within the competence of Member States pursuant to the Resolution 2020.

According to H. Zech, when the risk cannot yet be determined based on the state of technological knowledge, strict liability can serve as a useful tool for controlling technological risk in the face of uncertainty. This liability regime can also be used as a risk-sharing tool, especially in combination with mandatory liability insurance (third-party insurance). However, like any liability rule, it applies only when it is possible to prove an individual causality [18]. However, as Emiliano Marchisio notes, in the field of AI, the interrelation between cause and effect regarding the causality of damage can be non-linear. Therefore, applying the conventional civil liability paradigm to AI may not considerably improve security and may instead identify negative external effects. This is explained by the fact that compensation for damage to consumers and other end users of AI devices requires, according to the conventional paradigm, that the obligation to pay compensation is imposed on manufacturers and programmers. However, manufacturers and programmers will not be able to forecast the unpredictable “behaviour” of AI algorithms, which will be affected by countless variables provided by databases, Big Data collection, and end users themselves, which are completely beyond the reach and control of anyone. The scientist believes that strict liability should not be applied if an algorithm programmed in accordance with standards sometimes makes mistakes and leads to negative consequences, despite the absence of shortcomings in development or implementation. In these cases, manufacturers and programmers of AI algorithms and devices should be exempt from civil liability for damages. In other words, in all cases where there is no evidence of negligence, carelessness, or ineptitude, and the robot (both in its physical components and in aspects of artificial intelligence) adhered to the production and programming of scientifically proven standards, programmers and manufacturers of AI algorithms and devices should not be held responsible for damages [16]. In this regard, Gyandeep Chaudhary added that the key question

regarding AI is whether AI systems offer any solution in a particular scenario, like most expert systems, or whether AI itself makes decisions and acts accordingly, such as an autonomous car. The first case concerns at least one external agent, thereby complicating the proof of causality, while in the latter case, due to the lack of participation of an external agent, such proof is relatively easy [19, p. 157]. However, the specific feature of AI is that AI systems are specially programmed to interact and change AI based on the wishes of consumers. Therefore, at the time of purchase, the AI programme has only the potential to develop into a dangerous or harmful product responding to the consumer's use in and of itself [20, p. 1213].

As for liability for damage caused by a defective product, established by the *Product Liability Directive*, pursuant to Article 1 of this Directive, the manufacturer shall be liable for damage caused by a defect in its product². “Manufacturer” in the Directive means the manufacturer of the finished product, the manufacturer of any raw material or manufacturer of a component, and any person who, by putting their name, trademark, or other distinctive feature on the product, represents themselves as its manufacturer. Also, a “manufacturer” is any person who imports goods into the community for sale, hiring, leasing, or any form of distribution during their activities, and therefore shall be responsible as a manufacturer. Thus, the “manufacturer” of AI in the sense of the *Product Liability Directive* will be a manufacturer of the finished product – software, or a design engineer, if the defect is conditioned by the design of this product. In this case, according to Susana Navas, the designer could be personally responsible for the damage caused as the “manufacturer of the component” of the robot [21, p. 81].

In accordance with the position of the European Parliament³, liability for damage caused using AI technologies should generally be borne by the AI system operator. This is explained by the fact that the operator controls the risk associated with the AI system, similar to the owner of the car. Due to the complexity and interconnectedness of the AI system, the operator will in many cases be the first perceptible person for the victim. The term “operator” covers both an external network operator and an internal network operator if the latter is not covered by the *Product Liability Directive*⁴. An external network operator is an individual or legal entity that exercises certain control over the risk associated with the operation and functioning of the AI system and benefits from its operation. An internal network operator is an individual or legal entity who constantly determines the features of the technology, provides data and the main support service of the internal network, and therefore also exercises some control over the risk

1. European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

2. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. (1985, July). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31985L0374>.

3. European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)), op. cit.

4. *Ibidem*, 2020.

associated with the operation and functioning of the AI system. Exercising control means any action of the operator that affects the operation of the AI system, and therefore the extent to which it exposes third parties to its potential risks. Such operator actions can affect the operation of the AI system from start to finish, determining inputs, outputs, or results, and whether particular functions or processes in the AI system can change. If there is more than one operator, all operators shall be jointly and severally liable, having the right to proportionate appeal against each other. The proportions of liability should be determined by the appropriate degree of control that operators had over the risk associated with the operation and functioning of the AI system.

However, proceeding from the basic principle of the *Product Liability Directive* that the manufacturer is liable for losses caused by a defect in the goods that they have put into turnover, the responsibility of the manufacturer is essentially a strict liability, since imposing on the manufacturer the obligation to compensate for damage caused by a defect in the goods does not require proof of their guilt. Therefore, by and large, this still refers to two modes of liability for damage caused using AI technologies – strict liability and liability on the principle of guilt.

Consequently, radically innovative approaches to compensation for damage caused using AI technologies have not yet been observed. At the statutory level, the idea of an “electronic person” as a participant in legal relations and a subject of legal liability was not supported. Legal liability for damage caused by artificial intelligence is based on conventional principles: strict liability and the principle of guilt.

CONCLUSIONS

The rapid development of digital technologies creates new opportunities, but also creates new challenges. Protecting

human and civil rights and freedoms, democratic values, and ensuring proper guarantees during the use of such technologies is becoming a priority task of the state. The implementation of this task requires well-thought-out law-making activities and coordination of national legislation with international legislation. Currently, the issue of legal liability for damage caused using artificial intelligence technologies is debatable. The idea of providing artificial intelligence with legal personality and, as a result, recognising it as a liable party, which is quite actively discussed in the scientific literature, has not been consolidated in regulatory documents. Numerous resolutions, adopted by the European Parliament, consolidate the conventional principles of legal liability and compensation for damage caused using AI technologies: 1) strict liability; 2) liability based on the principle of guilt. The differentiation of such modes is based on the risk assessment of AI systems, and the operator of such systems is determined as the party liable. Therefore, compensation for damage caused using high-risk AI technologies is the operator's obligation, regardless of where the operation takes place and whether it occurs physically or virtually, and whether the operator is guilty of causing the damage. If the damage is caused by devices or processes controlled by AI systems that are not classified as high-risk AI systems, compensation for such damage should be performed per the rules of liability for guilt. In this case, the operator's proof that it has taken all reasonable means to avoid damage will release it from liability for damage caused using AI technologies. At the same time, for subsequent research, it would be interesting to study the issue of liability insurance for damage caused using artificial intelligence technologies, from the standpoint of preventing and/or compensating for such damage.

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ОСОБЛИВОСТІ ПРАВОВОГО РЕГУЛЮВАННЯ ДІЄЗДАТНОСТІ НЕПОВНОЛІТНІХ ТА ПРОБЛЕМИ ЇХНЬОЇ ЕМАНСИПАЦІЇ

Анотація. *Стаття присвячена дослідженню та встановленню особливостей дієздатності неповнолітніх осіб, а також випадків надання їм повної цивільної дієздатності. Метою статті є розкриття окремих особливостей здійснення та захисту суб'єктивних цивільних прав неповнолітніх в межах своєї дієздатності, їх емансипації та формування конкретних пропозицій щодо вдосконалення приватноправового регулювання зазначених відносин. Проаналізовано положення чинного українського законодавства, присвяченого правовому регулюванню відносин щодо визначення обсягу цивільної дієздатності неповнолітніх осіб, а також законодавчий досвід зарубіжних країн, зокрема, Франції, Німеччини, Великої Британії, США тощо. Зроблено висновок про його неоднорідність, а також про існування різних за змістом законодавчих підходів як до визначення віку, з якого фізична особа вважається повнолітньою, так і до обсягу правомочностей, якими наділені неповнолітні. Досліджено іноземний досвід законодавчого наділення неповнолітніх можливістю розпоряджатись належним їм майном на випадок своєї смерті, а також підхід українського законодавця у частині врегулювання зазначених правовідносин. На підставі аналізу ст. 1234 ЦК України виокремлено специфічні риси права на вчинення заповіту в частині визначення його суб'єктів та сформульовано висновок про відсутність у законодавстві заборони вчинення заповіту неповнолітньою особою, що набула повну цивільну дієздатність в порядку, встановленому законом. Підтримано позицію науковців щодо необхідності нормативного закріплення можливості неповнолітніх вчиняти заповіт, однак із певними застереженнями, що обумовлені положеннями чинного цивільного законодавства, а також розроблено конкретні пропозиції щодо внесення змін до ЦК України. Зроблено висновок про правове закріплення отримання неповнолітнім статусу повністю дієздатної особи двома способами – наданням та набуттям. Водночас, під наданням повної цивільної дієздатності розуміємо прийняття компетентним органом (у цьому випадку органом опіки і піклування або судом) відповідного рішення за наявності передбачених законом підстав. Натомість набуття повної цивільної дієздатності в контексті ч. 2 ст. 34 ЦК України сприймається як результат самостійного вчинення неповнолітнім юридичної дії (у цьому випадку укладення шлюбу), яка передбачена законодавством і тягне за собою правові наслідки у вигляді отримання особою повної цивільної дієздатності без додаткового санкціонування з боку інших осіб чи держави*

Ключові слова: *фізична особа, правосуб'єктність, правоздатність, суб'єктивне цивільне право, обмеження цивільних прав, емансипація*

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FEATURES OF LEGAL REGULATION OF THE LEGAL CAPACITY OF MINORS AND PROBLEMS OF THEIR EMANCIPATION

Abstract. *This study investigated and established the specific features of the legal capacity of minors, as well as cases of granting them full civil legal capacity. The purpose of this study was to cover certain features of the implementation and protection of subjective civil rights of minors within their legal capacity, their emancipation and to develop specific proposals for improving the private law regulation of these relations. The study analysed the provisions of the current Ukrainian legislation on the legal regulation of relations on determining the scope of civil legal capacity of minors, as well as the legislative experience of foreign countries, in particular, France, Germany, Great Britain, the United States, etc. The authors of this study concluded that Ukrainian legislation is heterogeneous in nature, as well as that there are different legislative approaches to determining the age of majority of an individual, and to the scope of powers granted to minors. The study examined the foreign experience of legislative provision of minors with the opportunity to dispose of their property in case of their death, as well as the approach of the Ukrainian legislator in terms of governing these legal relations. Based on the analysis of Article 1234 of the Civil Code of Ukraine (hereinafter referred to as “the CCU”), the authors identified specific features of the right to make a will in terms of determining its subjects and concluded on the absence of legislative prohibition of making a will by a minor who has acquired full civil legal capacity in accordance with the procedure established by law. The position of scientists on the need for statutory consolidation of the ability of minors to make a will was supported, but with certain reservations conditioned by the provisions of the current civil legislation; the authors developed specific proposals for amendments to the CCU. It was concluded that a minor receives the status of a fully capable person in two ways – by granting and acquiring. At the same time, the granting of full civil legal capacity is interpreted as the adoption of an appropriate decision by the competent authority (in this case, the guardianship and custodianship authority or the court) provided the availability of grounds stipulated by law. Therewith, the acquisition of full civil legal capacity in the context of Part 2, Article 34 of the CCU is perceived as the result of independent performance of a legal action by a minor (in this case, marriage), which is stipulated by law and entails legal consequences in the form of obtaining full civil legal capacity without additional authorisation from other persons or the state*

Keywords: *individual, legal personality, legal capacity, subjective civil law, restriction of civil rights, emancipation*

INTRODUCTION

The civil status of minors constitutes an extremely complex, multidimensional, and dynamic phenomenon, the specific features of which are determined by numerous factors, namely the aspects of social and economic policy of the state. This, for its part, objectively necessitates the identification, pinpointing, and investigation of the fundamental components of the civil status of minors and the problems of their emancipation. However, modern civilistics has not yet developed a unified scientific approach to the main

categories that describe this status. Over the past few decades, the study of the specific features of the legal personality of minors and its main elements has become of unprecedented importance, given the consolidation at the highest international level – in the Universal Declaration of Human Rights of 1948¹ and the International Covenant on Civil and Political Rights of 1966² – the provision that “everyone, wherever they are, have the right to recognition of their legal personality”. Furthermore, this provision once

1. Universal Declaration of Human Rights. (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.

2. International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_043/ed19661216#Text.

again demonstrates the manifestation of the principle of anthropocentrism as fundamental for building a social and legal state.

The current stage of development of the doctrine of legal personality in general and the legal capacity of minors in particular is described by dynamism and the emergence of innovative approaches to understanding legal personality. New scientific challenges require the scientific community and the legislator to accumulate efforts to timely respond to the emergence of new phenomena and ensure adequate legal regulation of the legal capacity of minors and the problems of their emancipation. In addition, nowadays, one can confidently say that the category of legal personality of minors in the legal doctrine consistently acquires features inherent in an interbranch legal institution, going beyond the subject of civil law.

The purpose of this study was to cover certain features of the implementation and protection of subjective civil rights of minors within their legal capacity, their emancipation and to develop specific proposals for improving the private law regulation of these relations.

1. MATERIALS AND METHODS

The scientific and theoretical framework for the study of legal regulation of relations in the field of legal capacity of minors and the problems of their emancipation included the papers of famous theorists and civilistic scientists of the pre-revolutionary, Soviet, and modern periods, who considered the basic principles of legal personality of individuals: M.M. Agarkov [1], S.S. Alekseev [2], V.I. Borysova [3], S.M. Bratus [4], M.V. Vitruk [5], V.P. Hrybanov [6], O.V. Dzera [7], A.S. Dovhert [8], I.V. Zhylinkova [9], Yu.O. Zaika [10], O.S. Ioffe [11], O.O. Kot [12], O.D. Krupchan [13], N.S. Kuznetsova [14], V. V. Luts [13], O.O. Kovalenko [15], R.A. Maidanyk [16], Z.V. Romovska [17], M.M. Sibilova [18], R.O. Stefanchuk [19], Ye.O. Sukhanov [20], Ya.M. Shevchenko [21], G.F. Shershenevych [22], S.I. Shymon [23], V.L. Yarotskyi [24] and others. On their basis, using philosophical, general scientific, and special scientific methods of cognition, the features of legal regulation of the legal capacity of minors and the problems of their emancipation were established.

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 minors in civil law of Ukraine, features of its implementation, relevant theoretical provisions and conceptual approaches to understanding legal personality of minors, 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 minors for further scientific development of vectors of legal science in the field of regulation of relations concerning emancipation, as well as the legal consequences that the minors' behaviour 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, *dialectical method* was used to investigate the terms "individual", "legal personality", "legal personality", "legal capacity", and establish their specific features. Furthermore, the use of the dialectical method allowed outlining objective prerequisites for the development of an effective mechanism for legal regulation of relations arising in the exercise of legal personality. *Aristotelian method* was used to formulate the concepts of legal personality of minors and the category of emancipation.

The use of the *synergistic method* made it possible to study and determine the nature of legal personality or minors in the totality of its main features and elements and establish connections between the elements of its structure. Use of general scientific methods, such as *analysis and synthesis*, allowed investigating the components of the legal personality of minors and the effectiveness of legal regulation of relations arising upon its exercise. *The comparative legal method* made it possible to identify and determine ways to implement the positive foreign experience in law-making, legal doctrine, and judicial practice in the field of legal regulation of relations on the exercise of the legal personality of minors in the Ukrainian legal system. This method also helped clarify conceptual approaches to understanding the concept of legal personality, theories of static and dynamic legal capacity.

Use of *judicial practice* helped establish an understanding of the essence of the legal personality of minors from the standpoint of judicial practice. *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

When studying the specific features of the legal capacity of minors, it is necessary to refer to the provisions of the current legislation governing relations in this area. Thus, according to Article 32 of the CCU¹, an individual between the ages of fourteen and eighteen is recognised as a minor. Analysing the provisions of this Article, one can conclude that the legislator has considerably expanded the scope of legal capacity of minors in comparison with the legal capacity of children. Thus, Part 1, Article 32 of the CCU indicates that, apart from transactions provided for in Article 31 of the CCU (i.e., making small household transactions and exercising personal non-property rights to the results of intellectual and creative activities), a minor has the right to:

- 1) independently manage their earnings, scholarship, or other income;
- 2) independently exercise the rights to the results of

1. Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15/ed20030116#Text>.

intellectual and creative activities protected by law;

3) be a participant (founder) of legal entities, if this is not prohibited by law or the constituent documents of the legal entity;

4) independently conclude a bank deposit agreement (account) and dispose of the deposit made by them in their name (funds on the account).

At the same time, an exhaustive list of powers of minors aged 14 to 18 years indicates that the legislator states their inability to independently exercise other rights and perform obligations stipulated by civil legislation in comparison with adults. Moreover, Part 2, Article 32 of the CCU states that a minor makes other transactions with the consent of parents (adoptive parents) or guardians. This, in turn, as fairly noted by S.V. Reznichenko, is the reverse side of the legal status that reflects the aspect of interference in the fulfilment of their capabilities by parents (adoptive parents), guardians, or guardianship and custodianship authority. In this case, the legislation makes provision for a legal lever that can influence the course of civil relations, the subject of which is a minor, in particular, to restrict their rights. Proceeding from these factors, such a person is legally dependent and relatively non-independent [25, p. 14].

In this regard, it would be advisable to give examples of foreign experience in the legal consolidation of the scope of civil legal capacity of minors. Interesting, in particular, is the experience of France. Thus, according to Article 389 of the Civil Code of France, a person under the age of 18 is considered legally incompetent¹. Their property is managed by their legal representatives, that is, their parents, and in case of their death, custodians. Parents are jointly and severally liable for damage caused by their minor children. They also enter into agreements on behalf of a minor until they reach the age of majority. However, in cases defined by law, a minor can independently enter into transactions with the consent of their parents or guardians. According to the provisions of French civil law, upon reaching the age of 16, a minor can only enter into a certain number of transactions without the consent of their parents (guardians). Such transactions include the conclusion of an employment agreement, the right to dispose of personal earnings and deposit in the bank, the right to make a will for half of the property bequeathed to minors, and other transactions that, according to Article 1305 of the Civil Code of France, are not unprofitable for a minor and do not violate their rights [26, p. 82].

In Germany, a person becomes fully capable from the age of 18. A child under the age of 7 is completely incapable. A person between the ages of 7 and 18 has limited legal capacity and, as a general rule, concludes transactions with the consent of legal representatives. However, a minor has the right to conclude some transactions independently. Apart from the possibility of entering into transactions that give legal benefits, minors can enter into

transactions within the limits of funds received from a legal representative or other person (with the consent of their parents); transactions concluded as a result of the operation of an enterprise for which the legal representative's consent was obtained; transactions aimed at implementing and terminating an employment agreement. Tort – the ability to bear responsibility for the damage caused – is defined as a separate legal category in Germany. Thus, according to Paragraph 828 of the Civil Code of Germany², a person under the age of 7 is not responsible for damage caused to another person. A person between the ages of 7 and 10 is not responsible for damage caused to another person as a result of an accident involving a car or railway, except if he or she intentionally caused an injury. And according to Part 3 of the same Paragraph, a person under the age of 18 is not responsible for damage caused to another person, if, upon causing damage, they did not have the understanding necessary to realise their responsibility [27; 28].

In the United States and England, there is no concept of legal capacity in its classical understanding. In these countries, only the term “legal status” is used, which, according to judicial practice, is divided into passive and active legal status, although English civil doctrine does not clearly distinguish between these concepts. In the literal sense, active legal status is the ability to perform certain actions, which in Ukraine and in most European countries is called legal capacity [28]. As for the legal consolidation of the powers of minors, in England, until the age of 18, a person is considered a minor, their legal capacity is limited regardless of age. A minor can only conclude certain transactions, such as the purchase of necessary things and services; the possibility of entering into a personal employment agreement, etc. A special feature of the civil law of England is the presence of the so-called “unconditionally invalid transactions”, that is, transactions to which a minor is not entitled. Such transactions include a money loan agreement, trade transactions, recognition of the balance of a counter-current account [29].

In the United States, the legal capacity of a minor is regulated similarly to English law. A person becomes fully capable from the moment of their majority, which in different states occurs between the ages of 18 and 21. If a person has not reached the age of majority, they are considered to have limited legal capacity. A feature of American judicial practice is the tendency to expand the legal capacity of minors by recognising the validity of a larger scope of transactions that minors can conclude and perform [30, p. 83].

The analysis of foreign experience in the legal consolidation of the scope of civil legal capacity of minors indicates its heterogeneous nature and the existence of various legislative approaches, firstly, to the establishment of the age from which an individual is considered an adult; secondly, to the actual application of the terms “legal status”

1. Civil Code of France. (1804, March). Retrieved from https://www.napoleon-series.org/research/government/c_code.html.

2. Civil Code of Germany. (2013, October). Retrieved from https://www.gesetze-im-internet.de/englisch_bgb/.

and “legal capacity” in law-making; thirdly, to the scope of powers that minor individuals are endowed with. At the same time, there is no doubt that each of these approaches is based on the corresponding legal traditions that form the foundation of a particular legal system.

The experience of France in securing the right to make a will for property for minors deserves special attention and consideration of this right through the lens of Ukrainian civil legislation and doctrinal approaches to the expediency of consolidating it. Most importantly, the authors of this study note that pursuant to Article 1234 of the CCU¹, only an individual with full civil legal capacity has the right to a will. The analysis of this Article enables the identification of specific features of the right to make a will in terms of determining its subjects. Thus, the right to make a will belongs exclusively to individuals; the right to make a will is conditioned by the acquisition of full civil legal capacity by an individual; the right to make a will does not stipulate that an individual reaches the age of majority. This suggests the possibility of a will made by a minor who has acquired full civil legal capacity in accordance with the procedure established by law. At the same time, the theoretical provisions of civilistics generally lack consensus regarding the possibility for minors to dispose of wages or scholarships by making a will [31, p. 38]. According to V.I. Serebrovskyi, minors cannot bequeath property because they have the right to independently use their earnings “for consumption”, and the will does not have such a purpose [32, p. 99].

I.V. Zhylinkova’s position is quite opposite – she believes that since the relevant article of the CCU gives minors the right to dispose of their earnings, scholarships, and other income, the transfer of such property by will is another way to dispose of it. Otherwise, there is a conflict: on the one hand, a minor has the right to dispose of their earnings, scholarship, and other income, and on the other hand, they do not have the opportunity to dispose of these funds by making a will [33, p. 23].

It is difficult to disagree with this position because according to Article 1233 of the CCU, a will is a personal order of an individual in case of their death. It is the private, personal nature of this document that indicates that there is no need for its approval by other persons. Furthermore, the legislative ban on making a will through a representative, which is stipulated by Article 1234 of the CCU, indicates the inadmissibility of any influence on the will of the testator, and only the personal will of the latter must be considered when making a will. The literature also expresses the opinion that the right to make a will, along with fully capable persons, should be granted to persons with incomplete civil legal capacity because the right to bequeath is a component of the term “disposal”, and therefore, relating to specific property, minors should have a testamentary legal capacity [34, p. 10].

The legislative experience of foreign countries in securing the right to make a will for minors is quite different. Thus, according to the requirements of the legislation of the countries of the continental and Anglo-American legal systems, as a general rule, a will can also be made only by adults and fully capable persons, but there are exceptions to this rule. According to the Civil Code of Germany² a will can be made by a person who has reached the age of 16. A will made by a person who, due to mental illness, is incapable of understanding and evaluating the meaning of the instructions contained in it is considered invalid. Minors (from 16 to 18 years of age) can make a will only in the form of an oral application or transfer a written application to a notary.

According to the provisions of the Civil Code of France³, a will is any document, the content of which expressly indicates the will of a person to engage in a testamentary disposition. A person who has reached the age of majority or an emancipated minor who has reached the age of 16 has the right to make a will. Non-emancipated minors who have reached the age of 16 can make a will for ½ part of the property that is theirs by right of ownership, and which they could dispose of if they were of legal age [35, p. 87].

According to English law, the ability to make a will arises only upon reaching the age of majority, namely from the age of 18. An exception is made for sailors during the voyage and military personnel who can make a will from the age of 14 [36, p. 230].

Under US legislation, the right to make a will arises at the age of 16. Some states, such as Georgia, have set an earlier age for achieving the ability to make a will – 14 years. Laws and judicial practice require that the testator be “competent”, that is, understand what their actions, and determine wills made by incapable, mentally ill persons to be invalid, as well as those concluded with the use of violence, threats, deception, mistakes, etc. [36, p. 87; 37].

Based on the analysis of the above, one can state a global trend of moving away from the implicit condition that an individual has the right to make a will by acquiring full civil legal capacity or reaching the age of majority. On the contrary, the legislation of foreign states establishes a considerable number of exceptions for granting testability to persons who are not of legal age, as well as do not have full civil legal capacity. According to the authors, such an approach to solving the issue of the possibility of minors to be testators of their property is quite reasonable and adequate to modern social realities. Moreover, it does not contradict the current Ukrainian legislation in any way because, as already noted, minors aged 14 to 18 years have the right to independently dispose of the funds that they have acquired through their work, and, consequently, to determine their future legal fate in case of their death.

Considering the above, the authors deem it appropriate to support the position on the need for regulatory

1. Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15/ed20030116#Text>.

2. Civil Code of Germany. (2013, October). Retrieved from https://www.gesetze-im-internet.de/englisch_bgb/.

3. Civil Code of France. (1804, March). Retrieved from https://www.napoleon-series.org/research/government/c_code.html.

consolidation of the ability of minors to make a will, but with certain reservations, which are stipulated by the provisions of the current civil legislation. Thus, if according to Part 1, Article 32 of the CCU¹ minors have the right to independently, at their own discretion, dispose of their earnings, scholarship, or other income, then in accordance with Part 2 of this Article, a minor must make a transaction relating to vehicles or immovable property with the written notarised consent of the parents (adoptive parents) or the guardian and the permission of the guardianship and custodianship authority. Part 3, Article 32 of the CCU is based on the same principle, which indicates that a minor can dispose of funds deposited in whole or in part by other persons in a financial institution in their name with the consent of the guardianship and custodianship authority and parents (adoptive parents) or a guardian. Consequently, the existing legislative restrictions on the minors' disposal of certain categories of property belonging to them make it impossible for potential minor testators to freely include it in a will without the corresponding approval of their parents (guardians) and the guardianship and custodianship authority. With this in mind, to provide minor individuals with the opportunity to fully dispose of their property in accordance with the current legislation and at the same time to protect the property rights and interests of minors, the authors of this study propose to amend Parts 1-2 of Article 32 of the CCU, wording them as follows:

“Article 32. Incomplete civil legal capacity of an individual between the ages of fourteen and eighteen

1. Apart from transactions stipulated by Article 31 of this Code, an individual between the ages of fourteen and eighteen (a minor) has the right to:

*1) independently manage their earnings, scholarship, or other income, **including by making a will;***

2. A minor makes other transactions with the consent of their parents (adoptive parents) or guardians.

*For a minor to make a transaction relating to vehicles or immovable property, **including wills,** there must be written notarised consent of the parents (adoptive parents) or the guardian and permission of the guardianship and custodianship authority”.*

Furthermore, Article 1234 of the CCU should be supplemented with Part 2 and be worded as follows:

“A minor individual with incomplete civil legal capacity has the right to a will relating to the property belonging to them by right of ownership, considering the requirements of Parts 1-2 of Article 32 of this Code regarding the need to obtain the consent of parents (adoptive parents) or a guardian and the permission of the guardianship and custodianship authority for minor to make a transaction relating to certain types of property”.

In the context of studying the specific features of civil legal capacity of minors, the issue of granting them full civil legal capacity in accordance with the procedure established by law is critical. This institution is widely known to all legal systems of the world under such a term

as emancipation. In general, there is an opinion in society that a person acquires full civil legal capacity only after reaching the age of 18. However, in this regard, the position of I.F. Shershenevych is correct, that it is quite possible that a person will reach maturity before the legal term, and then it would be difficult for them to be under excessive guardianship; it is possible, on the contrary, that a person will remain mentally challenged even after reaching the age of majority, and then it would be dangerous to leave them without a mentor [38, p. 69].

As N.Ya. Dyachkova fairly noted, the basis for the emergence of emancipation in Ukraine was the need for legal regulation of existing relations due to the new economic structure of Ukraine and the rapid development of entrepreneurship, and the biosocial nature of human – the rapid acceleration of adolescents, etc. The forced unemployment of millions of adults has prompted their children to seek a certain source of income. The payment of extracurricular education, the unavailability of free higher education for many also contributes to the early growth of adolescents who seek to acquire economic freedom by their own work [39, p. 298]. Thus, the need to legislate the legal possibility of teenagers “reaching the age of majority ahead of schedule” is quite natural and objectively predetermined.

In general, emancipation emerged more than two thousand years ago in the Roman Empire and became one of those legal phenomena that are successfully used in the world to this day. Its primary importance, as a ritual for freeing persons from parental care, in the modern world has found its purpose in the procedure for granting full civil legal capacity to minors [40, p. 57].

“The Romans”, as Dionysius explained to Greek readers, “have nothing of their own as long as their parents are alive, but both money and slaves, everything they have belongs to their parents” [41]. Parental authority was unlimited and ceased only with the death of the father, the death of the subject, or the receipt of certain honorary titles by the subject. However, the power of the home-owner as a unilateral right could be terminated artificially – the father had the right to release his son from his power at his own discretion. This procedure was called emancipation and originated as the antipode of the ritual of mancipation (mancipatio), through which Roman citizens concluded transactions with things and persons. That is, in case of the implementation of mancipatio relating to a person, they fell under the power of the home-owner, but if emancipatio was applied to a person, they were released from parental authority. Thus, emancipation (emancipatio) is a procedure for the release of a subordinate son by the will of pater familias (home-owner) [40, p. 58].

Notably, emancipation did not cease to exist with the fall of the Roman Empire, and, according to I.V. Zhylinkova has retained its primary importance in foreign law and is interpreted as the release of a person from guardianship and custodianship by parents or other authorised persons and the acquisition of the ability to

1. Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15/ed20030116#Text>.

acquire rights and obligations by their actions, that is, the acquisition of full civil legal capacity by a person [27]. Thus, for example, Article 477 of the Civil Code of France¹ establishes the possibility of withdrawal from parental care if the person reaches the age of 16. The legal status of an emancipated person in this country is close to the legal status of an adult, but at the same time it has a number of restrictions. In particular, an emancipated minor cannot engage in business activities [37].

Considering the experience of Spain, according to Article 323 of the Spanish Civil Code², an emancipated person cannot borrow money, alienate their real estate or objects of special value without the permission of their parents (guardians) [37]. In the United States, only some states regulate the emancipation. According to Paragraphs 62, 64 of the Civil Code of the State of California³ a person aged 14 to 18 years is considered emancipated if he or she marries, enrolls military service, or by a court decision [40, p. 58].

According to the provisions of the legislation of the Czech Republic, a minor can be declared fully capable by a court decision if he or she has reached the age of 15, their ability to earn a living independently and solve their issues is confirmed, as well as with the consent of the legal representative of the minor (Part 1, Para. 37 of the Civil Code of the Czech Republic)⁴.

At the same time, emancipation does not find its legislative consolidation in all countries of the world. Thus, in Germany, after reducing the age of majority to 18 years, emancipation lost its significance and the corresponding paragraphs of the Civil Code were removed [42]. Furthermore, the emancipation procedure is also absent in such countries as Denmark, the Netherlands, England. [43, p. 861].

The analysis of the regulatory consolidation of the emancipation procedure in the legislation of foreign states indicates a variation in approaches to the possibility of minors to acquire full civil legal capacity, which is quite natural given the specific features of the legal customs of a particular state, which in turn are caused by the features of historical and social development.

At the same time, the legislation of Ukraine, as well as, for the most part, in European countries, also establishes emancipation as an institution. However, Z.V. Romovska made a reservation that “granting minors full civil legal capacity is both good and bad because, on the one hand, it eliminates obstacles to full social activity; on the other hand, because the minor becomes an independent subject of risk and responsibility, losing the possibility of partially transferring them to parents, guardians”. In this regard, according to Romovska, the provision of full civil legal capacity should be approached carefully and mindfully [17, p. 254].

Evidently, guided by the need for special protection of the interests of minors, the Ukrainian legislation approached the issue of regulating the procedure for emancipation cautiously, providing an exclusive procedure for obtaining full civil legal capacity by minors in the CCU provisions. Thus, according to the provisions of Article 35 of the CCU, full civil legal capacity can be granted to an individual who has reached the age of sixteen and works under an employment agreement, as well as to a minor who is recorded by the mother or father of the child. Full civil legal capacity is granted by a decision of the guardianship and custodianship authority at the request of the interested person with the written consent of the parents (adoptive parents) or the guardian, and in the absence of such consent, full civil legal capacity may be granted by a court decision. Full civil legal capacity may be granted to an individual who has reached the age of sixteen and wishes to engage in entrepreneurial activity. With the written consent of the parents (adoptive parents), guardian or guardianship authority, such a person may be registered as an entrepreneur. In this case, an individual acquires full civil legal capacity from the moment of state registration as an entrepreneur. Full civil legal capacity granted to an individual applies to all civil rights and obligations. In case of termination of the employment agreement or termination of business activities by an individual, the full civil legal capacity granted to him/her remains.

Furthermore, the full civil legal capacity of an individual before reaching the age of majority is also mentioned in Part 2, Article 34 of the CCU, according to which in case of marriage registration of an individual who has not reached the age of majority, he or she acquires full civil legal capacity from the moment of marriage registration. Thus, the analysis of these legislative provisions suggests that a minor receives the status of a fully capable person in two ways – by granting and acquiring. At the same time, the granting of full civil legal capacity is interpreted as the adoption of an appropriate decision by the competent authority (in this case, the guardianship and custodianship authority or the court) provided the availability of grounds stipulated by law. For its part, the acquisition of full civil legal capacity in the context of Part 2, Article 34 of the CCU is perceived as the result of independent performance of a legal action by a minor (in this case, marriage), which is stipulated by law and entails legal consequences in the form of obtaining full civil legal capacity without additional authorisation from other persons or the state.

Therefore, mandatory prerequisites for granting minors full civil legal capacity are as follows:

1) reaching the age of 16 and working under an

1. Civil Code of France. (1804, March). Retrieved from https://www.napoleon-series.org/research/government/c_code.html.

2. Civil Code of Spain. (1889, July). Retrieved from <https://www.refworld.org/cgi-bin/txis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5a8ad42e4>.

3. Civil Code of the State of California. (1872). Retrieved from <https://leginfo.ca.gov/faces/codesTOCSelected.xhtml?tocCode=CIV>.

4. Civil Code of the Czech Republic (2012, February). Retrieved from http://anesro.com/download/zakon/89-2012_Sb.pdf.

employment agreement;

2) reaching the age of 16 and wanting to engage in entrepreneurial activity;

3) recording of a minor by the father or mother of a child, regardless of the age of the minor.

At the same time, for persons engaged in labour activity or recorded by the father/mother of the child, the provision of full civil legal capacity is subject to the written consent of legal representatives. In the absence of such consent, full civil legal capacity may be granted by a court decision. At the same time, it appears rather strange and incomprehensible that a minor is not assigned the opportunity to obtain full civil legal capacity if there is a desire to engage in entrepreneurial activity in the absence of written consent of parents (adoptive parents), a trustee or a guardianship and custodianship authority in court.

This situation is also reflected in the procedural legislation. Specific features of court proceedings on cases of granting a minor full civil capacity are contained in Article 301 of the Civil Procedural Code of Ukraine, according to which the statement of a minor, who has reached sixteen years of age, requesting to grant them full civil capacity in cases established by the CCU, in the absence of the consent of parents (adoptive) or guardian is submitted to the court of residence. Therewith, according to the provisions of Article 302 of the Civil Procedural Code of Ukraine, the application for granting a minor full civil legal capacity must contain data that the minor works under an employment agreement or is the mother or father of the child in accordance with the civil status certificate¹.

Analysis of the grounds defined in Article 35 of the CCU for granting a minor full civil legal capacity suggests that different grounds for acquiring full civil legal capacity by minors are conditioned by different goals of the legislation. Thus, it is quite true that the emancipation of minors engaged in labour or entrepreneurial activity is carried out for stimulating, encouraging them to be involved in civil (entrepreneurial) turnover without waiting for the coming of age [44, p. 48]. Emancipation of minors based on their recording by their mother or father of the child is carried out not for stimulating them to give birth to children by minors, but for fully performing parental duties and the possibility of protecting the rights and freedoms of their children (since in case of failure to provide minor parents with full legal capacity, both they and their young new-born children will actually have incomplete and partial legal capacity, which will not allow them to become full members of society) [45, p. 115]. Thus, it can be confidently stated that each of the legally defined grounds for granting a person full civil legal capacity is a weighty argument in favour of the need to ensure the possibility of a minor to become a full-fledged subject of civil legal relations and, accordingly, a carrier of the entire range of rights and obligations stipulated by civil legislation. Considering the above, the possibility of minors to obtain full civil legal

capacity in court in the absence of the consent of legal representatives constitutes an additional legislative guarantee aimed at protecting the interests of minors and preventing abuse of legal rights by their rights and obligations relating to children (minors).

According to the authors of this study, entrepreneurship in its essence and meaning is as similar as possible to working under an employment agreement, and in some cases, the risks of entrepreneurial activity are much higher than self-employment. Regarding the dynamic growth of the role of entrepreneurship for young people, the literature contains fair points that today, when information technology is developing rapidly, numerous new human activities have emerged, including professions that are opened before reaching the age of majority. The “sale” of intellectual abilities and their results by minors is now fairly commonplace. Moreover, self-fulfilment in these types of activities is possible not only through the conclusion of employment agreements, but also through self-organisation of individual work, that is, through the implementation of entrepreneurship or the conclusion of separate civil agreements. One should not forget that young men and women are currently active not only in the field of information technologies or the creation of objects of intellectual property rights, but also in the “conventional” branches of entrepreneurship: retail trade, service provision, etc. [15, p.36].

Considering the above, it is necessary to introduce appropriate amendments to the Civil Code of Ukraine and the Civil Procedural Code of Ukraine regarding ensuring the possibility of minors to obtain full civil legal capacity by a court decision in the absence of the consent of legal representatives. In particular, the authors of this study propose to word Paragraph 2, Part 3, Article 35 of the CCU as follows:

“With the written consent of the parents (adoptive parents), guardian or guardianship authority, such a person may be registered as an entrepreneur. In this case, an individual acquires full civil legal capacity from the moment of state registration as an entrepreneur. In the absence of such consent, full civil legal capacity may be granted by a court decision”.

Furthermore, the authors also consider it appropriate to support the proposal of M.V. Mishchenko regarding the presentation of Article 302 of the Civil Procedural Code of Ukraine in the following wording:

“Article 302.

Content of the statement.

1. The statement for granting a minor full civil legal capacity must contain information that the minor works under an employment agreement, or is the mother or father of the child in accordance with the civil status certificate, or has other grounds for acquiring full civil legal capacity stipulated by the legislation of Ukraine” [45, p. 116].

Summarising this stage of research, the analysis of the current legislation aimed at the legal regulation of relations in the field of determining the legal capacity

1. Civil Procedural Code of Ukraine. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15#Text>.

of minors, as well as theoretical developments on this subject, indicates the existence of a considerable number of problematic issues that necessitate an in-depth study and solution. Considering the above, as well as factoring in the constant dynamic development of public relations, the features of the legal capacity of minors should become the subject of periodic scientific study of a legal, socio-economic, and psychological nature, and the results of these studies should be updated and correspond to the current level of society development. This, for its part, will ensure timely and adequate changes in legislative provisions in this area to maximise the protection of the rights and interests of minors.

CONCLUSIONS

The analysis of foreign experience in the legal consolidation of the scope of civil legal capacity of minors indicates its heterogeneous nature and the existence of various legislative approaches, firstly, to the establishment of the age from which an individual is considered an adult; secondly, to the actual application of the terms “legal status” and “legal capacity” in law-making; thirdly, to the scope of powers that minor individuals are endowed with. At the same time, there is no doubt that each of these approaches is based on the corresponding legal traditions that form the foundation of a particular legal system.

Having analysed the scope of legal capacity of children under the age of 14 under the civil legislation of Ukraine, one can come to the conclusion that in general, the provisions that currently govern these issues can create sufficient legal conditions for the exercise and protection of subjective civil rights of minors. It can be stated that there is currently a situation of expanding cases of independent participation of minors in civil relations, which actually goes beyond the limits of partial legal capacity granted to them by law. Therewith, to expand the opportunities of this category in modern civil legal relations, as well as to solve some problematic and controversial issues, the requirements of the legislation regarding the establishment of a minimum age for acquiring partial legal capacity, expanding the scope of legal capacity of minors, as well as providing them with the opportunity to independently apply for free legal aid to protect their subjective rights and interests, including civil ones, need to be improved.

The authors deem it appropriate to support the position on the need for regulatory consolidation of the ability of minors to make a will, but with certain reservations, which are stipulated by the provisions of the current civil legislation. Thus, if pursuant to Part 1, Article 32 of

the CCU minors have the right to independently, at their own discretion, dispose of their earnings, scholarship, or other income, then in accordance with Part 2 of this Article, a minor must make a transaction relating to vehicles or immovable property with the written notarised consent of the parents (adoptive parents) or the guardian and the permission of the guardianship and custodianship authority. Part 3, Article 32 of the CCU is based on the same principle, which indicates that a minor can dispose of funds deposited in whole or in part by other persons in a financial institution in their name with the consent of the guardianship and custodianship authority and parents (adoptive parents) or a guardian. Consequently, the existing legislative restrictions on the minors' disposal of certain categories of property belonging to them make it impossible for potential minor testators to freely include it in a will without the corresponding approval of their parents (guardians) and the guardianship and custodianship authority.

RECOMMENDATIONS

Considering the global trend of moving away from the implicit condition that an individual has the right to make a will by acquiring full civil legal capacity or reaching the age of majority, it is appropriate to pay attention to the legislation of foreign countries, which establishes a considerable number of exceptions for granting testaments to persons who are not of legal age, as well as do not have full civil legal capacity. According to the authors, such an approach to solving the issue of the possibility of minors to be testators of their property is quite reasonable and adequate to modern social realities. Moreover, it does not contradict the current Ukrainian legislation in any way because, as already noted, minors aged 14 to 18 years have the right to independently dispose of the funds that they have acquired through their work, and, consequently, to determine their future legal fate in case of their death.

Each of the legally defined grounds for granting a person full civil legal capacity is a weighty argument in favour of the need to ensure the possibility of a minor to become a full-fledged subject of civil legal relations and, accordingly, a carrier of the entire range of rights and obligations stipulated by civil legislation. Considering the above, it is recommended to pay attention to the minors' possibility of obtaining full civil legal capacity in court in the absence of the consent of legal representatives, which has to be an additional legislative guarantee aimed at protecting the interests of minors and preventing abuse of legal rights by their rights and obligations relating to children (minors).

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СТАНДАРТ ДОКАЗУВАННЯ В ЗАГАЛЬНОМУ ПРАВІ: МАТЕМАТИЧНЕ ОБҐРУНТУВАННЯ І ДОКАЗОВЕ ЗНАЧЕННЯ СТАТИСТИЧНИХ ДАНИХ

Анотація. Унаслідок нещодавніх змін до процесуального законодавства України в судовій практиці спостерігається тенденція до диференціації стандартів доказування залежно від виду судочинства. Так, у ході цивільного судочинства застосовується так званий стандарт «баланс ймовірностей», тоді як у кримінальному провадженні – застосовується стандарт «поза розумним сумнівом». Мета статті – знайти раціональне обґрунтування диференціації стандартів доказування, що застосовуються у цивільних (господарських) і кримінальних справах, та пояснити, як може бути, що один і той же факт вважається доведеним для цілей цивільного судочинства, але водночас недоведеним для цілей кримінального обвинувачення. В основу дослідження покладено методологію Байєсівської теорії рішень. Стаття демонструє, як принципи теорії рішень Байєса можуть бути застосовані до судового встановлення фактів. Згідно з теорією Байєса, застосований стандарт доказування залежить від відношення шкідливості хибно ствердних помилок до шкідливості хибно заперечних помилок. Оскільки в цивільному судочинстві обидва типи помилок мають однакові наслідки, порогове значення засудження становить 50+ відсотків. Натомість у кримінальній справі шкідливість хибно ствердних помилок істотно перевищує шкідливість хибно заперечних помилок, а отже, порогове значення переконаності має бути набагато вищим, і становить 90 відсотків. Байєсівська теорія рішень базується на ймовірнісних оцінках. І оскільки поняття ймовірності має ряд різних значень, результати застосування Байєсівської теорії до судового встановлення фактів можуть трактуватися по-різному. Маючи справу зі статистичними доказами, слід розрізняти суб'єктивну та об'єктивну ймовірність. Статистичні дані вказують на об'єктивну ймовірність, тоді як стандарт доказування стосується суб'єктивної ймовірності. Проте в деяких випадках, особливо коли статистичні дані є єдиними доступними доказами, суб'єктивна ймовірність може дорівнювати об'єктивній ймовірності. У таких випадках статистичні дані не можна ігнорувати

Ключові слова: стандарт доказування, Байєсівська теорія рішень, стандарт «поза розумним сумнівом», стандарт «баланс ймовірностей», гола статистика

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STANDARD OF PROOF IN COMMON LAW: MATHEMATICAL EXPLICATION AND PROBATIVE VALUE OF STATISTICAL DATA

Abstract. *As a result of recent amendments to the procedural legislation of Ukraine, one may observe a tendency in judicial practice to differentiate the standards of proof depending on the type of litigation. Thus, in commercial litigation the so-called standard of “probability of evidence” applies, while in criminal proceedings – “beyond a reasonable doubt” standard applies. The purpose of this study was to find the rational justification for the differentiation of the standards of proof applied in civil (commercial) and criminal cases and to explain how the same fact is considered proven for the purposes of civil lawsuit and not proven for the purposes of criminal charge. The study is based on the methodology of Bayesian decision theory. The paper demonstrated how the principles of Bayesian decision theory can be applied to judicial fact-finding. According to Bayesian theory, the standard of proof applied depends on the ratio of the false positive error disutility to false negative error disutility. Since both types of error have the same disutility in a civil litigation, the threshold value of conviction is 50+ percent. In a criminal case, on the other hand, the disutility of false positive error considerably exceeds the disutility of the false negative one, and therefore the threshold value of conviction shall be much higher, amounting to 90 percent. Bayesian decision theory is premised on probabilistic assessments. And since the concept of probability has many meanings, the results of the application of Bayesian theory to judicial fact-finding can be interpreted in a variety of ways. When dealing with statistical evidence, it is crucial to distinguish between subjective and objective probability. Statistics indicate objective probability, while the standard of proof refers to subjective probability. Yet, in some cases, especially when statistical data is the only available evidence, the subjective probability may be roughly equivalent to the objective probability. In such cases, statistics cannot be ignored*

Keywords: *standard of proof; Bayesian decision theory; beyond reasonable doubt; balance of probabilities; naked statistics*

INTRODUCTION

To prove a statement in court means to persuade the court or the jury (together referred to as “the fact-finder”) that the statement is true. But persuasion is a gradable concept, which means that the fact-finder may be more or less persuaded. Therefore, it is crucial to specify what degree of persuasion is sufficient for the fact-finder to hold that a statement is true, and the judgment can be based on it. In other words, if we express persuasion in percentage terms (supposing that one may be 100 per cent persuaded or 90 per cent persuaded etc.) then what is the threshold value necessary to adjudicate a case? Is 100 per cent persuasion the only acceptable threshold to serve justice? Is it ever achievable?

In civil law countries, these issues are not paid sufficient attention [1, p. 253-255, 258; 2, p. 1593]. Ukraine is no exception. Until recently, the very concept of the standard of proof was unknown to Ukrainian jurisprudence. As Justice of the Supreme Court Konstantin Pilkov notes, the courts started to apply it not earlier than 2018-2019 [3]. In accordance with the tradition of civil law countries, the procedural legislation of Ukraine stipulates that a judge shall assess evidence according to his/her inner conviction¹. This provision is supplemented by the rule that no evidence has a pre-established probative value for the court². Along with this, among the criteria for evaluating

1. Civil Procedural Code of Ukraine, Paragraph 1, Article 89. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15/ed20040318#Text>; Criminal Procedural Code of Ukraine, Paragraph 1, Article 94. (2010, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17/ed20100418#Text>; Commercial Procedural Code of Ukraine, Paragraph 2, Article 79. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15/ed20030116#Text>; Administrative Procedural Code of Ukraine, Paragraph 2, Article 76. (2005, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2747-15#Text>.

2. Civil Procedural Code of Ukraine, Paragraph 2, Article 89. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15/ed20040318#Text>; Criminal Procedural Code of Ukraine, Paragraph 2, Article 94. (2010, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17/ed20100418#Text>; Commercial Procedural Code of Ukraine, Paragraph 2, Article 86. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15/ed20030116#Text>; Administrative Procedural Code of Ukraine, Paragraph 2, Article 90. (2005, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2747-15#Text>.

evidence, procedural codes mention sufficiency and reliability¹. However, the above provisions of the law do not allow understanding when a judge can “diagnose” themselves as having necessary inner conviction, which would allow him to recognize the evidence as sufficient and reliable.

Furthermore, until recently, it was tacitly accepted that the standard of proof in civil and criminal cases is the same. However, under the influence of the case law of the European Court of Human Rights and as a result of changes in the procedural law², there is now a tendency to distinguish between the standard of proof in criminal proceedings (where “beyond reasonable doubt” standard applies) and the standard in commercial proceedings (where the so-called standard of “probability of evidence” applies). Notably, amendments pertaining to the standard of proof were introduced into the Commercial Procedural Code³, while the Civil Procedural Code remains unchanged in this regard⁴.

The tendency to differentiate the standards of proof is new for Ukrainian courts and therefore for doctrinal justification. Academicians can help clarify the reasons for the existence of distinct standards of proof for different types of proceedings. Second, comparative law studies can predict vexed questions Ukrainian courts will have to cope with in the future. In this vein, it is helpful to resort to the doctrine of common law, where the tradition of distinguishing between the standards of proof has been the subject of thorough scholarly analysis. In common law countries, there are two different standards of proof – one for criminal cases and one for civil cases. The former is known as ‘beyond reasonable doubt’ standard (BRD), the latter is known as ‘balance of probabilities’ (in the United Kingdom) or ‘preponderance of the evidence’ (in the United States) (BoP) [4, p. 280; 5, p. 80; 6, p. 1-2].

In criminal cases, the threshold value of persuasion is much higher than in civil cases. Under the BRD-standard, the fact-finder has to be almost certain that the statement is true. In numbers BRD-standard amounts to 90 per cent conviction [7, p. 1; 8, p. 561]. On the contrary, in civil cases a much lower degree of conviction is sufficient: the fact-finder has merely to find the trueness of the statement more probable than its falseness. In numbers, it amounts to 50+ percent conviction [9, p. 168; 10, p.1076-1077; 11, p. 384-386]. It means that one and the same fact may be considered proven for the purposes of civil litigation, but at the same time unproven for the purposes of criminal charge. A bright example is the famous O.J. Simpson case [12].

The standard of proof issue was addressed by many writers, which include J. Chalmers [13], E.K. Cheng [14],

K.M. Clermont [1; 15-18], C. Engel [19], J. Kaplan [20], D.H. Kaye [7; 21; 22], J. Leubsdorf [2], B. Luppi, F. Parisi, D. Pi [23], M. Schweizer [6], G. Tuzet [24], R.W. Wright [5] and other.

1. MATERIALS AND METHODS

The methodology employed was determined by the purpose of this study, which is to find a rational explanation of why the standard of proof in civil and criminal proceedings should be different, and, accordingly, how the same fact can be considered proven in a civil case and unproven – in a criminal case. The methodological framework of the study is Bayesian decision theory. This theory is based on Bayes' theorem and offers an algorithm to make a rational decision under uncertainty, when the real state of affairs is unknown and only the probability values are available. According to this theory, a rational decision is one that will result in the maximum value of the expected utility under the given conditions. Therefore, it calls for determining the expected utility value of each of the possible decisions and considering the probability that such a decision can appear to be wrong.

Through the use of mathematical modelling, the principles of Bayesian decision theory are applied to judicial fact-finding process in civil and criminal proceedings. The publications of D. Kaye and J. Kaplan constitute the theoretical basis of this exercise. The utility maximisation function is replaced by the equivalent disutility minimisation function, and it is assumed that a correct decision on the issue of fact does not have any disutility. The article mentions the methodology of behaviourism in the context of the discussion of whether the actor's perceptions should be considered when determining the utility value brought by a particular decision.

Since Bayesian decision theory is premised on probabilistic judgments, it is necessary to explain what is meant by probability in the context of the judicial fact-finding. According to D. Kaye probability has at least seven different meanings (mathematical probability, informal probability, classical probability, frequentist probability, logical probability, personal probability and propensity theory) [22, p. 164-166]. That is why the second part of the article addressed the problem where different interpretations of probability are most evident. It is the problem of using statistical data as evidence in court proceedings, or the so-called “naked statistics” problem. This problem most often manifests in tort cases, where the plaintiff claims that the damage to his or her health was caused by a toxic substance (for example,

1. Civil Procedural Code of Ukraine, Articles 78, 79. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15/ed20040318#Text>; Administrative Procedural Code of Ukraine, Articles 75, 76. (2005, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2747-15#Text>.

2. Commercial Procedural Code of Ukraine, Article 79. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15/ed20030116#Text>.

3. *Ibidem*, 2003.

4. Civil Procedural Code of Ukraine, Articles 77-80. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15/ed20040318#Text>.

asbestos-containing dust). In this part of the study, the methods of statistical analysis were used. Furthermore, the authors employed the epidemiological concept of relative risk. In particular, it is explained how the concept of relative risk in epidemiology is related to the standard of proof and the problem of establishing causation in some personal injury cases.

Particular attention was paid to the analysis of the hypothetical Blue Taxi case, which is widely discussed in the literature. In this context, the methodology of law and economics was also used with reference to one of its founders – R. Posner. The empirical framework of this study included the case law of American courts in cases where they had to decide on the probative value of statistics. Those are, in particular, the case of *Herskovits v. Group Health Cooperative of Puget Sound* [25] and *Sargent v. Massachusetts Accident Co.* [26].

Although the article does not directly compare the doctrine of common law with the law of Ukraine, it nevertheless has a comparative context, as the authors sought to emphasise the universalism of the idea of rational decision-making and its applicability regardless of whether the jurisdiction belongs to common law or to civil law family. After the amendments to the Commercial Procedural Code of Ukraine and the introduction of the standard of “probability of evidence” in Ukrainian law, courts gradually begin to differentiate the standards of proof depending on the type of proceedings. This study offers a take at the achievements of the doctrine of common law to develop a more profound understanding of this differentiation, which will allow judges to approach the problem of proof more carefully and consistently, avoiding hasty manoeuvres on a new path.

2. RESULTS AND DISCUSSIONS

2.1 Bayesian decision theory as a rationalisation of the two standards of proof

Bayesian decision theory offers an algorithm of how to make a rational decision under uncertainty [8, p. 558-559].

Table 1. Fact-finder's findings

	The fact took place	The fact did not take place
Found that the fact took place	a1	a0
Found that the fact did not take place	n0	n1

However, operating under uncertainty, one cannot calculate the real disutility; only the expected disutility value can be known [7, p. 10]. The latter is defined as the real disutility of the incorrect decision (L_{a0} or L_{n0}) multiplied by the probability factor that the decision will appear to be incorrect. If the probability that the fact really took place is p , and the probability that the fact did not really take place is $1 - p$, then the expected disutility of a false positive decision is $L_{a0} \times (1 - p)$, and the expected disutility of the false negative decision is $L_{n0} \times p$.

Therefore, it is rational to

opt for decision a whenever $L_{a0} \times (1 - p) < L_{n0} \times p$; and
opt for decision n whenever $L_{a0} \times (1 - p) \geq L_{n0} \times p$.

Next, if one takes an equilibrium point when the

Thus, the first step in its application is to acknowledge that the court and the jury operate under uncertainty. In this context, it is determined that a fact-finder cannot gain absolute knowledge of the facts under investigation [4, p. 275, 282; 9, p. 167; 19, p. 436], and therefore has to decide proceeding from incomplete knowledge, relying only on the greater or lesser probability of the relative facts (*The unattainable nature of absolute truth (absolute certainty) is emphasised even in the description of the criminal standard of proof*).

A rational decision is one that results in the maximum possible value of utility under the set conditions (utility maximisation) or, what is the same, minimum possible value of disutility under the set conditions (disutility minimisation) [1, p. 252-253; 6, p. 8; 7, p. 1-2; 21, p. 55; 20]. The fact-finding process can be analysed in terms of either function, but the analysis through the prism of disutility minimisation is somewhat more convenient and therefore prevail in the literature.

Regarding a particular fact, the fact-finder can make only one of two decisions: either that this fact really took place (true) or that it did not really take place (false). Both the first and the second decision can be either correct or incorrect. Thus, there are four possible scenarios: the fact-finder concludes that the fact took place, and it really did (a1); the fact-finder concludes that the fact took place, although it really did not (a0); the fact-finder concludes that the fact did not take place, and it really did not (n1); the fact-finder concludes that the fact did not take place, although it really did (n0) (Table 1). Scenarios a0 and n0 are called false positive and false negative errors, respectively, (or “alpha error” and “beta error” [19, c. 444-445]).

Of the two alternative decisions, it is rational to choose the one which results in less disutility. Assuming that the correct decisions do not result in any disutility, then it is rational to opt for positive decision whenever the disutility of false positive error (L_{a0}) is less than the disutility of false negative error (L_{n0}).

expected disutilities of false positive and false negative errors are equal, that is, $L_{a0} \times (1 - p) = L_{n0} \times p$, then, having solved the obtained equation, one can find the threshold value p^* , i.e., fact's probability value, below which it is rational to act as if the fact did not take place, and above which – it is rational to act as if the fact did take place. This threshold value p^* is calculated as follows:

$$p^* = \frac{L_{a0}}{L_{a0} + L_{n0}} \quad (1)$$

In Figure 1 (after [7, p. 12-14]) the descending line from the vertex L_{a0} denotes the expected disutility of the false positive error: it decreases with the increase in probability that the fact really took place (p). Instead, the ascending line to the vertex L_{n0} denotes the expected disutility of the false

negative error: contrariwise, it increases with the decrease in the probability that the fact really took place (However, it is more precise to represent the expected disutility function via the normal distribution curve (Gaussian distribution), the vertex of which corresponds to $p = 0$ (for the expected

disutility of a false positive error) or $p = 1$ (for the expected disutility of the false negative error)). Sought-for threshold value p^* is the probability value at the point of intersection of these two lines.

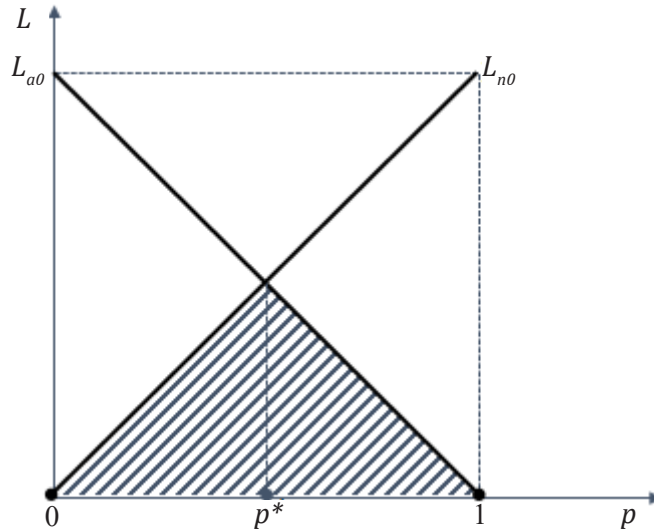


Figure 1. Threshold value of probability (p^*) where disutility of false positive error (L_{a0}) equals disutility of false negative error (L_{n0})

If up to this point one opts for the negative decision, and after it – for the positive decision, one gets the minimum amount of expected disutility possible resulting from one's decisions (Figure 1 demonstrates this amount as the shaded triangle). In this way, the goal of minimising disutility is achieved, and thus the decision-making strategy can be considered as rationally justified, despite the incompleteness of knowledge available.

Next, the point p^* can move along the p -axis closer to the right ($p = 1$), or closer to the left ($p = 0$). It depends on how the vertices L_{a0} and L_{n0} relate to each other. If they

are equal (as in Figure 1), then the point p^* will lie exactly in the middle, i.e., at the value of 0.5 (or 50%) because in this case:

$$p^* = \frac{L_{a0}}{L_{a0} + L_{n0}} = \frac{1}{1 + 1} = \frac{1}{2} \quad (2)$$

But if L_{a0} is greater than L_{n0} , then the value of p^* will move closer to the right edge (as shown in Figure 2). So, for example, if $L_{a0} = 8 L_{n0}$, then we obtain:

$$p^* = \frac{L_{a0}}{L_{a0} + L_{n0}} = \frac{8}{8 + 1} = \frac{8}{9} \approx 0.9 \quad (3)$$

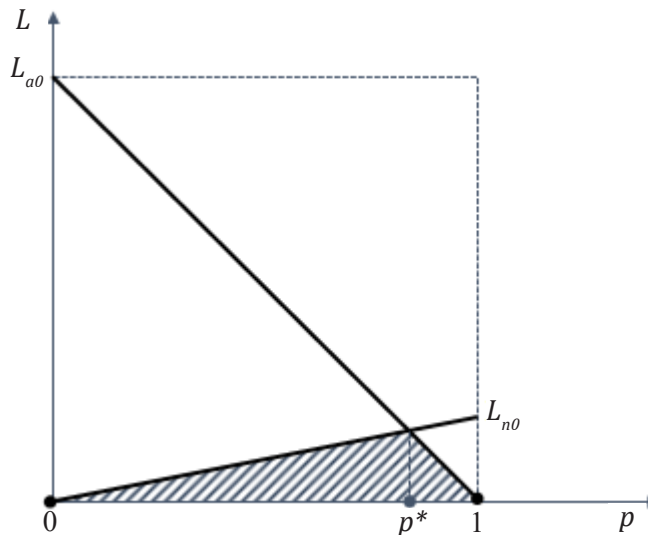


Figure 2. Threshold value of probability (p^*) where disutility of false positive error (L_{a0}) exceeds disutility of false negative error (L_{n0})

Thus, the greater the disutility of the false positive error, compared to the disutility of the false negative error, the closer to the right edge moves the threshold value p^* (and vice versa). That is, the greater the disutility from the false positive error than the disutility of the false negative error, the more confident one must be to opt for the positive decision. Therefore, if the disutility of the false positive error is eight times greater than the disutility of the false negative error, then taking a positive decision is rational only if the decision-maker is more than 90% sure that the fact on which the decision is based did really take place. On the other hand, if the disutility of the false positive error is equal to the disutility of the false negative error, it is enough to be just more than 50% sure that the fact on which the decision is based did really take place.

The above sets the scene for the justification of why the standards of proof should be different in civil and criminal cases. In a civil case, money or some other pecuniary interest is usually at stake. Upholding a claim is the positive decision and rejecting a claim – is the negative decision. Accordingly, the false positive error is when the court upholds a claim that under the complete knowledge would have been rejected. The false negative error is when the court rejects the claim, that under the complete knowledge would have been upheld.

Assuming the price of the claim is 10,000 USD, the false positive error results in defendant's losing 10,000 USD he/she should not lose; the false negative error results in plaintiff's not obtaining 10,000 USD he/she should obtain. It is generally accepted that the disutility in both cases is the same, since every dollar erroneously not received by the plaintiff has the same value as a dollar erroneously overpaid by the defendant [1, p. 252; 2, p. 1580-1581; 4, p. 280; 6, p. 3; 8, p. 559; 9, p. 171; 18, p. 469-470]. That is, $L_{a0} = L_{n0}$, which means that, according to the Bayesian formula, the probability threshold p^* is equal to 0.5, and this is precisely the threshold value set by the "balance of probability" (or "preponderance of evidence") standard [8, p. 560].

In contrast to civil cases, in criminal cases the situation is fundamentally different: under a liberal regime (*The Bayesian formula for decision-making alone does not determine the standard of proof since the respective values of the variables need to be substituted into the formula. Estimation of these values is a political decision, and it depends on the political regime. Under an authoritarian regime, the punishment of an innocent may be considered less harmful than when a guilty one goes unpunished*), convicting an innocent person (false positive error) is considered much worse than acquitting the guilty one (false negative error) [1, p. 268; 6, p. 3; 8, p. 560]. By some estimates, ten times worse [8, p. 562]. That is, $L_{a0} = 10 \times L_{n0}$. Substituting these values into the formula yields the following:

$$p^* = \frac{L_{a0}}{L_{a0} + L_{n0}} = \frac{10}{10 + 1} = \frac{10}{11} \approx 0.9 \quad (4)$$

It means that to convict a person of committing a criminal offence, the fact-finder needs to be more than 90% sure that the accused did really commit it. And this is

precisely the threshold required by the 'beyond a reasonable doubt' standard. The approach prevailing in common law, therefore, is based on three basic tenets. First, the court and the jury have to decide under uncertainty, i.e., in a situation where the absolute truth about the facts of the case is not achievable. Second, under uncertainty, the best thing to do is to make a rational decision based on the available knowledge, i.e., a decision that minimises the total amount of expected disutility. Third, in civil cases the disutility of the error favouring the plaintiff equals the disutility of the error favouring the defendant; instead, in criminal cases, a mistake favouring the prosecution is much worse than a mistake favouring the defence.

The first tenet seems to be commonly accepted. As for the other two, there is some criticism. Thus, R. Allen insists that the goal should be to minimise the real disutility instead than expected disutility [27, p. 47; 28, p. 641; 29, p. 346]. But, as D. Kaye points out, minimising the real disutility calls for the data that is not usually available in the real world [7, p. 27]. Secondly, the more cases are considered, the more the real disutility approaches the expected disutility value [7, p. 30] (as with a coin toss: out of ten attempts, the number of heads may be other than five, but out of a thousand attempts, the number of eagles will be close to five hundred [21, p. 57]). Thus, eventually, the strategy of minimising the expected disutility leads to minimising real disutility as well.

As for the third tenet, there are two limbs of criticism. The first is based on behaviourism: there is empirical evidence showing that gaining something is perceived emotionally less intensively than losing the same [6, p. 10; 30, p. 279]. Gaining a thousand dollars brings less satisfaction than losing a thousand dollars brings frustration. From this point of view, the erroneous recovery of a thousand dollars from the defendant is emotionally experienced by the latter not in the same way as the plaintiff experiences an erroneous rejection of their claim for the same amount. However, it is debatable whether such emotional experiences should be considered when determining the rational approach to decision-making.

The second limb essentially lies in stressing that all civil or criminal cases are not the same and, thus, applying the same standard to all civil or criminal cases is effectively a "one-size-fits-all" approach [4, p. 285-286]. Indeed, if the subject of the dispute is money, then there really is a symmetry [4, p. 280]: the erroneous recovery of the money is as harmful to the defendant as its erroneous non-recovery – to the plaintiff. But in contrast, there are many civil cases in which entirely different, non-pecuniary interests are at stake: for example, cases involving deprivation of parental rights, protection of honour, dignity or business reputation, restriction of legal capacity etc. In such cases, there is no symmetry – the ratio of the two errors' disutility is other than 1:1. The same is true for the criminal cases: unlike cases involving imprisonment, there are cases of petty criminal offences where pecuniary punishment is at stake. Thus, according to K. Kotsoglou, the common view of the standards of proof is generally incoherent, since if one acknowledges

that the standard of proof is dependent on what is at stake in the trial, one should infer that the standard has to be determined for each case individually (depending on what is at stake in this particular case) rather than be fixed for all civil or all criminal cases altogether [4, p. 286].

To some extent, the third, “higher” civil standard of proof (“clear and convincing evidence”) may serve as a response to this objection. In this context, it is noteworthy that the Supreme Court of New Jersey in the case of *In re Polk License Revocation* [31] pointed out that “the clear and convincing standard has been found to be required as a matter of due process when the threatened loss resulting from civil proceedings is comparable to the consequences of a criminal proceeding in the sense that it takes away liberty or permanently deprives individuals of interests that are clearly fundamental or significant to personal welfare”. The main argument against the ‘floating’ standard of proof is, however, that it would be practically difficult to implement it [19, p. 447].

Probative value of the statistical data. For proper understanding of the standard of proof concept, it is necessary to address the issue of so-called “naked statistics”. The crux of the issue is to find out what probative value (if any) statistical data has. The issue has provoked heated debate in the academic literature and legal science. Suppose that in some city there are only two taxi services – Blue Taxi and Yellow Taxi, and the former has a fleet of vehicles three times larger than the latter. Thus, of all the taxis on the city roads, 75% are blue and 25% are yellow. Suppose further that a pedestrian was knocked down by a taxi, but he cannot recall its colour. Is it sound to hold a Blue Taxi liable for the damage proceeding solely from the fact that statistically the probability of the car being blue is greater (0.75)? It would be a hasty conclusion, even though at first glance it may seem that the threshold set by the civil standard of proof has been surmounted ($0.75 > 0.5$).

In *Herskovits v. Group Health Cooperative of Puget Sound* [25] Justice Brachtenbach (dissenting) stated: “This fact has relevancy; it is admissible. But is it sufficient to prove the blue cab company more probably than not committed the act? No. If this were not the case, the blue cab company could be held liable for every unidentified cab accident that occurred. Thus, statistics alone should not be sufficient to prove proximate cause. What is necessary, at the minimum, is some evidence connecting the statistics to the facts of the case. Referring back to the cab example, testimony that a blue cab was seen in the vicinity of the accident before or after it occurred or evidence of a recently acquired, unaccounted for, dent in a blue cab could combine with the statistical evidence to lead a jury to believe it was more probable than not that this plaintiff was hit by a blue cab”.

The Blue Taxi case shows that there are really two different types of probability: objective and subjective. Subjective probability describes the level of confidence that some statement is true, or, in other words, the readiness to act like it were true. It is the level of our belief [4, p. 283]. Subjective probability is backward-looking: one decides

whether one believes in the facts that have taken place in the past, regarding which one does not have complete information. In contrast, objective probability is a numerically calculated concept in probability theory that describes properties of the objective world [4, p. 283]. For example, the fact that a considerable number of coin tosses show heads half of the times – it is an objective probability that describes the laws of the real world. Objective probability is forward-looking: it allows calculating the odds or chances that something will happen in the future (for example, it is the chances that one is dealing with while betting on sports).

Confusion of objective and subjective probability leads to fallacious perception of what standard of proof means [5, p. 91-95; 11, p. 379; 32]. Standard of proof sets the threshold value of subjective probability, i.e., the level of confidence the fact-finder should have to conclude that the statement is true; meanwhile 0.75 in Blue Taxi case is a value of objective probability, which indicates the odds or chances to be hit by a blue car. But when a person has already been hit, there are no odds or chances any more, it was either a blue car or not. From this point on, it becomes merely a matter of one's knowledge: one does not know which of two alternatives happened, and therefore one believes more or less in one of the versions.

In *Sargent v. Massachusetts Accident Co.* [26] J. Lummus stated: “It has been held not enough that mathematically the chances somewhat favour a proposition to be proved; for example, the fact that coloured automobiles made in the current year outnumber black ones would not warrant a finding that an unidentified automobile of the current year is coloured and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer. ... a proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that real belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may linger there”.

Thus, statistical probability and subjective probability are two indicators on two different scales. In the case of the Blue Taxi, the statistical data were not sufficient to form the necessary level of belief in the mind of the fact-finder that the victim was hit by a blue car. However, it would be wrong to claim based on Blue Taxi case that statistical probability has no probative value at all and hence it can never be used to prove causation in a particular case. Richard Posner suggests digging deeper into the reasons why exactly the statistical data in Blue Taxi case seem unconvincing [33, p. 39-42]. According to Posner, the main reason is the overall implausibility of the situation where there is absolutely no other evidence that could help identify the car apart from the naked statistics [33, p. 40].

The fact that the plaintiff failed to provide any other evidence (apart from the ratio of the number of cars belonging to two services) provokes two assumptions: either the plaintiff knows that he was hit by a yellow car, but for some reason he wants to avoid suing the Yellow Taxi (maybe, it is insolvent or has ceased to exist), or the

plaintiff poorly prepared his case and did not bother to find other evidence [33, p. 40-41]. If the first assumption is correct, admittedly, the claim is not subject to satisfaction. And the very possibility of such an assumption renders the subjective probability lower than the objective probability. If the second assumption is correct, then the hint of guilt for the plaintiff disinclines to believe in the veracity of his allegations. From law and economics perspective, “[a] court should not expend any of its scarce resources of time and effort on a case until the plaintiff has conducted a sufficient search to indicate that an expenditure of public resources is reasonably likely to yield a significant social benefit” [33, p. 41].

Instead, assuming that both parties have conducted a thorough investigation and did everything in their power, but nevertheless failed to find other evidence – in this case, a decision based on objective probability no longer seems an ill-founded [33, p. 41]. Thus, the vital question is whether evidence other than statistical data could have been obtained, and if not, was it due to the plaintiff’s fault? If no evidence other than statistical data is available, and the plaintiff is not to blame for it, the ponderance of statistics increases significantly and the subjective probability may approach the value of the objective probability indicated by the statistics [34; 35].

The need for admissibility of statistical evidence is particularly acute in cases of so-called toxic torts [11], where often the epidemiological data is the only evidence available that can prove a causal link between a toxic substance and a disease. In such cases, it is proffered to employ doubling the risk principle to assess causal nexus. This principle is based on the epidemiological concept of relative risk (*RR*) [36, p. 195-209; 37, p. 305-307]. Relative risk is the ratio of the incidence of a disease in a group exposed to a toxic substance to the incidence of a disease in a control group that has not been exposed to the substance [32, p. 129]. Therefore,

$$RR = \frac{\text{Risk in exposed group}}{\text{Risk in unexposed group}} \quad (5)$$

For example, if among the population not exposed to substance X the incidence of lung cancer is 1.5%, whilst among the population exposed it is 3%, then

$$RR = \frac{3}{1.5} = 2 \quad (6)$$

This means that the exposure to substance X doubles the risk of lung cancer. If $RR = 1$, it means that there is no correlation between the substance and the disease. Under doubling the risk doctrine, the causal nexus between exposure to substance and the disease shall be considered proven whenever $RR > 2$. Suppose that, in the above example, the incidence of the disease among the population exposed to substance X is 3.5% (instead of three). Thus, $RR = 2.3$. This means that for every 1,000 people exposed to substance X, 35 people contract the disease. However, 15 of them would have contracted the disease even if they had not been exposed to the substance, while 20 would not have contracted the disease but for the exposure. Therefore, statistically, the probability that a random person suffering from the disease

has contracted it because of the exposure is $20/35 = 0.57$. Such a statistical probability will always be greater than 0.5, provided that $RR > 2$. And since often in such cases objective (statistical) probability is the only knowledge available to humankind (since medical science cannot describe the aetiology of the disease in each particular case), there is no choice but to rely on this objective probability.

Against the application of doubling the risk doctrine, the following argument is submitted. Indeed, whenever $RR > 2$ among the exposed who contracted the disease, there are two categories of people: first is the people who contracted the disease as a result of exposure; second is the people whose disease was caused by some other factors. And it is correct that $RR > 2$ indicates that the first category is more numerous than the second. But it does not indicate to which of the two categories a particular plaintiff belongs [5, p. 92; 11, p. 383].

It is all about the distinction between general and individual causation [5, p. 92; 32, p. 125]. General causation answers whether some substance X is theoretically capable of causing the disease Y. Individual causation answers whether in this particular case the disease Y was caused by the substance X? [36, p. 127]. In substantiating the tort claim, the plaintiff must persuade the fact-finder that the answers to both questions are in the affirmative. The opponents of the use of statistical evidence insist that epidemiological data can only be helpful regarding the first question, and cannot clarify anything regarding the second, since epidemiology deals with populations, and not with a single case [5, p. 91-96; 11, p. 379-380, 390].

It is true that epidemiology does not solve the issue of individual causation. However, it does not follow that the plaintiffs should be denied compensation. Because, if in the given example with 35 diseased per thousand the courts deny all the claims on the ground that epidemiology does not prove individual causation, at the end of the day, the majority of court judgments (20) will turn out to be fallacious (since of all 35 people whose claims were rejected, 20 really deserved compensation); on the contrary, if the courts satisfy all the claims, recognising doubling the risk doctrine, then in a long run the number of fallacious decisions will amount to 15 and this number will be always less than the number of correct ones provided that $RR > 2$.

CONCLUSIONS

From the perspective of civil law countries, it may sound discordant that one and the same fact may be considered proven in the civil case and not proven in the criminal case. However, there is nothing irrational in it. As a starting point, one has to acknowledge that the fact-finder acts under uncertainty and conviction is a gradable concept. Once these premises are accepted, the question is how to determine the threshold value of conviction that would suffice for the specific purposes of civil litigation or criminal charge. The rational answer to this question can be found through the use of Bayesian decision theory. This theory offers an algorithm of rational decision-making under uncertainty. The decision is considered rational if it yields the

maximum possible utility value (or, which is the same, – the minimum possible disutility value). According to Bayesian decision theory, the standard of proof applicable in the proceedings depends on the ratio of false positive error disutility to false negative error disutility. Since in a civil case two types of error have equal disutility, the threshold value of conviction is 50+ percent. Instead, in a criminal case, false positive error disutility significantly exceeds false negative error disutility and therefore the threshold value of conviction is much higher – 90 percent.

Bayesian decision theory is based on probabilistic judgments. And since the concept of probability has many distinct meanings, the results of the application of Bayesian theory to judicial fact-finding can be interpreted in several ways. A bright illustration of this conflict of interpretations is the problem revolving around the probative value of statistical data.

However, it does not mean that statistics and subjective probability are out of contact with each other. In some cases, statistics (including epidemiological data) may be the only available evidence of a causal nexus between wrongdoing and harm. If the absence of any other evidence cannot be blamed on the plaintiff (or even more – can be blamed on the defendant), then the statistics may well determine the degree of subjective probability. In other words, the value of subjective probability (belief) can approach the value of the objective probability indicated by statistics. In such cases, statistics cannot be ignored.

RECOMMENDATIONS

This study may be of use for judges, lawyers, law professors, law students and everyone interested in evidence law in general and in the issue of the standard of proof in particular.

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ОСОБЛИВОСТІ ПРАВОВОГО СТАНОВИЩА СУБ'ЄКТІВ ЦИВІЛЬНОГО ПРАВА

Анотація. Теоретичні та прикладні дослідження особливостей правового статусу суб'єктів цивільного права на сьогодні залишаються дискусійними. Доктринальний і законодавчий аналіз цієї теми вказує на невирішені проблеми в цій галузі. Зокрема, положення про визначення держави як учасника цивільного законодавства залишається суперечливим. Серед вчених немає єдиної думки щодо визначення фізичних та юридичних осіб суб'єктами цивільного права. Крім того, правове регулювання певних видів суб'єктів господарювання є дещо безсистемним і хаотичним. Багато в чому це пов'язано з недостатньою розробкою теоретичних питань, пов'язаних із предметами цивільного права. Вищевказані питання визначають актуальність дослідження особливостей правового статусу суб'єктів цивільного права. Метою роботи є дослідження особливостей правового статусу суб'єктів цивільного права на основі доктринального та законодавчого аналізу. В основі дослідження лежить системний підхід, який полягає у вивченні складної системи взаємовідносин між суб'єктами цивільного права. Крім того, дослідження базується на законах і принципах діалектики, які сприяють вивченню правового статусу суб'єктів цивільного права. Для всебічного опису правового статусу суб'єктів цивільного права був використаний системний і структурно-функціональний аналіз. Історичний метод сприяв вивченню еволюції досліджень з питань цивільного права. Формально-правовий метод допоміг виявити особливості положень нормативних актів, що стосуються суб'єктів цивільного права. За допомогою порівняльно-правового методу в дослідженні проаналізовано положення Цивільного кодексу України з точки зору регулювання суб'єктів цивільного права, і таке регулювання порівнювалось з іншими країнами. У дослідженні визначено поняття та види суб'єктів цивільного права та розглянуто особливості правового статусу фізичних, юридичних осіб, а також держави як особливого учасника цивільного права. Особливу увагу було приділено історичному аналізу розвитку підходів до визначення суб'єктів права, починаючи з римського права

Ключові слова: фізичні особи, юридичні особи, держава, суб'єкти права, учасники цивільного права, правове становище

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FEATURES OF THE LEGAL STATUS OF SUBJECTS OF CIVIL LAW

Abstract. *Theoretical and applied research of the features of the legal status of the subjects of civil law remains debatable today. Doctrinal and legislative analysis of this subject points to unresolved issues in this area. In particular, the provision on defining the state as a party to civil law remains controversial. There is no consensus on the definition of individuals and legal entities as subjects of civil law among scholars. Furthermore, the legal regulation of certain types of entities is somewhat unsystematic and chaotic. This is largely due to the insufficient development of theoretical issues related to the subjects of civil law. The above issues determine the relevance of the study of the features of the legal status of subjects of civil law. The purpose of the study is to investigate the features of the legal status of subjects of civil law based on doctrinal and legislative analysis. The study is based on a systematic approach, which lies in studying a complex system of relationships between subjects of civil law. Furthermore, the study is based on the laws and principles of dialectics, which contribute to the study of the legal status of the subjects of civil law. Systemic and structural-functional analysis was used to comprehensively describe the legal status of subjects of civil law. The historical method contributed to the study of the evolution of research on the subjects of civil law. The formal legal method helped identify the special features of the provisions of regulations concerning the subjects of civil law. With the help of the comparative legal method, the study analysed the provisions of the Civil Code of Ukraine in terms of regulation of subjects of civil law and such regulation was compared with other countries. The study defined the concepts and types of subjects of civil law and considered the features of the legal status of individuals, legal entities, as well as the state as a special participant of civil law. Special attention was paid to the historical analysis of the development of approaches to the definition of subjects of law, starting with Roman law*

Keywords: *individuals, legal entities, the state, legal subjects, participants in civil law, legal status*

INTRODUCTION

The need to understand the legal status of subjects of civil law, the importance of forming stable ideas, as well as the development of ideas that express the attitude of subjects of civil law necessitate a comprehensive study of this subject. Therewith, there is currently no consolidation of subjects of civil law at the legislative level, being limited merely to the provisions on participants in civil law. Furthermore, with the development of market relations in Ukraine, new problems arise in the legal regulation of subjects of civil law, there are new types of subjects of civil law. The legal regulation of certain types of entities is somewhat

unsystematic and chaotic. This is largely due to insufficient development of theoretical issues related to the subjects of civil law. Notably, the consideration of the issue of individuals as subjects of law began started during the times of Roman law. In particular, some aspects of this issue were considered by such ancient Roman jurists as Justinian, Gaius, Julius Paul, and others.

For example, civil capacity in ancient Rome emerged from birth. However, according to Roman jurists, in some cases civil capacity could arise before the birth of a child. Paul noted, "He who is in the womb is protected, as if he

were among men, because it concerns the benefits of the foetus itself". At the time of birth, Roman jurists recognised the separation of the child from the mother and her cry. The dead child did not have legal capacity. From birth, the child was the bearer of rights; it could be the owner, the subject of other civil rights, such as being an heir, etc [1]. At the same time, in Roman private law, slaves were deprived of legal capacity. They represented a lower category of society not only in terms of their social status, but also due to the lack of legal rights. Their legal status was no different from the state of affairs.

However, the legal status of legal entities as subjects of civil law has been a subject of discussion since the 19th century. In particular, certain aspects of this issue have been studied by such scholars as Nikolai Korkunov, a Russian scholar-lawyer and philosopher of law [2]; Friedrich Karl von Savigny – German jurist and statesman [3]; Hans Kelsen – Austrian lawyer and philosopher [4]; Rudolf von Ihering – German jurist, and others.

The first scientific theory of the legal entity is known to modern civil science under the name "theory of fiction". The creator of this theory is considered to be the founder of the historical school of law – Friedrich Carl von Savigny. In particular, Carl von Savigny believed that a legal entity is inherently artificial, it is described by a lack of will, capable of duties and rights. Because legal entities are legal fictions, they do not have free will and are not subjects of law. Accordingly, he believed that the term "person" applied only to a human [3]. Hans Kelsen, for his part, argued that "subjects of law" are objects of legal obligation or subjective rights. That is, they may have legal authority to sue. That is, an individual and a legal entity are merely a set of rights and responsibilities, which together are metaphorically expressed as the concept of "person" [4].

1. LITERATURE REVIEW

To date, issues concerning the subjects of civil law have been considered by such domestic scholars as: A. Kostruba [5], R. Shyshka [6], V. Luts [7], R. Stefanchuk [8], E. Kharitonov, Y. Shevchenko [9] and others. However, in the theory of law there is a wide range of views on the features of the legal status of subjects of civil law. As for the subjects of civil law, Y. Shevchenko noted that they are necessary elements of civil law. The general formulation of civil relations implies that "a legal relationship is an ideological relationship that exists in the form of a relationship of subjects governed by the law of social relations, which is expressed in the presence of their subjective rights and responsibilities" [10].

Alekseev identified two main features that are inherent in the subject of law. First, it is a person – a participant in public relations, which by its nature can actually be a bearer of subjective legal rights and responsibilities. It must have a) external separation; b) personification; c) the ability to produce, express, and carry out a personalised will. Secondly, it is a person who is truly capable of taking part in legal relations, has acquired the properties of a subject of law through legal provisions [11]. For example,

Mazur names the subjects of civil law as follows: citizens of Ukraine, foreign citizens, stateless persons, legal entities (state enterprises and institutions, cooperatives, public organisations, joint stock companies, leased enterprises), the Ukrainian state, and others organisations (for example, religious organisations, joint ventures with Ukrainian and foreign legal entities, foreign enterprises and organisations) [12]. In turn, Nekit noted that a potential subject of civil relations can even be a robot integrated with general artificial intelligence, which has the ability to solve complex intellectual problems. Such division appears to be rather contradictory [13].

However, the question of the legal personality of the state is also debatable, for example, scholars express different opinions on this issue. Some researchers deny the legal personality of the state, arguing that the state has power and is not an ordinary participant in civil turnover. Opposing this view, other researchers noted that the state has legal personality, acquires rights and responsibilities and takes part in civil relations based on equality of subjects, but at the same time has the powers of authority.

We should also agree with Lunts, who defines the state as a political-territorial organisation of society, which is a special participant in civil relations. The presence of sovereignty enables it, through objective law, to independently determine the principles of its participation in civil relations and its legal personality. In civil relations, it acts by acquiring and exercising civil rights and obligations. Therewith, entering into civil relations, the state does not lose its status as a sovereign [14]. Furthermore, theoretical and legal approaches to the participation of the state in civil relations and its legal personality were studied by Dzera [15]. He noted that unlike other participants in civil relations, the legal status of the state is determined by a special function due to its participation in the political system of society, in which the state acts as a sovereign, a political organisation as a subject of political relations, and at the same time – as way of organising power.

2. MATERIALS AND METHODS

The study investigates such an important issue of the science of civil law as the features of the legal status of the subjects of civil law. Considering the purpose of the study, a set of regulatory principles is used, including techniques and methods, which altogether allowed to cognise the features of the legal status of civil law. In particular, several general scientific and special legal scientific methods were used in this study. Notably, the following methods were used in the study: discourse and content analysis, system analysis method, induction and deduction method, historical method, formal legal method, comparative legal method, etc.

Therewith, the research was performed with the use of qualitative methods, such as discourse and content analysis, which allowed to outline the specific features of the legal status of subjects of civil law, as well as to identify the main legal provisions governing the subjects of civil law. The study is based on a systematic approach, which lies in studying a complex system of interrelations between subjects of civil law. Furthermore, the study is based on

the laws and principles of dialectics, which contribute to the study of the legal status of subjects of civil law. For example, the method of system analysis and synthesis is used. Cognition gradually revealed the intrinsic essential features of the subjects of civil law, the connection of its elements and their interaction with each other. To take these steps, it was necessary to divide all subjects of civil law into constituent parts, and then study them, highlighting the properties and characteristics, tracing the links and relationships, as well as identifying their role in the system as a whole. This goal was achieved through operations such as analysis and synthesis.

The methodological techniques used in the research process include a multifaceted approach to determining the features of the legal status of subjects of civil law. This approach allowed to comprehensively study the phenomenon of the legal status of subjects of civil law, form a holistic view of it, thereby overcoming a one-sided view of the legal status of subjects of civil law. Another methodological approach used in the research process was an integrated approach. The integrated approach has largely overcome the shortcomings of analytical legal science, as it has allowed to organically combine legal remedies, legal tools, and essential legal ideas, legal ideals, deep principles of law.

Systemic and structural-functional analysis was used to comprehensively describe the legal status of subjects of civil law. The historical method contributed to the study of the evolution of research on the subjects of civil law. The formal legal method helped elaborate on the specific features of the provisions of regulations concerning the subjects of civil law. The comparative legal method allowed for a thorough analysis of the provisions of the Civil Code of Ukraine¹ in terms of regulation of subjects of civil law and compared such regulation with other countries.

Using the achievements of Ukrainian and foreign legal science, this study developed original conclusions about the specific features of the legal status of subjects of civil law. In particular, the source base of the study included the regulations of Ukraine and other countries, as well as doctrinal works of domestic and foreign scientists. The statutory framework of the study included the provisions of the Constitution of Ukraine², the Civil Code of Ukraine³, and the provisions of the Civil Codes of foreign countries. Therewith, the study of Ukrainian legislation governing the features of the legal status of civil law is of theoretical and practical interest, which determines the relevance of the subject matter. In general, the study is intended for anyone interested in the problems of civil law.

3. RESULTS AND DISCUSSION

3.1 *The concept of the participant in civil relations and the subject of civil legal relations*

The definition of “subjects of law” means the parties to a legal relationship that have mutual subjective rights and legal obligations [16]. For example, Arkhipov believes that the subject of law is not only the bearer of rights and responsibilities, but also the main factor of all legal life, which depends on the content of law, its functioning and development [17]. In turn, A. Kostruba notes that modern civil doctrine inherited a positivist vision of the institution of legal personality from the Marxist-Leninist theory of civil law. It is based on the priority of legal form over social content. A subject of law is a fact that emerges by virtue of law and in accordance with the law. Furthermore, its provisions are based on the fact that the subject of law is not an objective legal reality, which is conditioned by the social nature of the phenomenon, but a statutorily defined category, the existence of which in legal relations is conditioned by the will of the ruling class within a certain economic formation [18].

Notably, there currently no definition of subjects of civil law at the legislative level, although the participants in civil relations are enshrined in Article 2 of the Civil Code of Ukraine⁴. These include individuals and legal entities, as well as the state of Ukraine, the Autonomous Republic of Crimea, territorial communities, foreign states, and other subjects of public law [19]. In this regard, Kuzmich notes that being one of the elements of civil law, the subject as a concept personifies the participants in civil relations, the range of which is defined in Article 2 of the Civil Code of Ukraine [20]. However, as noted by Dzera, “the concept of participant in civil relations is broader than the concept of subject of civil relations. This circumstance is primarily connected with the fact that the participant in specific civil relations may also be a person who is not the subject of the relationship in question, in particular, a third party. Considering the above, it is possible to assume that apparently, in preparing the Civil Code of Ukraine, its developers considered this fact, consolidating in the Civil Code of Ukraine the concept of participant in civil relations, which, *inter alia*, includes the state itself” [15]. For example, in Georgia, Article 24 of the Civil Code⁵ also stipulates that the state and local governments take part in civil law relations as legal entities under private law. In this regard, the powers of the state or local government are exercised by its bodies, such as departments, institutions, etc.

As for the participants in the civil turnover of the People’s Republic of China, according to the Civil Code of

1. Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15/ed20030116#Text>.

2. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed19960628#Text>.

3. Civil Code of Ukraine, *op. cit.*

4. *Ibidem*, 2003.

5. Civil Code of Georgia. (1997, June). Retrieved from <https://www.wipo.int/edocs/lexdocs/laws/en/ge/ge012en.pdf>.

the People's Republic of China¹, they are individuals and legal entities. Therewith, the state is not endowed with the status of a subject of civil law [21]. This fact is a distinctive feature, which indicates that in China, the state in civil law acts as a sovereign, i.e. a public entity, the bearer of powers of authority. The state acts in the interests of society as a whole, so its participation in civil turnover is determined by its special functions. Signs of the state are sovereignty, the presence of population and territory, the legal form of state self-organisation. Furthermore, an integral feature of the state is public authority, and civil law regulation of public relations is based on the recognition of equality of participants in relations. That is, the state uses power to organise civil turnover. This means that the state legally establishes the rules of participation in civil relations, which are mandatory for all, including for the state itself. Thus, the recognition of the state as a subject of civil law entails a sharp contradiction, because upon entering into civil legal relations, the state either loses public power, or retains it, but does not use it. In the first case, the state loses its essence. In the second case, there is a violation of the principle of equality of participants in civil relations, as other subjects of civil law do not possess public authority. That is, the state is a party to civil relations and is not a subject of civil law.

As A. Kostruba notes, "since the state is a union of interests of persons united in a single social organism in order to ensure them, it is justified that a legal entity as a subject of law synthesises not only the features inherent in the corporation, but also the features that inherent in the state as a subject of law. That is, the state is a legal entity in which public authorities must perform the functions of the governing body of such a person" [18]. The state enters into civil legal relations with the help of its bodies, which have the right to act only to the extent that they are expressly permitted to do so. Accordingly, the state can have only those rights and obligations that are stipulated by legislation. However, an individual, as a participant in civil relations has certain features and properties that in some way individualise it and affect its legal status. Such features and properties should include name, citizenship, age, marital status, gender. Therewith, individuals as subjects of civil law have civil capacity and legal capacity.

3.2 *The civil capacity: The features of the emergence and termination*

In international human rights instruments, in particular Article 6 of the Universal Declaration of Human Rights² (1948)

and Article 16 of the International Covenant on Civil and Political Rights³ of 1966 declare that every person, wherever they may be, shall have the right to recognition of their legal personality. The Constitution of Ukraine⁴ also contains provisions that all citizens have equal constitutional rights and freedoms and are equal before the law. There may be no privileges or restrictions on the grounds of race, colour, political, religious, or other beliefs, sex, ethnic or social origin, property status, place of residence, language, or other characteristics. Foreigners and stateless persons who are in Ukraine legally, enjoy the same rights and freedoms, have the same responsibilities as citizens of Ukraine – except those established by the Constitution of Ukraine⁵, laws of Ukraine or international treaties [22].

The practical significance of civil capacity is that if a person is capable of acquiring specific civil rights and have specific civil obligations, they can enter into a corresponding civil relationship, i.e. can become its obligated party. In this regard, the issue of the moment of occurrence of an individual's civil capacity becomes especially relevant. Thus, the legal capacity of an individual, i.e. the ability to have civil rights and responsibilities, arises from birth and ends with their death. In this case, an individual has legal capacity throughout life, regardless of age and health.

However, legal capacity describes its bearer as a legal entity, which allows to consider it as a socio-legal quality of a person. This shapes the features of the emergence and termination of legal capacity, as well as the fact that it is a constant quality of a person and it does not cease in the process of its implementation. Due to the legal capacity, more specific rights and responsibilities may arise with a citizen [23]. Another element of the material and legal status of an individual is legal capacity. Civil capacity means the ability of a citizen to acquire and exercise civil rights by their actions, to create civil duties for themselves and to perform them.

The most essential elements of the content of the legal capacity of citizens are the ability to independently enter into agreements and the ability to bear independent property liability (tort). For example, in § 1 of the German Civil Code⁶, an individual means a person as a bearer of rights and responsibilities. The decisive feature of an individual is legal capacity. According to § 1 of the German Civil Code⁷, legal capacity begins from the moment a child is born. Thus, the legal capacity of an individual does not depend on nationality, gender, or origin. It cannot be denied or deprived of a person by an official or court decision. The legal capacity of an individual ends in death. The

1. Civil Code of the People's Republic of China. (2020, May). Retrieved from http://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html.

2. Universal Declaration of Human Rights. (1948, December). Retrieved from <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

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

4. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed19960628#Text>.

5. *Ibidem*, 1996.

6. German Civil Code. (2002, January). Retrieved from https://www.gesetze-im-internet.de/englisch_bgb/.

7. *Ibidem*, 2002.

concept of death is not defined by law in German law, but it must be established by medical science, considering the criterion of brain death. Confirmation of death is carried out by means of the state registration of death. In the Civil Code of Turkmenistan¹, individuals are understood as citizens of Turkmenistan, foreign citizens, as well as stateless persons.

Individuals include persons with ordinary legal personality and individuals with entrepreneurial legal personality. Vorotintseva defines an individual-entrepreneur as follows: a capable individual registered, in accordance with the established procedure, in the status of an individual-entrepreneur, without the status of a legal entity, which engages in independent, professional, entrepreneurial activity at its own risk and under its own responsibility with the purpose to profit from such activities, has certain rights and responsibilities conditioned by the entrepreneurial activity [24]. Butkov defines an individual-entrepreneur as a person who takes the initiative in the development of the economic sphere of the state, engages in entrepreneurial activity by increasing labour productivity and reducing production costs and is responsible for its activities [25]. Notably, they have different legal regimes. For example, the problems of bankruptcy of individuals who are not engaged in entrepreneurial activities are actively discussed but will not be able to be implemented in practice. At the same time, the need for the institution of bankruptcy of individual entrepreneurs is beyond doubt.

3.3 *The legal entities as subjects of civil law*

Along with individuals, legal entities also act as subjects of civil law. A legal entity is an organisation that owns, manages, or operates a separate property and is responsible for its obligations with this property, can, on its own behalf, acquire and exercise property and personal non-property rights, perform duties, be a plaintiff and defendant in court. While individuals acquire legal personality at birth, legal entities acquire the legal personality granted to them through the commission of certain legal acts. In the most common case, a legal entity usually acquires legal capacity by registering with a government agency established for this purpose. As Artikulenko notes, “the amount of civil legal capacity of a legal entity depends on the very nature of the subject, and therefore it is incapable of having those rights that by their nature can belong only to a human. Moreover, in contrast to the legal capacity of individuals, which is equal for all, organisations can have either general or special legal capacity” [26]. Thus, the legal personality of legal entities differs from the legal personality of individuals, for example, a legal entity cannot bequeath its property. The content of the legal personality of legal entities is that they have the opportunity to acquire rights, the legal entity is responsible for its obligations, has a name and location.

The fact that a legal entity is an organisation that

owns, manages, or operates separate property means that the property belongs to the legal entity directly, as an independent subject of law, and is attached to it either on the right of ownership or on the right of economic management or operational management. In this case, the property of a legal entity is separated from the property of its founders. In turn, legal entities are responsible for performing their civil obligations with all their property. The founders of a legal entity are not liable for its obligations, and the legal entity is not liable for the debts of the founders, except the cases stipulated by law.

Furthermore, the use of a legal entity’s own name allows to distinguish it from other organisations and, therefore, constitutes a necessary prerequisite for civil legal personality of a legal entity. To ensure proper civil turnover, the legislation makes provision for the individualisation of a legal entity, i.e., its separation from the mass of all other organisations. Individualisation of a legal entity is carried out by determining its location and assigning it a name. The location of a legal entity is determined by state registration, unless otherwise stipulated by law. However, the location of the legal entity is indicated in the constituent document. Notably, a legal entity can independently protect its violated rights and legitimate interests. At the same time, it is capable of taking responsibility for its own actions. If necessary, claims for compensation for losses, damage caused to the health of a citizen, etc. will be presented specifically to a legal entity. If the organisation is not a legal entity, it has no right to appear in court as a plaintiff or defendant [27].

At the international level, the concept of legal entity is contained in the 1999 Convention on Criminal Liability for Corruption², developed within the framework of the Council of Europe. In particular, the term: “legal entity” means any organisation having such status in accordance with applicable national legislation, with the exception of states or other public bodies exercising public authority and public international organisations. The liquidation of a legal entity entails its termination without the transfer of rights and obligations to other persons by way of succession. Liquidation is carried out by the decision of its founders (participants) or its authorised body, including the achievement of the purpose for which it was created, or by a court decision in case of gross repeated violations of the law.

The key features of the subjects of certain legal relations should include the following: 1) they must be endowed with certain legal rights and responsibilities, 2) the capability of being the subjects of specific legal relations, which is determined based on legal provisions. Thus, the subjects of civil law may be individuals (citizens, foreign nationals, stateless persons); legal entities (Ukrainian, foreign). The state is a special participant in civil law. Individuals are described by legal status and capacity. That is, individuals are subjects who act as persons endowed with civil legal

1. Civil Code of Turkmenistan. (1998, July). Retrieved from <https://cis-legislation.com/document.fwx?rgn=2363>.

2. Convention on Criminal Liability for Corruption. (1999, January). Retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173>.

personality. Legal personality can be attributed to the integral, inalienable rights of citizens, which describes the civil status of the individual. Therewith, an individual can be the owner of specific subjective rights and obligations only due to their legal capacity, which occupies a special place in the mechanism of legal regulation. Legal capacity is recognised equally for all citizens, it arises at birth and ends with death. That is, it means that all citizens have equal legal capacity, no one has any privileges and advantages in the ability to have rights compared to others. Also, an individual as a participant in civil relations has certain features and properties that individualise it and affect its legal status. Such features and properties include name, age, citizenship, marital status, gender.

A legal entity is an organisation that acts in civil circulation under its own name, has property rights or other rights, and can be a plaintiff and defendant in court. It is considered established from the date of its state registration and introducing the corresponding entry in the unified state register of legal entities. State registration and introduction of relevant entries in the state register is also required for reorganisation and liquidation of legal entities, when amending their constituent documents. Furthermore, the participation of the state in civil relations also deserves attention. It has specific features that are not inherent in individuals and legal entities as independent subjects. Such specificity is primarily conditioned by the public legal nature of the state, embodied in such features as the existence of a sovereign territory and its population, the public nature of the organisation of power and government, the presence of its own state symbols, etc. That is why, acting as a party to civil relations, the state does not constitute a subject of civil law. Accordingly, the state can have only those rights and obligations that are enshrined in law.

CONCLUSIONS

Most often, the science of civil law distinguishes such subjects as individuals and legal entities. Therewith, the state constitutes a special participant in civil law relations. The issue of individuals as subjects of law started to be considered as early as the times of the Roman law. In the modern understanding, individuals are subjects who act as persons endowed with civil legal personality, which can be attributed to the integral, inalienable rights of citizens, which describes the civil status of the individual. Individuals with entrepreneurial legal personality stand out among individuals. Notably, individuals and individuals-entrepreneurs have different legal regimes. For example, the problems of bankruptcy of individuals who are not engaged in entrepreneurial activities are actively discussed but will not be able to be implemented in practice. At the same time, the need for the institution of bankruptcy of individual entrepreneurs is beyond doubt.

In turn, the legal status of legal entities as subjects of civil law has been a subject of discussion since the 19th century. At present, a legal entity is defined as an organisation endowed with civil legal personality, which owns separate property, is liable for its obligations with this property, can acquire property and personal non-property rights on its own behalf, bear responsibilities, be a plaintiff and defendant in court. Therewith, the recognition of the state as a subject of civil law entails a sharp contradiction because the state, upon entering into civil legal relations, either loses public power, or retains it, but does not use it. In the first case, the state loses its essence. In the second case, there is a violation of the principle of equality of participants in civil relations, as other subjects of civil law do not have public authority. That is, the state is a party to civil relations and is not a subject of civil law.

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ЗАХИСТ СПОЖИВАЧІВ ПРИ КУПІВЛІ ТОВАРІВ ЧЕРЕЗ ІНТЕРНЕТ

Анотація. Враховуючи глобальне поширення використання сучасних технологій, Інтернет усе більше набуває популярності як платформа для торгівлі. Саме тому потреба у захисті прав споживачів під час купівлі товарів через Інтернет постійно зростає. Зокрема, автори розглядають проблему реалізації прав споживачів під час придбання товарів в інтернет-магазинах України та Молдови. Дослідження показало, що Україна та Молдова набирають величезних темпів розвитку в секторі Інтернет-торгівлі, котрі ще більше посилюються в контексті глобальної пандемії COVID-19 та запровадження карантину. Узв'язку з цим питання дотримання прав споживачів в Інтернеті є надзвичайно актуальним сьогодні. Вивчаючи проблему захисту споживачів під час придбання товарів в Інтернеті, автори використали формальний і логічний метод для визначення змісту основних понять, систематизації матеріалу та отримання узагальнених висновків у рамках предмету дослідження. Порівняльно-правовий метод допоміг виявити тенденції та порівняти законодавство України та законодавство Республіки Молдова у контексті захисту прав споживачів під час придбання товарів в Інтернеті. Згідно з результатами дослідження, законодавча база у сфері захисту прав споживачів, які купують товари через Інтернет, повинна бути однією з пріоритетних сфер світових держав. Стосовно законодавства України та Молдови у цій галузі, варто зазначити, що з огляду на те, що Україна та Молдова мають європейські інтеграційні прагнення, що, зокрема, відображається в ратифікації Угоди про асоціацію між Україною та ЄС (Європейським Союзом) 2014 року і Угоди про асоціацію між Молдовою та ЄС 2014 року, а також зобов'язання, прийняті цими державами щодо приведення законодавства у відповідність до законодавства ЄС, важливо гармонізувати національне законодавство зі стандартами ЄС у цій галузі. Крім того, важливим для України є також прийняття концепції захисту прав споживачів, які купують через Інтернет

Ключові слова: електронна комерція, інтернет-торгівля, права споживачів, Угода про асоціацію, законодавство ЄС

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CONSUMER PROTECTION WHEN PURCHASING GOODS ON THE INTERNET

Abstract. *Considering the global spread of the use of modern technologies, the Internet is increasingly gaining popularity as a platform for trading. That is why the need to protect consumer rights when buying goods via the Internet keeps growing. In particular, the author considers the problem of implementing consumer rights when purchasing goods in online stores in Ukraine and Moldova. The study showed that Ukraine and Moldova are gaining huge rates of development in the internet trade sector, which is further intensified in the context of the global COVID-19 pandemic and the introduction of lockdown. In this regard, the issue of compliance with consumer rights on the Internet is extremely relevant today. When studying the issue of consumer protection upon purchasing goods on the Internet, the author used a formal and logical method to determine the content of the main concepts, systematise the material, and obtain generalising conclusions within the framework of the subject matter. The comparative legal method helped identify trends and compare the legislation of Ukraine and the legislation of the Republic of Moldova in the context of consumer protection when purchasing goods on the Internet. According to the findings of the study, the legislative framework in the area of protecting the rights of consumers who purchase goods via the internet should be one of the priority areas of the world's states. With regard to the legislation of Ukraine and Moldova in this area, it should be noted that given that Ukraine and Moldova have European integration aspirations, which in particular is reflected in the ratification of the Association Agreement between Ukraine and the EU (European Union) of 2014, as well as the Association Agreement between Moldova and the EU of 2014, and the commitments made by these states to bring the legislation into line with the EU acquis, it is important to harmonise national legislation with EU standards in this area. In addition, the adoption of the concept of protecting the rights of consumers who purchase via the Internet is also important for Ukraine*

Keywords: *e-commerce, internet trading, consumer rights, association agreement, EU acquis*

INTRODUCTION

The legal consequence of the rapid development of technological advance is the emergence of new forms of civil legal relations that are insufficiently regulated at present, which, in turn, entails a considerable number of offences, primarily in the sphere of trade in goods and services. The internet trading market is actively introducing new forms

of civil legal relations, in particular the relations between the seller and buyers on the Internet, and as a result, the purchase of goods, works, and services via the Internet is becoming increasingly popular [1]. Admittedly, consumers around the world are increasingly using the Internet to purchase goods, which is becoming a particularly common

practice in the wake of the global COVID-19 pandemic and the introduction of lockdown. According to Statista, the German company specialising in market and consumer data, 2.05 billion customers were registered in the world in 2020, which is 25% of the world's population, and such figures are projected to reach 2.14 billion in 2021 [2]. Therewith, according to statistics from NASDAQ, one of the three main US stock exchanges, by 2040, 95% of all purchases will be made via the Internet [3]. In other words, in the next 20 years, almost all commerce will be transferred online. It is also predicted that most of the online sales will be performed through mobile devices.

Therewith, upon purchasing the necessary product on the Internet, the consumer spends a minimum of their time searching for it and ordering it, and the ability to deliver the selected product to any place specified by the consumer simplifies the order procedure even more. However, on the other hand, there are numerous cases of fraud, violation of the rules of e-commerce, sale of low-quality products, violation of the terms of delivery and transportation, etc. This means that the consumer remains the least protected when buying a product over the Internet. In addition, the legislation still has many gaps in this area. For example, M. Kuzmina [4] notes that among the frequent violations on the part of online stores, one can distinguish refusal to provide replacement or warranty repair of goods; non-compliance of goods with the requirements of regulations; non-compliance of documents accompanying the goods, changes in the price of goods during its delivery, and much more. In addition, even despite the attempts of the legislator to resolve problematic aspects that are associated with the conclusion of contracts for the purchase and sale of goods at a distance or outside of retail or office space, this area is filled with issues regarding the establishment of a transparent mechanism for protecting consumer rights. Even with proper legal regulation, online buying/selling is a type of relations that implies an increased risk of consumer rights violations [5].

Thus, the scientific novelty of the study lies in a comprehensive analysis of consumer protection issues upon purchasing goods on the Internet. In particular, the author examines the international experience in protecting consumer rights when purchasing goods on the internet, compares the experience of Ukraine and the Republic of Moldova in this area, taking into account the European integration aspirations of both states.

1. LITERATURE REVIEW

In the modern world, buying goods via the Internet is developing intensively, and thousands of people become customers of online stores every day. Accordingly, the problem of protecting the rights of consumers who purchase goods via the Internet is becoming more acute. Therefore, in the doctrine, national and foreign scientists dealt with issues related to consumer protection when purchasing goods on the Internet. For example, O. Vinnyk [6] investigated the legal basis for consumer protection in the area of e-commerce. Therewith, she noted that e-commerce

is rapidly becoming widespread, but with numerous violations of consumer rights due to the lack of effective legal regulation of relations in this area. Problems of e-commerce development were investigated by V. Pleskach, T. Zatonatska and L. Oleksyuk [7]. In addition, A.M. Korobtsova and M. Khomenko [5] analysed the issue of basic guarantees and mechanisms for protecting consumer rights when purchasing products via the Internet.

A.M. Korostashov [8] noted that despite the rapid growth of e-commerce in the world, this process is slowed down in Ukraine, which is caused by the following factors: 1) problems with access to high-speed internet connection in small settlements; 2) lack of user trust associated with considerable number of cases of fraud, disregard for the buyer's right to return goods within 14 days according to current legislation, etc.; 3) sizeable costs for the development of a web resource that are at risk of being unjustified as a result of unforeseen external circumstances; 4) market leaders have won the leading niche of consumers, so newcomers are unable to compete with them. Among foreign scientists, O. Plotnik [9] investigated the establishment and development of consumer protection legislation in the Republic of Moldova. S. Riefa [10] investigated the impact of lockdown on consumer protection. In particular, she noted that the lockdown accelerated the growth of e-commerce, as online purchases became more frequent. Therewith, the pandemic should serve as a catalyst to commence the process of improvement necessary to ensure consumer protection policies. At present, more than ever before, consumer protection legislation must protect vulnerable segments of the population.

R. Ariyaratna [11] researched online consumer protection issues within the Sri Lankan legal system. In particular, she noted that online consumers are more vulnerable to violations of their rights in the virtual space, since they deal with usually unknown sellers. Therefore, consumer protection on the Internet is a relevant and important subject. S. Rosadi and Z. Tahira [12] studied consumer protection in the digital economy era using the example of Indonesia. In particular, they noted that in the digital economy, an increasing number of consumers are participating in e-commerce, which provides easier and faster access to products and services. However, this also poses some challenges for consumers. The impersonality of e-commerce weakens the relations between businesses and consumers, thereby increasing consumer vulnerability, which can lead to unfair commercial practices and lead to uncertainty and lack of consumer confidence. Therefore, there is a need to protect consumer confidence in digital markets, which should not hinder the development of the digital economy.

2. MATERIALS AND METHODS

The main feature of making purchases of goods via the Internet is that usually individuals do not have the professional knowledge required to properly ensure data protection and, as a result, personal security and money safety in the global digital environment. When ordering goods via

the internet, it is sometimes difficult to verify the reliability of the seller, the authenticity of the site, and it is impossible to evaluate the quality and compliance with the declared characteristics of the product prior to receiving it. In this aspect, the protection of consumer rights becomes relevant when purchasing goods via the Internet. Materials and methods of the study were selected with consideration of the goals and objectives set. In addition, the study involved a set of regulatory principles, techniques and methods used to cognise the features of consumer protection upon purchasing goods on the Internet. The use of the methods and materials listed below enabled a comprehensive analysis of the problems of consumer protection upon purchasing goods on the Internet.

In particular, the methodological basis of this study constitutes is a set of general scientific and special legal methods of cognition. Among the general scientific methods, the author used the method of analysis and synthesis, deduction, induction, prediction, modelling, analogy, dialectic method, etc. For example, when studying the issue of consumer protection upon purchasing goods on the Internet, the author used the dialectical method. The Aristotelian method was used in the analysis of the legislative provision of Ukraine and the Republic of Moldova, determining the content of the main concepts, systematising the material to obtain generalising conclusions within the framework of the subject matter. The comparative legal method helped identify trends and compare the legislation of Ukraine and the legislation of the Republic of Moldova in the context of consumer protection when purchasing goods on the Internet.

The historical legal method was used to obtain and generalise knowledge about the essence and stages of development of consumer protection upon purchasing goods on the Internet. The system analysis enabled the evaluation of the existing approaches to the legal regulation of consumer protection upon purchasing goods on the Internet. The predictive method was used to determine the prospects for the development of legislation aimed at protecting consumer rights upon purchasing goods on the Internet. The methodology of this study is based on factor, cause-and-effect analysis aimed at identifying circumstances that pose a danger when purchasing goods on the Internet. The method of factor analysis was used for a systematic study of the problems of consumer protection upon purchasing goods on the Internet, as well as for developing proposals aimed at improving the legal regulation of this area. The formal legal method was used to generalise, classify, and systematise the research results, as well as to correctly present these results. One of the methodological techniques used in the research process was the integrated approach, which made it possible to significantly overcome the shortcomings of analytical legal science, as it allowed organically combining legal means, legal tools and basic legal ideas. In turn, the theoretical basis of the study included fundamental monographic studies, scientific papers of Ukrainian and foreign authors on the problems of consumer protection upon purchasing goods on the Internet.

3. RESULTS AND DISCUSSION

With the development of e-commerce, various forms of fraud on the Internet are intensively developing, new ways and new schemes for violating consumer rights are emerging. As a result, consumers are exposed to a huge risk when ordering goods in online stores, including at the moment of online settlement for goods. There are also cases when the ordered product is not sent, and the money is not returned. Consumers also have to frequently deal with receiving goods of poor quality. In addition, such issues as violations of the legislation on personal data by online stores, etc., remain extremely relevant. For example, V. Pleskach notes that the most common violations of consumer rights in the area of electronic commerce are as follows: lack of identification of sellers; failure to provide the consumer with accessible, complete, reliable, and timely information about goods, works, and services; inability for the consumer to verify the quality of the purchase; difficulties in dispute resolution; lack of inevitability of punishment of a dishonest seller; lack or insufficiency of guarantees for consumers, etc. [7].

That is, on the one hand, e-commerce currently provides a substantial number of opportunities and benefits for consumers, in particular, a wide range of goods and services, the ability to compare prices for the same product or service from different sellers, a variety of payment methods. However, on the other hand, e-commerce creates substantial risks for consumers that are associated with the technological features of the digital environment. That is why the issues of consumer protection on the Internet are in the center of attention of the international community. Regulations on consumer protection on the Internet have been regularly included in the programme of leading international, regional, and national political and economic organisations since the beginning of the 21st century. For example, within the framework of the Organization for Economic Cooperation and Development (OECD), the first act in this area was developed in 1999 under the title OECD Recommendations on Consumer Protection in E-commerce. However, given the substantial growth in e-commerce volumes over the past years and the growing importance of consumer confidence issues in the digital economy in March 2016, revised recommendations on consumer protection in e-commerce were issued [13]. To date, the OECD focuses on such issues as the security of online payments, the purchase of intangible products with digital content, the protection of personal data of consumers, etc.

Issues related to protecting consumers on the Internet and building trust in e-commerce are also being explored at the World Economic Forum. In particular, it is noted that the approach of public administration should include ensuring that countries adopt or modernise laws on consumer protection (and data) on the Internet in such a way as to keep up with the development of technology and ensure real consumer protection [14]. Considering the fact that that Ukraine and Moldova have European integration aspirations, which in particular is reflected in the ratification of

the Association Agreement between Ukraine and the EU of 2014¹, as well as the Association Agreement between Moldova and the EU of 2014², and the commitments made by these states to harmonise their legislation with the EU Acquis, it is important to review the provisions on the protection of the rights of consumers who make purchases via the Internet in legislation of the European Union. Notably, the EU is of fundamental importance in the implementation of European integration of Ukraine and the Republic of Moldova. This role is not limited to declarations, visits, and formal meetings, but is also presented in the context of supporting the internal legislative reform process. In addition, both countries are members of the Eastern Partnership, which is the main tool by which the European community monitors the level of readiness for EU membership of Ukraine and the Republic of Moldova. Thus, the process of European integration of Ukraine and the Republic of Moldova is described by an interdependence between actions at the internal and external level, which is based on the implementation of European requirements and is evaluated in reports on the progress of the implementation of European requirements. That is why Ukraine and the Republic of Moldova need to prove that both countries are capable of performing their obligations in order to move on to the next stage in relations with the EU.

In the context of protecting the rights of consumers who make purchases via the Internet, the parties cooperate based on Association Agreements. In particular, Article 140 of the Association Agreement between Ukraine and the European Union³ notes that the parties shall maintain a dialogue on the regulation of electronic commerce, including, *inter alia*, issues of consumer protection in the area of electronic commerce. However, Article 416 stipulates that the parties cooperate to ensure a high level of consumer protection and achieve compatibility between their consumer rights protection systems. Notably, similar provisions are contained in the Association Agreement between Moldova and the EU. In particular, Article 255, similar to Article 140 of the Association Agreement between

Ukraine and the EU, emphasises cooperation on consumer protection in the area of electronic commerce. Article 38 of the Association Agreement between Moldova and the EU⁴ states that the parties cooperate to ensure a high level of consumer protection and achieve compatibility between their consumer protection systems. Such cooperation may include the following: (a) aims to harmonise consumer protection legislation; (b) facilitation of the exchange of information on consumer protection systems, including consumer legislation and its application, consumer product safety, including market surveillance, consumer information systems and facilities, consumer education, empowerment and reimbursement to consumers, and sales and service agreements concluded with consumers; (c) facilitation of training activities for administration officials and other consumer representatives; and (d) encouragement of the development of independent associations, including non-governmental organisations, and cooperation between authorities and non-governmental organisations in the consumer protection industry. Therewith, both Association Agreements refer to the need to implement Directive 97/7/EC⁵ on the protection of consumers in respect of distance contracts and Regulation No. 2006/2004⁶ of 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

Notably, within the European Union, a strategy for the establishment of a single digital market has been approved and is being implemented, aimed at overcoming the European market barriers to e-commerce related to infrastructure, Internet coverage, copyright and data protection, through the improvement of online services and digital technologies, as well as consumer protection. Directive 2011/83/EC⁷ of 2011 on consumer rights aims to generalise and harmonise requirements in the area of providing information to consumers. In particular, it states that the consumer must receive sufficient information prior to the conclusion of the contract. The information that must be provided to the buyer before the conclusion of the contract includes a number of data. Namely, these include information about the main characteristics of goods or

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. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part. (2014, September). Retrieved from <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2014001>.

3. *Ibidem*, 2014.

4. *Ibidem*, 2014.

5. Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts. (1997, May). Retrieved from <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A31997L0007>.

6. Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation). (2004, October). Retrieved from <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R2006>.

7. Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. (2011, October). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083>.

services; the trade name, registration address, phone number, and other data of the seller that allow the latter to be identified; the cost of goods, including taxes and other expenses that will need to be paid; the methods of making payment; the term of the contract; the procedure for handling complaints, the existence of the right to refuse, and it is necessary not only to indicate the existence of the right to refuse, but also to describe the conditions and procedures for its implementation. In addition, all information must be provided in an accessible form, and this requirement applies to the terms of the contract, and any other information that is important to the buyer.

In addition, Directive 2000/31/EC¹ on electronic commerce requires that promotional offers, such as discounts and gifts, must be clearly and unambiguously indicated. The provisions of Directive 2005/29/EC of 2005² concerning unfair business-to-consumer commercial practices in the internal market are aimed at protecting the consumer's right to freedom of choice of products and conclusion of a contract. In particular, it contains the concept of commercial relations, which are subject to its provisions; commercial communications; seller's policies directly related to the promotion, sale or delivery of goods to consumers. At the national level, Ukraine regulates most issues related to the protection of consumer rights when purchasing goods via the Internet by the Civil Code of Ukraine³, the Law of Ukraine "On Consumer Rights Protection"⁴, the Law of Ukraine "On Electronic Commerce"⁵. However, the existing mechanism stipulated by the current legislation may not always guarantee consumer protection when purchasing goods via the Internet, while at the same time allowing dishonest business representatives to avoid any liability.

In 2017, Ukraine approved the Concept of national policy in the field of consumer protection until 2020⁶, which notes that consumers in Ukraine are not protected by the state and law due to the declarative nature of the proclaimed rights and the lack of mechanisms for their implementation

and restoration. At present, there is a need to update this concept. In addition, considering the introduction of a lockdown to prevent the spread of coronavirus infection COVID-19, which led to the intensification of shopping on the internet, it is important to adopt a concept to protect the rights of consumers who make purchases via the Internet. Notably, the ordering of goods in the online stores is performed via an electronic transaction. Thus, according to the Rules for the Sale of Goods to Order and Outside Retail or Office Premises, approved by the Order of the Ministry of Economy of Ukraine No. 103⁷ of 2007, the Internet together, with the telecommunications network, postal communication and television, is recognised as those means of remote communication that can be used to conclude contracts at a distance.

Therewith, according to Article 627 of the Civil Code of Ukraine⁸, contracts involving an individual take into account the requirements of the legislation on consumer protection. The rights of consumers and the mechanism of their protection are stipulated by the Law of Ukraine "On Consumer Rights Protection", according to which consumers, when purchasing products that are sold on the territory of Ukraine, in order to meet their personal needs, have the right to the necessary, accessible, reliable, and timely information about the goods, their quantity, quality, assortment, as well as about their manufacturer/seller. One of the main principles stipulated by the Law of Ukraine "On Electronic Commerce"⁹ of 2015 is to ensure the proper quality of goods, works, and services sold in the area of e-commerce. However, the current national legislation of Ukraine does not sufficiently regulate the area of consumer protection on the Internet and does not cover the entire process in general. In this context, it is necessary to strengthen the role of executive authorities, which should exercise oversight and control powers in terms of compliance with legislation on consumer protection on the Internet and establish the responsibility of violators. With regard to the protection of consumer rights upon purchasing goods on

1. Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). (2000, June). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031>.

2. Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'). (2005, May). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>.

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

4. Law of Ukraine No. 1023-XII "On Consumer Rights Protection". (1991, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/1023-12#Text>.

5. Law of Ukraine No. 675-VIII "On Electronic Commerce". (2015, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/675-19#Text>.

6. Order of the Cabinet of Ministers of Ukraine "On approval of the Concept of national policy in the field of consumer protection until 2020". (2017, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/217-2017-%D1%80#Text>.

7. Order of the Ministry of Economy of Ukraine No. z1181-07 "On approval of the Rules for the sale of goods to order and outside retail or office premises". (2007, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/z1181-07#Text>.

8. Civil Code of Ukraine, op. cit.

9. Law of Ukraine No. 675-VIII "On Electronic Commerce", op. cit.

the Internet in the Republic of Moldova, the legal basis for this is as follows: Civil Code of the Republic of Moldova No. 1107-XV¹, the Law No. 105/2003 “About Consumer Protection”², etc.

An important stage in the development of the legislative framework regarding quality and safety assurance commenced on December 22, 2006, when the Law of the Republic of Moldova “About Technical Regulation”³ was adopted, which radically changed the procedure for establishing mandatory and voluntary requirements for products and the procedure for state control over their compliance [9]. At present, e-commerce remains almost the only way for individual sellers to continue their activities, and for buyers – the opportunity to purchase goods without endangering their health. In addition, modern trends in the development of information technologies in recent years have made it possible to revolutionise electronic interaction. In particular, the spread of e-commerce entails prerequisites for the development of legal regulation of consumer protection. In other words, e-commerce is increasingly covering markets, attracting consumers from all over the world and creating the need to develop approaches to solving various problems that arise in this area. In particular, these are such problems as fraud, violation of legislation on personal data protection, sale of low-quality goods, etc. Notably, the doctrine certainly contains research on the legal regulation of consumer protection on the Internet. However, the research carried out by the authors of this study has substantial differences from the previous studies. For instance, G. Howells [15] noted in his study that the world is entering an era of new technological opportunities. The consumer gets many benefits from computer innovation. Not wanting to slow down Innovation, his research was aimed at supporting consumer protection on the Internet.

Upon conducting a comparative analysis of the provisions on the rules of consumer protection in e-commerce in China and Europe, J. Binding and K. Purnhagen [16] noted that due to the commercialisation of the Internet, the consumer world has undergone fundamental changes. The internet allows consumers and entrepreneurs to enter into contracts to exchange goods and services around the world while staying at home at the computer. In addition, O. Vinnyk [6], who studied the legal framework for consumer protection in the area of e-commerce, covered the issues related to consumer protection on the Internet; V. Pleskach, T. Zatonatska, L. Oleksiuk [7] investigated the issues of e-commerce development; A.M. Korostashov and T.E. Isheikin [8] analysed the issue of basic guarantees

and mechanisms for protecting consumer rights when purchasing products via the Internet.

Therewith, V. Kepko, V. Novikova and L. Stadnik [17], having reviewed consumer protection in electronic commerce in the European Union, aptly note the multifaceted and complex nature of the issues in this area. That is why in order for Ukraine to properly perform its international and legal obligations to harmonise national legislation with European standards, it is necessary to take into account the features and aspects of economic and legal regulation of this area in the EU at all stages of harmonisation, not only during transposition, that is, regulatory harmonisation of legislation with the requirements of law, but also in the process of practical implementation of European requirements and standards, as well as within the framework of ensuring their compliance [18].

The scientific novelty of this study in relation to others is the comparison of the legislation of Ukraine and the Republic of Moldova regarding the legal regulation of consumer protection upon purchasing goods on the Internet. In particular, the aspirations for European integration of these two countries were also considered, which is also reflected in the ratification of the Association Agreement between Ukraine and the EU⁴ of 2014, as well as the Association Agreement between Moldova and the EU of 2014, and the obligations undertaken by these states to harmonise their legislation with the EU *acquis*. Therefore, this study also investigates the legislation of the European Union, taking into account the importance of harmonising the national legislation with EU standards in the area of legal regulation of consumer protection upon purchasing goods on the Internet.

CONCLUSIONS

Considering the introduction of a lockdown to prevent the spread of COVID-19 pandemic, which led to the intensification of the purchase of goods via the Internet, the states around the world are aware of the importance of e-commerce and its increased relevance in these difficult times. Therefore, the current legislative framework in the area of protecting the rights of consumers who purchase goods via the internet should be one of the priority areas of the world's states. With regard to the legislation of Ukraine and the Republic of Moldova in this area, it should be noted that given that Ukraine and Moldova have European integration aspirations, which in particular is reflected in the ratification of the Association Agreement between Ukraine and the EU of 2014, as well as the Association

1. Moldova Civil Code. (2002). Retrieved from <https://www.ebrd.com/downloads/legal/core/moldova.pdf>

2. Law of the Republic of Moldova No. 105/2003 “About Consumer Protection”. (2003, March). Retrieved from <https://cis-legislation.com/document.fwx?rgn=5078>.

3. Law of the Republic of Moldova No. 420-XVI “About Technical Regulation”. (2006, December). Retrieved from <https://cis-legislation.com/document.fwx?rgn=18037>.

4. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part. (2014, September). Retrieved from <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2014001>.

Agreement between Moldova and the EU of 2014, and the commitments made by these states to bring the legislation into line with the EU acquis, it is important to harmonise national legislation with EU standards in this area.

However, the current national legislation of Ukraine does not sufficiently regulate the area of consumer protection on the Internet and does not cover the entire process in general. In this context, it is necessary to strengthen the role of executive authorities, which should exercise oversight and control powers in terms of compliance with legislation

on consumer protection on the Internet and establish the responsibility of violators. At present, the methods of protecting the rights of consumers who took advantage of the purchase of goods via the internet, but received low-quality goods or were involved in a fraudulent scheme practically do not differ from the methods of protecting consumer rights in a regular shop. Therefore, it is also important for Ukraine to adopt special legislation in this area, as well as concepts for protecting the rights of consumers who make their purchases via the Internet.

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ПЕРСПЕКТИВИ РЕКОДИФІКАЦІЇ МІЖНАРОДНОГО ПРИВАТНОГО ПРАВА В УКРАЇНІ: ЧИ ПОТРЕБУЮТЬ КОЛІЗІЙНІ НОРМИ НОВОГО «ПРИХИСТКУ»?

Анотація. *Метою статті є дослідження напрямів модернізації законодавства, що регулює приватні відносини транскордонного характеру, запропонованих авторами проекту Концепції оновлення (рекодифікації) Цивільного кодексу України, та узагальнення іноземного і міжнародно-правового досвіду розробки актів кодифікації міжнародного приватного права. Автори статті розглядають міжнародне приватне право як галузь, що розвивається найбільш динамічно у зв'язку із постійним розширенням сфери транскордонних відносин та потребує постійного оновлення і адаптації до вимог міжнародного цивільного обігу. У роботі проаналізовані загальні чинники та передумови рекодифікації міжнародного приватного права, усебічно досліджені питання доцільності відмови від автономної кодифікації та перенесення колізійно-правових норм до ЦК України. У центрі дослідження сучасний європейський досвід, оцінка впливу регулятивних актів ЄС на національні кодифікації міжнародного приватного права держав-членів та третіх країн. З метою оцінки ідеї відновлення статусу ЦК України як стрижневого акта, що регулює усі суспільні відносини з приватноправовим змістом, автори дослідження звертають увагу на негативні наслідки міжгалузевої кодифікації міжнародного приватного права у низці пострадянських країн. У роботі доведено, що у європейських державах домінує тенденція прийняття консолідованих актів кодифікації у цій галузі та визнання пріоритету уніфікованих міжнародно-правових актів, що регулюють окремі види транскордонних приватних відносин. На основі проведеного аналізу обґрунтовано висновок, що на даному етапі у світі накопичений значний досвід правотворчості у сфері міжнародного приватного права і найбільш ефективною є комплексна автономна кодифікація колізійних норм, в основі якої пріоритет уніфікованих міжнародних актів, широке застосування прямих відсилок до міжнародних угод. Погоджуючись в цілому із запропонованими змінами щодо змістовного оновлення колізійного регулювання, автори наголошують на необхідності вдосконалення та розвитку концептуальних підходів*

Ключові слова: *кодифікація, автономна кодифікація, міжгалузева кодифікація, колізійне регулювання, вибір права*

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PROSPECTS FOR RECODIFICATION OF PRIVATE INTERNATIONAL LAW IN UKRAINE: DO CONFLICT-OF-LAWS RULES REQUIRE A NEW HAVEN?

Abstract. *The purpose of the study was to investigate the areas of modernisation of legislation governing private relations of a cross-border nature, proposed by the authors of the draft concept of updating (recodification) of the Civil Code of Ukraine (the CCU), and generalise foreign and international legal experience in developing acts of codification of private international law. The authors of the study considered private international law as a most dynamically developing branch due to the constant expansion of cross-border relations and requirements for constant updating and adaptation to the requirements of international civil turnover. The paper analysed the general factors and prerequisites for the recodification of private international law, comprehensively examined the expediency of abandoning autonomous codification and transferring conflict-of-law rules to the CCU. The study focused on current European experience and assessment of the impact of EU regulations on the national codifications of private international law of member states and third countries. To assess the idea of restoring the status of the CCU as a core act governing all public relations with private law content, the authors of the study addressed the negative consequences of interbranch codification of private international law in a number of post-Soviet countries. The paper proved that European states are dominated by the tendency to adopt consolidated acts of codification in this area and recognise the priority of unified international legal acts governing certain types of cross-border private relations. Based on the analysis, it is justified to conclude that the world has currently accumulated considerable experience in law-making in the area of private international law and the most effective is a comprehensive autonomous codification of conflict-of-laws rules, which is based on the priority of unified international acts and the widespread use of direct references to international agreements. While agreeing in general with the proposed changes regarding the content update of conflict-of-laws regulation, the authors emphasised the need to improve and develop conceptual approaches*

Keywords: *codification, autonomous codification, intersectoral codification, conflict-of-laws regulation, choice of law*

INTRODUCTION

In 2004, on the pages of “Legal Practice”, arguing the need for early approval of the draft Law of Ukraine “On Private International Law”¹, prof. V.I. Kysil wrote: “Analysis of the history of lawmaking in the field of private international law indicates that the gradual separation of legislation on private international law from acts of civil and family legislation is inevitable. This process is logical, consistent, has a convincing justification and is welcomed by legal practice.

Special laws on private international law have a clear structure and allow applying a comprehensive approach to regulating the most complex problems of the branch of law, which is often regarded as “higher mathematics of legal science”. The application of such laws is more convenient and efficient” [1]. The idea of autonomous codification of private international law was justified in the doctoral dissertation of Prof. V.I. Kysil and the studies of

1. Law of Ukraine No. 2709-IV “On Private International Law”. (2005, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/2709-15#Text>.

his students [2; 3], and in 2005 it was implemented by the parliament, which approved the Law of Ukraine “On Private International Law” (hereinafter referred to as “the Law on PIL”)¹. For sixteen years, Ukrainian and foreign scientists and practitioners emphasised the advantages of autonomous codification of PIL in their studies, calling it a “need of the hour” and the embodiment of “best European practices”. However, the draft concept of updating the Civil Code of Ukraine (hereinafter referred to as “the Concept”) proposed last year radically changed the positions of certain scientific circles, and today the existence of the Law of Ukraine “On Private International Law” is already considered as a “legislative tragedy”, a “blow of anti-market forces”, which slows down law-making, complicates law enforcement and negatively affects legal education [4]. In one of the last issues of the above-mentioned publication, Prof. A.S. Dovhert noted: “particularly serious consequences (significant losses in law-making, law enforcement, training of lawyers, etc.) occurred as a result of two treacherous blows: the adoption of the Economic Code of Ukraine, which is antagonistic to private law² and separation of two books from the codification (“Family Law” and “Private International Law”)³” [5]. Thus, according to the authors of the Concept, autonomous codification in the field of private international law in its “destructive impact” on the system of legal regulation of private relations is equal to the adoption of the Economic Code of Ukraine³.

The content of the Concept and the categorical nature of many of its provisions have caused a wave of discussions in the academic environment, and experienced lawyers and young scientists are joining them with renewed vigour and new arguments. It is difficult to overestimate the importance of scientific events that are currently being discussed because modern lawyers have much wider access to the European and world scientific space, research information platforms and leading legal publications, which enables a more in-depth study of doctrinal approaches and practical experience in codifying private law in different states.

The problem of codification of PIL has been discussed in doctrine since the second half of the 19th century. Until recently, it was widely believed that the PIL is not ready for codification at all due to its “youth”, excessive complexity and casuistry, and in some European countries this concept still prevails (France, Norway, Sweden, etc.). However, since the second half of the last century, doctrinal approaches have changed dramatically and codification processes have become extremely active because the existence of an effective act of codification of the PIL is one of the mandatory conditions for the development of foreign economic turnover, which is crucial for the economy of any country. Today, there are more than 90 national codifications of PIL in the world.

Thus, the current challenges and level of discussion have become an extremely favourable moment for studying

the phenomenon of national codification of private international law in Ukraine. Especially important, in the authors' opinion, is the analysis of the arguments of supporters of both interbranch and autonomous codification because referring to the same circumstances (economic globalisation, liberalisation of market relations, comprehensive internationalisation), appealing to the studies of the same acknowledged specialists (S.C. Symeonides [6], R. Cabrillac [7], J. Basedow [8], etc.), referring to the analytical reports of international institutions, the authors draw diametrically opposite conclusions regarding the optimal form of consolidating the PIL provisions.

The purpose of the study is an analysis of the proposed areas of modernising legislation governing private relations of a cross-border nature, generalisation of foreign and international legal experience in the development of acts of codification of private international law and an attempt to formulate the author's vision of the prospects for the recodification of private international law in Ukraine.

1. LITERATURE REVIEW

The theoretical framework of this study included the articles of Ukrainian and foreign scientists in the field of private international law, in particular, the studies by V.I. Kysil [1; 2], A.S. Dovhert [5; 9], V.Ya. Kalakura [3], which cover the problems of PIL codification in Ukraine. To investigate the experience of foreign codifications, the Encyclopaedia of Private International Law was used as one of the main sources [10], which was published in 2016 under the editorship of the director of the Max Planck Institute for Private International Law and Comparative Law, professor J. Basedow and today is the most authoritative and comprehensive reference source in this subject area.

The study of the works of S.C. Symeonides [6], R. Cabrillac [7], and Cs. Varga [11] was of great importance for clarifying the opinions of world-famous researchers on the modern processes of PIL codification. The fundamental works of these scientists provide an in-depth understanding of the institution of codification as such, allow determining its essence and significance from legal, technical, historical, sociological, and other standpoints. The book “Codification of private international law around the world: an international comparative analysis” by S.C. Symeonides contains a global study of codifications of private international law for 50 years (1962-2012) [6]. During this period, more codifications in the field of PIL were adopted than in all previous years, and horizontal comparison and analysis of these codifications provides answers to the fundamental philosophical and methodological dilemmas of PIL.

The authors of this study also investigated the articles of young scientists, their new views on the theory of codification, on the prospects for the development of legislation in the field of PIL in the global digital economy. In particular, the results of the dissertation work of Professor

1. Law of Ukraine No. 2709-IV “On Private International Law”. (2005, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/2709-15#Text>.

2. Economic Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15#Text>.

3. *Ibidem*, 2003.

E.A. Hetman “Codification of the Legislation of Ukraine: General Characteristics, Features and Types” and other developments of this scientist were used [12; 13]. The studies of Estonian legal scientists Prof. Tanel Kerikmäe [14], Karin Sein [15], Maarja Torga [16], Lithuanian scientist Prof. Valentinas Mikėlėnas [17] and others also became important literary sources. The experience of codifying PIL in the Baltic States is important for Ukraine, first and foremost because this process began simultaneously in these countries and the initial conditions were quite similar. Of particular importance for comparative analysis is the fact that, despite similar doctrinal approaches, conflict-of-laws rules were included in civil codes in Lithuania and Latvia, and the Estonian legislator carried out autonomous codification by adopting the Law of Estonia “On Private International Law”¹. To summarise the Baltic experience, the study investigated the monograph “Law of the Baltic States” under the general editorship of Prof. Tanel Kerikmäe, one of the sections of which contains a deep comparative analysis of the private law of three states [14]. Studies of Prof. K. Sein and M. Torga, doctor of law, covering the development of the Estonian PIL and its relationship with EU regulations [15] were also used to get acquainted with certain aspects of the national codification process in this area.

The studies of Russian scientists Prof. N.I. Marysheva [18], prof. I.B. Hetman-Pavlova [19], researcher Ye.O. Krutiy [20] were also of great importance for the coverage of the subject under study, as well as the opinions of the famous Kazakh civilian Prof. M.K. Suleimenova [21]. The analysis of the studies of these authors clearly illustrates the change in doctrinal approaches to the codification of PIL in the post-Soviet space under the influence of European and global trends, at least in the field of theoretical research.

2. MATERIALS AND METHODS

The methodological framework of the study included a set of general and special methods of scientific cognition, namely such methods of empirical research as comparison, methods of analysis and synthesis, induction and deduction, methods of formal legal, comparative, and historical analysis. At all stages of the study, the general philosophical (universal) method of cognition and the hermeneutical method were used to interpret theoretical concepts of private international law and the provisions of current legislation.

Considering the scientific task set, the main research method was the critical legal method. According to one of the most influential contemporary philosophers of science, K. Popper [22, p. 29-30], any solutions proposed in social research should be subjected to critical analysis, and solutions that are not available for criticism should be excluded as unscientific. The essence of the critical analysis was to verify the relevance of legal information and the completeness of the sources used, as well as to evaluate the proposed scientific solution. The paper also widely used the

method of comparative law, which allowed identifying the most important features of the problem under study: factors and prerequisites for the codification of PIL, approaches to the classification of national codifications of PIL from the standpoint of consolidating provisions, structural aspects of modern codifications of PIL, etc. The comparison covered acts of national codifications of PIL and international unified legal provisions. Diachronic comparison allowed tracing the development of national codifications of different countries according to the principle of time sequence, which made it possible to determine the vector of development of PIL codifications as a legal phenomenon and outline future trends. Synchronous comparison was applied to simultaneously existing codification phenomena.

The method of historical analysis allowed studying the stages of development and adoption of private international law codification acts in Ukraine and other states. The dialectical method provided an opportunity to analyse the PIL codification in its development, to identify trends in improving the legislation of EU Member States and third states in the context of harmonisation and European integration. The formal legal method was used to analyse the legal provisions governing certain types of cross-border legal relations and the practice of their application.

Using the method of deduction based on the doctrinal opinions of scientists, a conclusion was made about the general prerequisites for systematisation and codification of legislation in the field of PIL. The study also identified the specific features of the main types of codification used in the implementation of modern approaches, and evaluated their effectiveness. The inductive method helped conclude that the intersectoral approach to PIL codification reduces the effectiveness of regulatory influence, complicates the processes of updating and adapting to EU legislation. The Aristotelian method was used to analyse the content of the current legislation of Ukraine and other states in the field of private international law, identify problems of legislative technique used in certain regulations.

The results obtained thanks to special scientific research methods were corrected considering the data of related legal sciences (history and theory of law, civil studies, comparative law), which helped identify the historical and meaningful context of ideas about the forms and methods of systematisation of conflict-of-laws rules of modern lawyers and scientists of past centuries.

The theoretical framework of the study comprised scientific articles and monographic studies of leading domestic and foreign experts in the field of law theory, civil studies, private and public international law. In addition, the paper used specialised doctrinal studies covering the entire range of issues of systematisation and codification of PIL. The study analysed the concept of updating the Civil Code of Ukraine [4], prepared by the members of the working group formed by the Resolution of the Cabinet of Ministers of Ukraine, under the scientific supervision of Professor

1. Law of the Republic of Estonia “On Private International Law”. (2002, July). Retrieved from <https://www.riigiteataja.ee/akt/13242136>.

A.S. Dovhert and Prof. N.S. Kuznetsova¹. The regulatory framework of the study comprises modern national acts of codification of the PIL, foreign family, commercial, civil, and civil procedural legislation, international universal and regional agreements, EU regulations and directives. The study also investigated such regulations as the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I”)², Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility³; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (“Rome I”)⁴, etc.

3. RESULTS AND DISCUSSION

3.1 Refusal of autonomous codification of PIL as a component of the system update of private law in Ukraine

The idea of abandoning the comprehensive autonomous codification of private international law in Ukraine was proposed by the authors of the Concept as one of the factors of the “general process of reviving private law in Ukraine”, which should be implemented in the updated CCU⁵, which will become a “supermarket of legal opportunities for every citizen of Ukraine” [23]. The particular relevance of recodification with a change in the structure and a considerable expansion of the scope of regulation of the Civil Code of Ukraine⁶ is explained by pan-European trends, namely, the invention of “globally applicable legal provisions (solutions)” by scientists of the EU countries for many areas of private law relations, and the modernisation of “old” civil law codifications, considering European and universal international documents.

Systematic updating of legislation, admittedly, plays a critical role in the development of legal systems, at the same time, codification (recodification) is the most radical means that provides an orderly statutory regulation of certain legal relations, so this type of law-making requires a particularly careful and responsible attitude. In the theory of law, there have been many attempts to classify the types of systemic updates of legislation, but, as noted by the

outstanding Hungarian legal scientist C. Varga, each such project is born in a unique socio-historical environment, so attempts to deduce rigid schemes and regularities of the development of these processes do not make sense [11, p. 328].

The current socio-historical and political situation in Ukraine is, in fact, unique, and it determines the main actors of changes, goals, and volumes of modernisation of legislation. Further transformation of society, the impact of new technologies on all spheres of life, admittedly, require a corresponding update of the legal regulation of private relations, which participants in national and international legal events have been discussing in recent years, primarily emphasising the urgent need to introduce changes and amendments to the current CCU⁷. Well-known Ukrainian civilists, namely prof. O.E. Kharytonov and prof. A.S. Dovhert believe that the current civil legislation is outdated and needs a complete reinterpretation and adaptation to the European concept and new political values, as well as elimination of substantial gaps and shortcomings [9; 24]. Other scientists, in particular, prof. I.V. Spasibo-Fateeva, on the contrary, believe that the CCU of 2003 is based on a well-thought-out and consistently implemented scientific concept, “the application of provisions of the Civil Code did not reveal any obvious and gross shortcomings for 15 years. Therefore, it cannot be said that the reason for the modernisation of the Civil Code is its shortcomings, which must be eliminated” [25]. Despite some differences in opinions, almost all representatives of civilistic schools as well as foreign researchers [26] are united in the fact that the main reason for the crisis of regulation of civil law relations is the Economic Code of Ukraine, which creates other legal mechanisms compared to those proposed in the CCU, and “its existence does not allow reforming what modern society urgently demands” [27, p. 101]. Thus, the main efforts to date are aimed at “reforming the Civil Code in such a way that nobody could find what has left of the Economic Code” [25].

The proposed concept generally meets the goals outlined above, defining the abolition of the Economic Code of Ukraine⁸ as the primary task, it makes provision for clarifying the areas of application of civil legislation, in particular, the inclusion of “additional areas of social reality –

1. Resolution of the Cabinet of Ministers of Ukraine No. 6501 “On the Establishment of a Working Group on Recoding (Updating) of the Civil Legislation of Ukraine”. (2019, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/650-2019-y%D0%BF#Text>.

2. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. (2000, December). Retrieved from eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN.

3. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. (2003, November). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003R2201>.

4. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Retrieved from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>.

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

6. *Ibidem*, 2003.

7. *Ibidem*, 2003.

8. Economic Code of Ukraine. (2003, January). Retrieved from: <https://zakon.rada.gov.ua/laws/show/436-15#Text>.

entrepreneurship, corporate, or information spheres, etc.”. It is also proposed to expand the list of objects of civil rights. The concept contains detailed analytical materials and important suggestions for structural and meaningful changes to each book of the current Civil Code. Therewith, the argument for the abolition of the Family Code of Ukraine¹ and the Law on PIL² and the transfer of their provisions to the updated Civil Code is concise, and about ten pages of the Concept are devoted to both issues taken together. The least attention is paid to family law, Section 7 states that “the inclusion of family law in the updated Civil Code of Ukraine is considered by the Working Group as an important step towards the harmonisation of Ukrainian doctrine and *jus commune* legislation, but the main areas of the recodification are not elaborated, with a mere reference that they will be presented after discussing the concept at the stage of its completion [4, p. 59].

The issues of PIL recodification are considered somewhat more broadly. The section “Main areas of updating (recodification)” provides a critical analysis of the content of the current Law on PIL³, stating that the national conflict-of-laws theory and rule-making practice do not fully comply with the legislative achievements of European countries and suggesting updating the content of the Law on PIL⁴ in five identified areas: strengthening the private law foundations of conflict-of-laws rules; providing conflict-of-laws rules with greater flexibility while maintaining their certainty; “materialising” the choice of law; clarifying a one-vector approach to solving a conflict-of-laws issue; reformatting the text of the Law on PIL in the final book of the modified CCU. The appendices separately consider the factors and prerequisites for updating the CCU, the main results of the PIL codification in 2005, provide a brief analysis of the practice of applying the PIL provisions by the courts of Ukraine, address individual unification acts, legislation of the EU and foreign states, the fundamental ideas of which should be considered during recodification, and outline the expected results of modernisation.

Thus, the analysis of the text of the concept allows conditionally distinguishing three types of provisions concerning the PIL recodification: determination of general factors and prerequisites for its implementation; proposals for meaningful updating and improvement of individual PIL provisions; justification of the expediency of transferring conflict-of-law rules to the CCU⁵. Therefore, the

authors of this study attempted to consistently analyse the prerequisites and expediency of recodification using critical legal, comparative legal, dogmatic, and other methods of legal research and determine the degree of their validity, compliance with historical principles and modern needs of society, verify the presence of contradictions, compliance with fundamental principles, etc.

3.2 Analysis of the prerequisites for the PIL recodification and the feasibility of transferring conflict-of-laws rules to the CCU

The concept names five factors that led to the start of work on the recodification of private law, two of which are related to internal processes: the development of market legislation and increasing the potential of Ukrainian private law science. These processes are ongoing and, according to the authors of this study, cannot be considered as decisive factors of influence. Other factors are external in nature and are related to the legislative experience of both individual European countries and trends at the pan-European level, namely the availability of model provisions of international acts, the experience of recodification of civil codes of France⁶ and Germany⁷, a legislative example of new EU members.

The subject of analysis in the future will be precisely external factors in terms of their impact on conflict-of-laws regulation. However, according to the authors of the Concept, there is another factor at play that should encourage the PIL recodification, which is “the restoration of the national legal tradition regarding the placement of conflict-of-laws rules, since earlier the Civil Code of 1963 contained a similar part, although under a different name – “the application of foreign law and international treaties, the legal status and capacity of foreign citizens” [4, p. 126].

Admittedly, the Civil Code of the Ukrainian SSR⁸ (Articles 565-572) and Fundamentals of Civil Legislation of the USSR and Its Republics⁹ (Articles 156-170) contained about a dozen conflict-of-laws rules focused on regulating a very narrow scope of issues because the emergence of a “foreign element” in private relations was a rare phenomenon behind the “Iron Curtain” of a totalitarian state. However, even in those days there were ties with individual countries, and after the end of the Cold War, with a gradual change in foreign policy, the exchange in the private sphere intensified, which required expanding the scope of conflict-of-laws regulation. As early as in the 1970s, a

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

2. Law of Ukraine No. 2709-IV “On Private International Law”. (2005, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/2709-15#Text>.

3. *Ibidem*, 2005.

4. *Ibidem*, 2005.

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

6. Civil Code of France. (2020). Retrieved from <https://hindravi.files.wordpress.com/2019/12/french-civil-code.pdf>.

7. Civil Code of Germany. (2002). Retrieved from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf.

8. Civil Code of the Ukrainian SSR. (1963, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2709-15#Text>.

9. Fundamentals of Civil Legislation of the USSR and Its Republics. (1991, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/v2211400-91#Text>.

recognised specialist of that time, the author of a fundamental course on private international law, Prof. L.A. Lunts proposed to develop and adopt a special law on PIL, and in 1990 his students O. M. Sadikov, N. I. Martsheva and A.L. Makovskyi developed a Draft Law of the USSR “On Private International Law and International Civil Procedure”¹. The developers of this project are convinced that it did not become law due to departmental competition and administrative influence. Later, an abridged version of the text of the draft law was included in the Civil Code of the Russian Federation². However, to this day, Professor N.I. Marysheva and other well-known experts in the PIL defend the expediency of autonomous codification proposed by L.A. Lunts, believing that only in this way “the shortcomings of branch codification” can be successfully overcome. “The adoption of the federal law on private international law and international civil procedure would allow, firstly, most fully and consistently defining and distinguishing between general and special institutions in this area and, secondly, achieving goals that can be defined as 1) restoring gaps, 2) eliminating duplication, 3) eliminating contradictions. But most importantly, the introduction of this law would provide a rare opportunity to unite (or rather, reunite) related institutions of private international law, scattered across “branch compartments”, and would be one of the serious steps towards the development of truly private law” [18, p. 62].

Consequently, the reference to the regulatory framework and doctrine of the Soviet period, according to the authors of this study, is insufficiently justified. It is improbable that the approaches of that time can be considered the origins of the national legal tradition, given that the most authoritative scientists, whose professional development took place in the pre-Soviet period, even then saw the advantages of a comprehensive autonomous codification of private international law.

Next, the authors analysed the external factors and prerequisites for the PIL codification. The Concept names new pan-European trends as *the first factor*. Admittedly, the reform of European private law is of great importance for Ukraine, given the European integration aspirations and

the need to perform programme tasks to adapt national legislation to EU legislation. The European Union has been active in the field of PIL and international civil procedure for more than two decades, and today a supranational codification has been created, comprising EU directives and regulations in this area.

Association Agreement between Ukraine and the EU of June 27, 2014³ (hereinafter referred to as “the AA”) makes provision for the rapprochement of the private legislation of Ukraine to *acquis communautaire* in the field of corporate regulation, intellectual property, contractual relations, etc., but it does not contain special rules relating to the private international law issues. Only Article 24 of the AA⁴, which covers legal cooperation, notes that the parties intend to develop further judicial cooperation in civil cases based on relevant multilateral legal documents, in particular the conventions of the Hague Conference on Private International Law in the areas of international legal cooperation⁵, litigation, and child protection.

According to Prof. J. Basedow, such “blind spots” of the AA⁶ regarding the PIL are understandable when it comes to mutual recognition of court decisions within the EU, established by the Brussels I Regulation⁷ but the harmonisation of conflict-of-laws regulation, for example, relating to non-contractual obligations, established by other *acquis* documents, “does not affect the sovereignty of associated states, such as Ukraine”, and can contribute to the development of a good-neighbourly policy [8, p.16]. Comments by Prof. J. Basedow, according to the authors of this study, are quite reasonable. Unfortunately, the National Programme of Adaptation of Ukrainian Legislation to EU Legislation⁸, approved on May 18, 2004, does not make provision for particular measures for rapprochement of national conflict-of-laws regulation and does not contain a list of corresponding regulations of the EU and Ukraine.

It appears that upon developing the conceptual framework for modernising the provisions of the PIL, most of all, it is necessary to conduct an in-depth analysis of the EU regulatory framework and determine the list of *acquis* acts of priority importance, as well as the scope and limits of adaptation of legislation in this area. At present,

1. Draft Law of the USSR “On Private International Law and International Civil Procedure”. (1970, March). Retrieved from <https://zakon.ru/Tools/DownloadFileRecord/24255>.

2. Civil Code of the Russian Federation. (1994, November). Retrieved from http://www.consultant.ru/document/cons_doc_LAW_5142/.

3. Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part. (2014, June). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011#Text.

4. *Ibidem*, 2014.

5. Conventions, protocols, and principles. Hague Conference on Private International Law. (n.d.). Retrieved from <https://www.hcch.net/en/instruments/conventions>.

6. Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part. (2014, June). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011#Text.

7. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1. (2012, December). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215>.

8. Law of Ukraine No. 1629-IV “On the National Program for Adaptation of the Legislation of Ukraine to the Legislation of the European Union”. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1629-15#n16>.

the Concept briefly mentions only the EU regulations “Rome I”¹ and “Rome II”² as such that should improve the institution of autonomy of the will in Ukraine [4, p. 61].

Notably, such research and identification of priorities are quite a difficult and time-consuming task. As Prof. T.K. Grazianonotes, “over the past two decades, the number of EU regulations in the field of private international law has grown at breakneck speed, on the one hand, this has eliminated many gaps, but, on the other hand, it is becoming increasingly difficult to determine the scope of EU regulations. Moreover, the same legal terms have different meanings in different regulations, there are complex issues concerning the interaction of procedural provisions and provisions regarding the choice of proper law. That is, the system of private international law of the EU is becoming increasingly difficult to apply and risks losing its consistency” [28, p. 585].

The need to systematise EU conflict-of-laws legislation is currently being discussed by the European academic community and EU advisory bodies. As one of the options for solving the issue, the possibility of adopting the European Code of Private International Law is considered, the draft of which is being developed by experts of the Directorate General of Internal Policy of the EU [29, p. 75]. In the authors' opinion, this experience is worthy of attention and should also be considered when determining ways to update the PIL of Ukraine. The EU's legislative activity in the field of private international law has considerably affected the internal codifications of Member States, but it is impossible to completely replace national legislation at this stage of integration. Therefore, the study of options for modernising conflict-of-laws regulation at the national level is important for the further development of the Ukrainian PIL doctrine and legislative activities.

The second external factor to which the Concept attaches special importance are the civil codes of France³ and Germany⁴ – “bastions” of civil law in continental Europe, the reform of which over the past decade affects the legislative processes of neighbouring states. It is impossible to disagree with this statement, but it is worth noting that in the field of conflict-of-laws regulation, the approaches used in both countries are based on ideas that clearly do not coincide with the proposals of the authors of the Concept.

Germany is one of the countries that have an autonomous national PIL codification. In 1986, the Law “On New Regulation of Private International Law”⁵ introduced

Chapter Two of the Introductory Law to the Civil Code of Germany, entitled “Private International Law”. However, as Prof. Jan von Hein notes, due to the constant expansion of EU conflict-of-laws legislation, the scope of application of national provisions is becoming narrower, with courts applying internal conflict-of-laws rules only in the absence of corresponding European regulation or an international treaty [30].

France belongs to a number of states where private international law is not codified. Prof. Gilles Cuniberti, highlighting French legislation in the Encyclopaedia of Private International Law, notes as follows: “ironically, the birthplace of the Civil Code has never had a comprehensive regulation of private international law... except for three articles of the Civil Code of the Napoleonic era: Article 3 (on the applicable law) and Articles 14-15 (on the choice of jurisdiction)” [31, p. 2079]. Today, conflict-of-laws rules on the applicable law are contained in certain national laws governing family and property relations, numerous universal and bilateral agreements on private international law, as well as EU regulations. Conventionally, the practice of higher courts is of great importance for governing relations with a foreign element. French legal doctrine proceeds from the fact that the casuistry of legal matter necessitates the construction of decisions in accordance with each particular case, which judicial practice succeeds in much better than codes. Prof. Pierre Mayor, in particular, argues that “the extremely complex nature of the problems being solved requires compliance with the concept of legal provisions that are created based on consideration of particular situations. If we do not have such a beacon, then the human mind, whatever the inherent power of abstraction, risks falling into error” [32]. The French approach is not unique in Europe, the PIL is not codified in the Scandinavian countries (Denmark, Norway, Sweden, Finland, Iceland), as well as in Ireland and Cyprus.

Eleven European countries, five of which are former republics of the USSR (Russia, Belarus, Armenia, Latvia, Lithuania, Moldova), have carried out interbranch PIL codification and placed the main array of conflict-of-laws rules in one of the last sections (books) of the civil codes, and individual institutions in family, commercial, and other codified acts. However, the absolute majority (twenty-five countries) have special laws on the PIL, or the PIL codes (Belgium, Bulgaria, Turkey), which also include the rules of international civil procedure, that is, these countries have performed a comprehensive autonomous codification of PIL.

1. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Retrieved from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>.

2. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0864&from=en>.

3. Civil Code of France. (2020). Retrieved from <https://hindravi.files.wordpress.com/2019/12/french-civil-code.pdf>.

4. Civil Code of Germany. (2002). Retrieved from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf.

5. The Law of Germany on Private International Law. (1986, July). Retrieved from https://www.bgbl.de/xaver/bgbl/start.xav?start=/*%5B@attr_id=%27bgbl186s1142.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl186s1142.pdf%27%5D__1622817586757.

Consequently, the complexity of conflict-of-laws rules in the vast majority of legal systems does not prevent the PIL codification – on the contrary, codification in theory and practice is considered a means of overcoming excessive complexity and casuistry. As noted by R. Cabrillac, the code does not necessarily have to simplify, it can consolidate complex realities, “nothing prevents formulating decisions found by judicial practice in one or two abstract provisions” [7, p. 392]. Significant, from this point of view, is the PIL codification in the UK. Neither the complexity of English law nor its casuistry prevented the adoption of the PIL law in 1995¹, where a small scope of relations in this area has been settled, but with a trace of desire for broader codification. Notably, in most countries of the Anglo-Saxon legal system, unofficial PIL codifications are popular, such as the work Dicey, Morris & Collins *on the Conflict of Laws* [33], where the relevant precedents are systematised. In the United States, the first (1934) [34] and second (1971) sets of rules on conflict of laws are widely known [35] (*Restatements of the Conflict of Laws*), the latter is a 30-volume publication, where precedents are systematised and set out in the form of articles of the law. In 2014, the American Institute of Law commenced the development of the third Restatement, which should radically reconsider the American tradition of conflict-of-law regulation [36].

Thus, according to the authors of this study, there is no reason to assert that interbranch codification, that is, the placement of an array of conflict-of-laws rules in civil codes, is confirmed by the current legislative practice of European countries. On the contrary, the vast majority of countries in the continental legal system implemented autonomous codification of the PIL at the beginning of the third millennium, a trend that remains dominant and is gaining popularity even in common law states.

The *third external factor* considered by the authors of the Concept as decisive for applying an interbranch approach to the recodification of PIL in Ukraine is the experience of new EU Member States. However, the analysis demonstrates that only three countries that are considered as new EU members use a cross-branch approach, namely Romania, Latvia, and Lithuania. Other countries, including Bulgaria, Estonia, Poland, Slovenia, Slovakia, Hungary, Croatia, Czech Republic, etc., have separate laws or codes of the PIL.

The authors of this study are particularly interested in the experience of the Baltic States, which from the middle of the 19th century and prior to the Soviet occupation had a unified Baltic Civil Code [37], also had almost similar

legislation in the Soviet period, but after the restoration of independence chose entirely different approaches to the PIL codification. The least developed is conflict-of-laws regulation in Latvia, where certain provisions of the PIL are placed in the Introductory Law to the Civil Code, which was in force since 1937 and was updated in 1992 in an almost unchanged wording². Seventeen articles of this regulation (Articles 7-24) contain strict conflict-of-laws rules that have a structure inherent in codifications of the middle of the 20th century, while Article 25 establishes the priority of international treaties in governing cross-border private relations: “the rules of this law apply to the extent that otherwise is not established by international treaties and conventions in which Latvia takes part”.

In the Civil Code of Lithuania³ of 2000, a separate chapter covers the issues of the PIL, where five articles contain general rules of conflict-of-laws: application of foreign law, restrictions on the application of foreign law, determination of the content of foreign law, international treaties and reverse references, and forty-seven articles govern individual institutions of the general part of the PIL. The Civil Code of Lithuania also recognises the priority of international treaties, but reservations are made regarding their direct application and compliance with a unified approach to the interpretation of terms. The Lithuanian model is more advanced than the Latvian one, but it considerably differs from the latest codifications of Western European states. Scientists from Latvia and Lithuania and representatives of the judiciary, upon discussing ways to improve conflict-of-laws legislation, more frequently suggest referring to the experience of autonomous codifications of EU Member States. Thus, professor of Vilnius University *Valentinas Mikelėnas* considers that the absence of a single law on private international law and the dispersion of conflict-of-laws rules between different codes “is the weakest link in the reform of private international law” in Lithuania. The scientist hopes that this is only the first stage, the next step of the reform will no longer be a “leap into darkness” for Lithuanian judges and scientists [17, p. 181].

Unlike Lithuania and Latvia, Estonia has had a separate Law “On Private International Law” in force since 2002⁴, which was developed by German, Swiss, and Austrian lawyers, since Estonia traditionally belongs to the German legal family [15]. The law was drafted according to the Swiss model and included both the rules of the PIL and the rules of international civil procedure, but only conflict-of-laws regulation was ultimately introduced. The scientific literature notes the modernity and thoughtfulness of the principles for determining the competent legal order

1. Private International Law (Miscellaneous Provisions) Act. (1995, November). Retrieved from <https://www.legislation.gov.uk/ukpga/1995/42>.

2. Civil Law of Republic of Latvia. (1937, January). Retrieved from <http://www.vvc.gov.lv/export/sites/default/LV/publikacijas/civillikums.pdf>.

3. Civil Code of the Republic of Lithuania. (2000, July). Retrieved from <https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=14f2280hqa&documentId=TAIS.400592&category=TAD>.

4. The Law of Estonia on Private International Law. (2002, March). Retrieved from <https://www.riigiteataja.ee/akt/13242136>.

proposed by the Estonian legislation, the presence of blanket rules containing references to EU legislation and The Hague Conventions on private international law. The indisputable advantages also include detailed conflict-of-laws regulation of ownership relations for such objects as vehicles and securities, devoting articles to certain types of obligations (consumer agreements, assignment of claims, insurance agreements, etc.). Therewith, the regulation of certain PIL issues is contained in other regulations: in the Laws “On Succession”¹ of 2009, “On Investment Funds”² of 2004 and in Chapter 62 “Proceedings on Cases on Recognition of the Execution of Acts of Foreign Judicial and Other Bodies” of the Civil Procedural Code³ of 2005.

Assessing the prospects for the development and improvement of the regulation of cross-border relations in the legislation of the Baltic States, most legal experts note the need for more complete implementation of the fundamental provisions of EU acts regarding the PIL and the most developed European codifications [14, p. 147].

Prof. I.V. Hetman-Pavlova connects the specific features of the PIL codification in the former Soviet countries with the “Soviet tradition of interbranch codification of the PIL” [19, p. 56], which is deeply rooted in the minds of lawyers. That is why even the latest autonomous codifications of Estonia and Azerbaijan do not include the rules of international civil procedure, despite the global trend that has dominated since the beginning of the 1980s. Comparable to Latvia and Lithuania, a larger or smaller set of conflict-of-laws rules is contained in the civil codes of Moldova⁴, Kazakhstan⁵, Belarus⁶, Armenia⁷ and some other post-Soviet countries. As the well-known Kazakh scientist Prof. M. K. Suleimenov fairly pointed out upon answering a question regarding the prospects for the development of the PIL of Kazakhstan, “we abandoned the Soviet greatcoat but still remain in it. Therefore, we still use the Russian model in our activities. We shall see what the future brings” [38].

Thus, according to the authors, the modern form of codification of PIL in Ukraine, carried out considering the best practices of European codifications, demonstrates a departure from Soviet traditions. In one of the latest dissertation studies covering modern codifications of private international law, three types of modern codifications of

PIL are identified in terms of the form of consolidating rules, namely, interbranch, autonomous, and complex, and it is proved that since the mid-1980s, the world has been dominated by the trend of complex autonomous codifications. The overwhelming majority of experts in the PIL make the following arguments favouring autonomous codification:

- the separation of the PIL rules from the provisions of civil and economic legislation is necessary due to the special subject of regulation, which emphasises its independence as a definite branch of law;

- the presentation of the general PIL institutions in one specialised act allows them to subordinate all types of private legal relations with a foreign element, which contributes to a clearer and more detailed systematisation of legislation;

- combining the PIL rules in one act ensures their greater accessibility to all stakeholders, hence their effectiveness;

- integrated autonomous codification of the PIL avoids duplication of the same provisions, eliminates gaps and discrepancies between different conflict-of-laws rules;

- the adoption of a codified act on the PIL enables the reduction of the legislative array in general, contributing to the “legislation clearing”;

- there are no “mutual references” in full-scale codification, as well as fewer grounds for applying the analogy of law;

- the clear structure of special laws on the PIL enables the implementation of a comprehensive approach to regulating the most complex branch of law (which is called “higher mathematics of legal science”) and consistent distinction between its general and special institutions [20, p. 55-56].

As noted above, there is also a clear trend at this stage to incorporate the rules of international civil procedure into codified acts of the PIL. Examples include the Hungarian PIL Law (2017)⁸, Section IX of which covers the international civil procedure (Articles 66-126); the Law of Slovakia “On Private International Law and Rules of Procedure” (as amended in 2008)⁹ contains Part 2 “International Civil Procedure” (Articles 37-68); the Law of Czech Republic on PIL (as amended in 2015)¹⁰ governs not only the general provisions of international civil procedure, but also cross-border bankruptcy procedures (Articles 102-123).

1. The Law of Estonia on Succession. (2008, January). Retrieved from <https://www.riigiteataja.ee/akt/104012021036>.

2. Investment Funds Act of Estonia. (2016, December). Retrieved from <https://www.riigiteataja.ee/akt/131122016003>.

3. Code of Civil Procedure of Estonia. (2005, April). Retrieved from <https://www.riigiteataja.ee/akt/109042021017>.

4. Civil Code of the Republic of Moldova. (2002, June). Retrieved from <https://cis-legislation.com/document.fwx?rgn=3244>.

5. Civil Code of the Republic of Kazakhstan. (1994, December). Retrieved from <https://cis-legislation.com/document.fwx?rgn=3634>.

6. Civil Code of the Republic of Belarus. (1998, December). Retrieved from <http://law.by/document/?guid=3871&p0=Hk9800218e>.

7. Civil Code of the Republic of Armenia. (1998, May). Retrieved from http://www.translation-centre.am/pdf/Translat/HH_Codes/CIVIL_CODE_en.pdf.

8. The Law of Hungary XXVIII “On Private International Law”. (2017, April). Retrieved from <https://magyarkozlony.hu/dokumentum/ok/016703e04c2a3e6791025f6066da98b69fca22d8/megtekintes>.

9. The Law of the Republic of Slovakia No. 97 “On Private International Law and Rules of Procedure”. (1993, December). Retrieved from <http://jafbase.fr/docUE/Slovaquie/LoiDIP.pdf>.

10. Law of Czech Republic No. 91/2012 Sb. “On the Regulation of Private International Law”. (2012, January). Retrieved from <http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf>.

The Concept states that “the emergence of individual laws on the PIL in some countries is explained by tradition (Albania, Poland, Turkey, Czech Republic, Hungary, the countries of the former Yugoslavia, Japan) or the lack of civil codes or the initiated processes of their modernisation” [4, p. 68]. The authors of this study believe that this provision is subject to additional study because Poland, Hungary, the Czech Republic, Slovakia, Estonia, and even Turkey have national civil codes, and the legislation on PIL has been updating for the last 3-5 years. Thus, the authors also believe that the experience of the new EU members and the conducted theoretical research convincingly indicate that the integrated autonomous codification of the PIL is currently the most popular, relevant, and widespread form of systematisation of the PIL rules and international civil procedure.

Concluding a fundamental study on the codification of private international law, professor S. Symeonides wrote: “this book was written in 2013, which coincidentally matches with the 700th anniversary of Bartolus de Saxoferrato (1613-1357), the founder of modern private international law. Over the course of seven centuries, the world has become closer and more complex, and the art of codifying law has become a science... today private international law is not only *alive and well*, although less idealistic, but it is also more viable, refined, flexible, and pluralistic” [6, p. 425]. The development of the PIL as an independent branch of law, legislation, science, and academic discipline has taken place, and it deserves a modern autonomous codification.

CONCLUSIONS

Unlike many former Soviet bloc republics, after lengthy discussions in independent Ukraine, the idea of autonomous codification was implemented, the PIL law was a big step in the development of private law, meeting the requirements of an open society and embodying the best achievements of academic science of that period. The existence of a separate law emphasised the independence of the branch of private international law, which does not require “shelter” on the periphery of branch codifications, which was emphasised in the comments and reviews of the vast majority of scientists and practitioners.

The analysis of current scientific studies and legislation of individual European countries and the EU demonstrates that the idea of abandoning the autonomous codification of PIL proposed by the authors of the Concept is insufficiently justified and requires further investigation. Firstly, there is a controversial claim regarding the violation of national legal traditions of the Soviet period, the minimum number of conflict-of-laws rules in the civil legislation of that time, which were almost not applied in judicial practice, hardly give grounds to speak about the existence of tradition. Ukraine created conflict-of-laws regulation starting “from scratch”, based on the best European practices of the beginning of the third millennium. Secondly, the emphasis on the dominance of interbranch codification in the EU is confirmed neither by the modernisation results of the “bastions” of civil legislation, the codes of France and Germany, nor by the current legislative practice of the new EU members. On the contrary, the vast majority of countries in the continental legal system implemented autonomous codification of the PIL at the beginning of the third millennium, a trend that remains dominant and is gaining popularity even in common law states. The development of EU law-making in the field of PIL has put on the agenda the need to systematise numerous regulations, and the possibility of adopting a European Code of Private International Law is being considered as one of the options.

It is also worth considering the fact that the development processes of information and communication technologies, which have been ongoing for more than thirty years, have developed a new space of social interaction, which does not have territorial and temporary barriers. The role of law in the new so-called networked society is undergoing considerable changes, and the PIL is at their forefront, as it governs cross-border private law relations, which are currently distinguished by a certain anti-hierarchy and decentralisation. In such circumstances, the modernisation of conflict-of-laws legislation, the conceptual revision of individual institutions and the introduction of new ones are much more effective within the framework of a special law. Thus, the provisions of the Concept of updating the Civil Code of Ukraine regarding the PIL require further professional discussion and an in-depth analysis of the prospects for the proposed recodification.

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ВПЛИВ COVID-19 НА ТРУДОВІ І СОЦІАЛЬНО-ЗАБЕЗПЕЧУВАЛЬНІ ВІДНОСИНИ: НОРМОТВОРЧИЙ ДОСВІД БІЛОРУСІ ТА УКРАЇНИ

Анотація. У статті представлений короткий аналіз ситуації в Білорусі та Україні з поширенням коронавірусу COVID-19 та заходи, вжиті роботодавцями для оптимізації трудових відносин і відносин соціального забезпечення протягом 2020 року. Подається короткий огляд рішень, прийнятих президентами, парламентами, урядами та Міністерством охорони здоров'я обох країн, спрямованих на нерозповсюдження коронавірусної інфекції. Були розглянуті останні правки до Трудового кодексу Білорусі та Кодексу законів про працю України, які регулювали дистанційну роботу з 2020 року. Звертається увага на концепцію самоізоляції згідно із законодавством Білорусі та України, обмежувальні заходи, яких необхідно дотримуватися при самоізоляції громадян у зв'язку з інфекцією COVID-19, а також контакти 1-го та 2-го рівнів. Автори аналізують нові норми законодавства, що регулюють дистанційну та віддалену роботу, введені до трудового законодавства в Білорусі в 2020 році, в Україні в 2020 і 2021 роках. У статті представлений конкретний досвід Білорусі, де за розпорядженням президента розширено права роботодавців тимчасово перевести працівників без їх згоди, а також змінювати основні умови праці без внесення змін до Трудового кодексу. Автори дають оцінку таким законодавчим нововведенням. У статті розглядаються деякі питання соціальної підтримки працівників, які потрапили в ситуацію простою внаслідок зупинення діяльності організацій, які простоюють, а також самоізоляції. Наприкінці статті подано кілька пропозицій та рекомендацій щодо подальшої адаптації законодавства про працю та соціальне забезпечення в Білорусі та Україні в контексті пандемії COVID-19

Ключові слова: COVID-19, трудове право, соціальне забезпечення, трудові відносини, віддалена робота, трансфери

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THE IMPACT OF COVID-19 ON LABOUR AND SOCIAL SECURITY RELATIONS: RULE-MAKING EXPERIENCE OF BELARUS AND UKRAINE

Abstract. *The article presents a brief analysis of the situation in Belarus and Ukraine with the spread of coronavirus COVID-19 and measures taken by employers to optimise labour and social security relations during 2020. A brief overview of the decisions taken by Presidents, Parliaments, Governments and Ministry of Healthcare of both countries aimed at containment of coronavirus infection is presented. The latest changes in the Labour Code of Belarus and Labour Code of Ukraine, which regulated remote work since 2020, were touched upon. Attention is paid to the concept of self-isolation under the legislation of Belarus and Ukraine, restrictive measures that must be observed when self-isolating citizens in connection with COVID-19 infection, as well as level 1st and 2nd contacts. The authors analyse the new legislative provisions governing home and remote work, introduced into the labour legislation in Belarus in 2020, in Ukraine in 2020 and 2021. The article presents the specific experience of Belarus, where the presidential decree extended the rights of employers to temporarily transfer employees without their consent, as well as to change essential working conditions, and without making changes to the Labour Code. The authors give an assessment of such legislative innovations. The article deals with some issues of social support for employees who find themselves in a situation of downtime due to the suspension of the activities of organisations that are idle, as well as self-isolation. At the end of the article, some suggestions and recommendations are made for further adaptation of labour and social security legislation in Belarus and Ukraine in the context of the COVID-19 pandemic*

Keywords: *COVID-19, labour law, social security, labour relations, remote work, transfers*

INTRODUCTION

In the conditions of the COVID-19 coronavirus pandemic announced by the World Health Organization on March 11, 2020, most of the world's states have taken measures to close borders and restrict the movement of citizens within their countries. However, many countries have imposed quarantine or even declared a regime of emergency in connection with the pandemic COVID-19 (UK, India, China, most countries of the European Union, Russia, USA, Ukraine), some states (Belarus, Sweden) were limited to milder measures, without lockdown and limiting the right of its citizens to move within their own countries. From 7 to 9 July 2020, the ILO held a Global summit on COVID-19 and the world of work, at which the Director General of the ILO, Guy Ryder, heads of state and government of many countries of the world, as well as international experts spoke. Currently, the agenda of international legal measures to overcome the consequences of the COVID-19 pandemic is being actively discussed both globally and regionally (in particular, in the European Union and the Eurasian Economic Union).

The main question on the agenda: how will the world of work change after the COVID-19 pandemic? In Belarus, 288,267 people were registered with a positive test for COVID-19 as at 01.03.2021. A total of 4,908,397 tests were performed. During this period 1,985 patients with detected coronavirus infection died. 278,661 patients who had previously been diagnosed with COVID-19 recovered and were discharged. According to sentinel surveillance, the frequency of detection of SARS-CoV-2 virus RNA (PCR) in experimental samples for 14 KN. 2021 was 11.9% [1]. 1,357,470 cases of COVID-19 were recorded in Ukraine as at 2 March 2021. Since the pandemic had begun, 26,212 people have died from the coronavirus, and 1176918 people have recovered. A total of 6,948,980 tests were made [2].

In April 2020, a new concept of "self-isolation" appeared in the legislation of Belarus. Since January 2020, changes to the Labour Code of Belarus have legalised the use of distance work, and distance learning elements are widely used in universities. The rules on flexible working

time contained in Articles 128-130 of the Labour Code of the Republic of Belarus¹ (hereinafter referred to as “the Labour Code of Belarus”), but they are less adapted to the conditions of COVID-19 pandemic because they were introduced in 2000 and have not been changed since.

The Law of Ukraine No.540-IX² was adopted on 30 March 2020, which set out the definition of an employment agreement in a new wording, consolidated the concepts of flexible working hours and remote (home) work, and made provision for the payment of partial unemployment benefits for the period of implementation of measures to prevent the emergence and spread of COVID-19, introduced by the quarantine established by the Cabinet of Ministers of Ukraine. The Law of Ukraine No.555-IX for the first time consolidated the concepts of self-isolation and observation on 13 April 2020³. On February 4, 2021, the Verkhovna Rada of Ukraine adopted Law 1213-IX “Amendments to Certain Legislative Acts Concerning the Improvement of Legal Regulation of Television Networks”⁴. The Law, in particular, regulates the issue of flexible working hours and introduces the conclusion of an employment agreement for telework and an employment agreement for home work, the conditions of this introduction, the obligations of the employer and the employee under such employment agreements, etc.

Despite the fact that the ILO, human rights activists, and scholars of labour law had already been seeking legislative measures to combat the effects of the COVID-19 and its impact on labour relations in individual countries [3-7], a review was published on the legislative measures taken in Belarus [8] and Ukraine [9], this paper was the first attempt at comparative legal studies of legal experience in Belarus and Ukraine.

Throughout 2020, attempts were made to analyse the adaptation of labour legislation and legislation in the field of social security in the context of the COVID-19 pandemic in individual countries of the European Union [10], EAEU member states (Belarus, Kazakhstan, Kyrgyzstan and Russia). The studies of such researchers as S.Yu. Golovina, K.S. Ramankulov, K.L. Tomashevski, M.Kh. Khasenov [11], N.L. Lyutov [12], among Ukrainian scientists – S.V. Venediktov, Ya.V. Simutina [9; 13], etc. deserve special attention.

This study attempted a comparative analysis of the legislative measures adopted in Belarus and Ukraine aimed at reducing the negative consequences for labour relations and social support of the population in the context of the economic crisis caused by the COVID-19 pandemic.

1. MATERIALS AND METHODS

The paper is based on the study of scientific achievements of foreign and Ukrainian scientists and the results of research on Ukrainian and foreign legislation on the impact of COVID-19 on labour and social security relations. The study analysed the developments of labour law representatives of Ukraine and Belarus regarding the subject matter, as well as the legislative provisions of both Ukraine and Belarus aimed at providing additional social and economic guarantees in connection with the spread of coronavirus disease (COVID-19). Several proposals and recommendations were made for further adaptation of labour and social security legislation in Belarus and Ukraine in the context of the COVID-19 pandemic.

To achieve the purpose of the study, an appropriate research algorithm was selected, typical for the set of collected materials, conditions and forms of work. The methodological basis of the study were general scientific and special scientific methods, the use of which is due to the purpose of the study and the need to use the theoretical achievements of the science of labour law and social security law in the legislation of Ukraine and Belarus. The study employed such methods as dialectical, systematic analysis, historical, comparative law, formal law, laws of logic, and others. In their interaction, all these methods enabled a full-fledged completed legal study, each of them was used at a certain stage of the study, so the methodology is balanced, thorough, and comprehensive.

The basis of the research methodology was the dialectical method as an objectively necessary logic of the movement of cognition, which allows considering the studied phenomenon in its development, the relationship due to the material conditions of social life. This method helped cover the essence of the impact of COVID-19 on labour and social security relations. The dialectical method allowed considering the legal regulation of home and remote work, self-isolation, and determining the expediency of legislation proposed in 2020-2021 aimed at containment of coronavirus infection. The Aristotelian method provided an opportunity to study the current state of the situation in Belarus and Ukraine with the spread of COVID-19 coronavirus and the measures taken by employers to optimise labour and social security relations during 2020. The comparative legal method was used in the review and comparison of the latest amendments to the Labour Code of Belarus and the Labour Code of Ukraine⁵, which regulated teleworking from 2020. The study considered the

1. Labour Code of the Republic of Belarus. (1999, July). Retrieved from <https://cis-legislation.com/document.fwx?rgn=2562>.

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. Law of Ukraine No. 555-IX “On Protection of the Population from Infectious Diseases” to Prevent the Spread of Coronavirus Disease (COVID-19)”. (2020, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/555-20#Text>.

4. Law of Ukraine No. 1213-IX “On Amendments to Certain Legislative Acts of Ukraine Concerning Improvement of Legal Regulation of Home, Remote Work and Work with Application of Flexible Working Hours”. (2021, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/1213-IX#Text>.

5. Labour Code of Ukraine. (1971, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/322-08#Text>.

concept of self-isolation introduced in accordance with the legislation of Belarus and Ukraine as a restrictive measure in connection with COVID-19 infection. The specific experience of Belarus has been studied, where the President's decree expanded the rights of employers to temporarily transfer employees without their consent, as well as to change the basic working conditions and without amending the Labour Code of Belarus. The study analysed the new legislative provisions governing home and remote work, which were introduced into the labour legislation in Belarus in 2020, and in Ukraine in 2020 and 2021. A brief overview of the decisions taken by the presidents, parliaments, governments and submitted by the Ministries of Healthcare of both countries to prevent the spread of coronavirus infection. The use of the comparative legal method made it possible to determine the place of home and remote work in the structure of a complex legal act 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 home and remote work in the system of modern organisation of labour of employees. System analysis convincingly proved the need to develop home and remote work in modern conditions.

2. RESULTS AND DISCUSSION

2.1 Legal regulation of self-isolation in Belarus and Ukraine

In accordance with Article 23 of the Law of the Republic of Belarus No. 340-Z “On Sanitary and Epidemiological Welfare of the Population” dated January 7, 2012¹, restrictive measures are introduced (cancelled) by the decision of the Council of Ministers of the Republic of Belarus, local executive and administrative bodies on the recommendation of the chief state sanitary doctors. The list of restrictive measures and the procedure for their implementation are determined by the Ministry of Healthcare of the Republic of Belarus. In accordance with these rules to prevent the spread of infection caused by a coronavirus COVID-19, a Resolution of the Council of Ministers of the Republic of Belarus No. 208 “On Introduction of Restrictive Measures” dated 08.04.2020² (hereinafter referred to as “the Resolution No. 208”) introduced self-isolation on the territory of the Republic of Belarus as a restrictive measure.

Resolution No. 208 legally defined the concept of self-isolation as a system of measures that ensure the isolation (in the home or other conditions) of persons who came from epidemic countries, or persons who had or could have had contact with persons who have infectious diseases, and (or) persons who are carriers of pathogens of such infectious diseases, and (or) persons who are recovering from infectious diseases.

According to Paragraph 3 of Resolution No. 208,

three categories of citizens of the Republic of Belarus, foreign citizens and stateless persons are subject to self-isolation:

- 1) having COVID-19 infection;
- 2) related to contacts:
 - first-level contact with persons with COVID-19 infection – within 10 calendar days from the date of last contact;
 - second-level persons with COVID-19 infection, in the presence of one or more respiratory symptoms, if such citizens are children under the age of 10 and attend a pre-school or general secondary education institution (hereinafter referred to as minors), – for the period of the presence of these symptoms.
- 3) persons who arrived in the Republic of Belarus from countries where cases of COVID-19 infection are registered.

The criteria for classifying citizens as persons who have these first- and second-level contacts are established by the Resolution of the Ministry of Healthcare of Belarus No. 36 “On the Implementation of the Resolution of the Council of Ministers of the Republic of Belarus No. 208 dated 08.04.2020” dated 10.04.2020³;

3) persons who arrived in the Republic of Belarus from countries where cases of COVID-19 infection are registered.

A citizen who is subject to self-isolation is handed a requirement to comply with the rules of behaviour in self-isolation.

In accordance with Paragraph 6 of Resolution No. 208, citizens who are in self-isolation are obliged as follows:

- 1) not to leave the place of residence (stay), including not to visit places of work (study), trade and public catering facilities, sports, exhibition and concert halls, cinemas, train stations and other places of mass stay of people, except in the following cases of extreme necessity:
- 2) visit the nearest grocery store or pharmacy to purchase the necessary goods;
- 3) notify the employer of the reason for absence from work;
- 4) exclude the use of services that involve contact with other persons, except in cases where such services are required to ensure the safety of life;
- 5) if your health condition worsens (body temperature rises to 37°C or higher, coughing, shortness of breath), contact an ambulance.

If a citizen violates the requirement of self-isolation, the temporary disability benefit is assigned at the rate of 50 percent of the benefit calculated in accordance with the law. In addition, violation of the requirements for self-isolation may involve administrative or criminal liability [8].

The Law “On Amendments to the Law of Ukraine No. 555-IX “On Protection of the Population from Infectious Diseases” to Prevent the Spread of Coronavirus Disease

1. Law of the Republic of Belarus No. 340-Z “On Sanitary and Epidemiological Welfare of the Population”. (2012, January). Retrieved from <https://pravo.by/document/?guid=3961&p0=H11200340>

2. Resolution of the Council of Ministers of the Republic of Belarus No. 208 “On Introduction of Restrictive Measures”. (2020, April). Retrieved from https://pravo.by/upload/docs/op/C22000208_1586379600.pdf

3. Resolution of the Ministry of Healthcare of Belarus No. 36 “On the Implementation of the Resolution of the Council of Ministers of the Republic of Belarus No. 208 dated 08.04.2020”. (2020, April). Retrieved from <https://pravo.by/document/?guid=3961&p0=W22035248>

(COVID-19)” was adopted in Ukraine on 13 April 2020¹. It is aimed at legal regulation of issues related to the stay by citizens in self-isolation, observation, in temporary health care institutions during the implementation of measures counteracting the spread of COVID-19, provided for in the decision of the Cabinet of Ministers of Ukraine on the quarantine setting, as well as expanding the powers of executive authorities and local self-government bodies in the case of a quarantine setting while it is valid. The Law No. 555-IX² and legal acts adopted in its development provide for the following innovations:

A. The concept of “self-isolation” has been defined (the stay of a person in relation to whom there are reasonable grounds for the risk of infection or spread of an infectious disease in a set by him/her place (placement) in order to comply with anti-epidemic measures on the personal obligation basis) and “observation” (the stay of a person (in relation to whom there is at risk of an infectious disease spreading) in the observatory for the purpose of his/her examination and medical observation). If we analyse the definition of self-isolation, then we can make the following conclusions regarding isolated persons: 1) there should be reasonable grounds to consider that a person is at risk of infection or can spread infectious diseases him/herself. However, the legislation does not set a state one or other body establishing a list of justified grounds; 2) the mentioned person must take personal obligations of self-isolation in the place (placement) specified by him/her.

B. It has been set that the grounds and procedure for mandatory self-isolation, observation and hospitalisation are determined by the Cabinet of Ministers of Ukraine in a decision on the quarantine establishment. Persons who need self-isolation are: 1) persons who have had contact with a patient with a testified COVID-19 case, except for persons who used personal protective equipment during the performance of their duties; 2) persons in relation to whom there is a suspicion of infection, or persons who are sick with COVID-19 in a mild form and do not require hospitalisation; 3) persons who have given their consent to self-isolation using the application “Act at Home” of the Unified State Web Portal of Electronic Services before crossing the state border or checkpoints of entry into and out of the temporarily occupied territory; 4) persons who have reached the age of 60. But the fourth group does not include persons from among public servants and employees of state bodies and local self-government bodies, people's deputies and deputies of local councils, judges, military personnel and employees of the Armed Forces of Ukraine, other military formations and law enforcement agencies, as well as persons who carry out activities related to preventing the spread of COVID-19, ensure the activities of legal entities that: carry out activities and provide services in the energy, chemical industry, transport, informational-communication technologies, electronic communications,

banking and financial sectors, defence industry; provide services in the spheres of life support of the population, in particular in the spheres of centralised water supply, sewerage, supply of electricity and gas, food production, agriculture, health care, are communal, emergency and rescue services, population emergency help services; are included in the list of state property objects of strategic importance for the economy and security of the state; are objects of potentially hazardous technologies and industries.

The grounds for observing a person are: a person's application for voluntary observation due to the impossibility of the requirements of self-isolation adherence; the conditions of self-isolation violation by a person for a second time (except for persons who are a subject to self-isolation solely in connection with reaching the age of 60); refusal of a person who had contact with patients or who has signs of COVID-19 infection from a medical examination according to the attending physician appointment; crossing the state border by a person; crossing by a person the checkpoints of entry to the temporarily occupied territories of Donetsk and Luhansk regions, the Autonomous Republic of Crimea and the city of Sevastopol and leaving them.

C. Provided for the issuance and payment of certificates of incapacity to work for the period of persons being in self-isolation, observation, in temporary healthcare institutions;

D. The conditions of leaving the quarantine zone by citizens are determined.

Persons who suffer from infectious diseases in Ukraine are obliged:

- to apply measures recommended by medical professionals to prevent the spread of infectious diseases;
- to comply with the requirements and recommendations of medical workers on the procedure and conditions of treatment, to comply with the mode of operation of healthcare institutions and scientific institutions in which they are treated;
- undergo the necessary medical examinations and inspections on time.

2.2. Rules on home work and remote work in the Labour Code of Belarus and the Labour Code of Ukraine

The Law No. 219-Z “On Changing Laws” dated 18.07.2019 introduced global amendments to the Labour Code of Belarus, which came into force on 28.01.2020. In particular, the Labour Code has received a new Chapter 25, which contains special rules of labour law that regulate the specifics of labour relations with remote employees. Remote employees are individuals who have concluded an employment agreement for remote work. Remote work is work that an employee performs outside of the employer's location using information and communication technologies to perform this work and interact with the employer.

A form of non-standard employment, such as home

1. Law of Ukraine No. 555-IX “On Protection of the Population from Infectious Diseases” to Prevent the Spread of Coronavirus Disease (COVID-19)”. (2020, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/555-20#Text>

2. *Ibidem*, 2020.

work is closely related to remote work. The work of homeworkers is regulated by Chapter 25 of the Labour Code of Belarus. This chapter regulates the specific aspects of labour relations such as concluding, changing and terminating an employment agreement with remote employees, and allows for extensive self-regulation of working hours and rest time by remote employees. Thus, the Belarusian legislator shortly before the COVID-19 coronavirus pandemic had created a legal basis for the use of remote work by employers. According to available information, employers use this flexible form of employment quite widely, transferring many of their employees to remote work by concluding additional agreements to employment agreements [14, p. 40].

However, the Belarusian legislator does not regulate the mechanism for switching to remote work with an employee who previously worked in an office, that is, at the employer's location. Similarly, there are no rules in Belarus that allow for a combination of office work and remote work, although such forms of employment are used in practice during the period of COVID-19 distribution. We believe that in the future, the mode of remote work and partially remote work should be regulated in Chapter 10 of the Labour Code of Belarus "Working time", including the minimum period for warning an employee about switching to this mode.

The only legal possibility for organising distance working in Ukraine for a long time was home work, which was regulated by the Regulations on the Working Conditions of Homeworkers (1981)¹. However, that legal act of the Soviet period was not adapted to modern realities and, accordingly, did not provide for the possibility of performing work using computer technologies, video chats and other similar technical innovations. The rules and requirements for the transition to such a mode of operation were complex and excessive until recently. Thus, the Regulation on Working Conditions for Homeworkers obliges the administration, together with representatives of the trade union, to examine the living conditions of citizens who have expressed a desire to do homework. Representatives of local fire and sanitary inspections may be involved in order to determine general rules for fire safety and sanitation, as well as the living conditions of homeworkers performing certain types of homework. These requirements seem being absurd, but the Ministry of Social Policy of Ukraine, in a letter No. 30/1/204-19 dated 19 February 2019², emphasised that the homeworkers' living conditions must be examined.

And only on 17 March 2020, the Law of Ukraine No. 530-IX³ was adopted, which provided employers with the opportunity to entrust workers with tasks should be done at home, and already on 30 March 2020, the Law of Ukraine No. 540-IX⁴ regulated distance working precisely at the level of the Labour Code – and not only for the quarantine period, but also for all other cases according to the agreement of the parties.

Distance working (home, remote work) is defined as a form of labour organisation in which an employee performs his/her work at one's place of residence or in another place of his/her choice, including using informational-communication technologies, but outside the employer's premises. As a general rule, when concluding an employment agreement for remote work, compliance with the written form of the agreement is mandatory. However, at the time of the spread of the epidemic threat, special rules apply – the condition for remote work could be set in the employer's order without the obligatory conclusion of an employment agreement with the employee in written form.

Today, a serious drawback is the lack of a legislative ban on entrusting remote workers with performing those types of work, which cause inconveniences for their neighbours. While working remotely, employees can use working hours at their discretion, the internal labour regulations do not apply to them. But the employer needs to ensure that the work performed is recorded using any accounting methods on which the parties have agreed. The duration of the working time of employees who perform work remotely cannot exceed the provisions stipulated by the labour legislation of Ukraine (40 or less hours per week). It should be emphasised that distance workers are fully covered by labour legislation, taking into account the specifics and features of remote work set in the employment agreement. That is, the performance of remote (home) work does not entail any restrictions on the scope of labour rights of workers [13; 15]. If an employee who is at remote work properly performs all the obligations assigned to them, their labour is paid in full. That is, not only the official wage itself is paid, but also other components of the salary provided for by the conditions of the employment agreement (additional payments, allowances, bonuses).

Law 1213-IX of February 4, 2021⁵ introduces two independent types (forms) of work – remote and home. The employer has the right when concluding an employment

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. Letter of the Ministry of Social Policy of Ukraine No. 30/1/204-19 (2019, February). Retrieved from <https://www.profiwins.com.ua/uk/letters-and-orders/ministry-of-labour-and-social-policy/15136-30s-19.html>

3. 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>.

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)". (2020, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/540-20#Text>.

5. Law of Ukraine No. 1213-IX "On Amendments to Certain Legislative Acts of Ukraine Concerning Improvement of Legal Regulation of Home, Remote Work and Work with Application of Flexible Working Hours". (2021, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/1213-IX#Text>

agreement for remote or home work to receive information about the place of residence or other place of his choice, where the job function will be performed (in order to properly register the employee for remote work). It is possible to acquaint the employee with the rules of internal labour regulations, collective agreement, local regulations of the employer, notices and other documents that the employee must be acquainted with in writing by exchanging electronic documents. According to the Law¹, an employee can remotely get acquainted with the requirements for labour protection through the use of modern information and communication technologies, including video communication. The employee has the opportunity to combine remote work with the performance of work in the normal mode at workplaces on the premises or on the territory of the employer.

2.3. New opportunities for temporary transfers and changes in essential working conditions in Belarus in comparison with Ukrainian model

The Decree of the President of the Republic of Belarus No. 143 “On Support of the Economy” of 24.04.2020² (hereinafter referred to as “the Decree No. 143”) extraordinary expanded rights of employers to change labour relations with employees.

According to Paragraph 14 of the Decree No. 143, employer have the right to change the essential working conditions of an employee, with the exception of salary reducing, due to justified reasons for the adverse impact of the epidemiological situation on the activities of the company. In this case, the employer must notify the employee of changes in essential working conditions in writing no later than one day in advance. It is appropriate to remind that according to Part 3, Article 32 of the Labour Code of Belarus, a period of warning of employees about change the essential working conditions is provided for no later than one month. For comparison, in Russia, such warnings should be issued by the employer 2 months in advance, in Kazakhstan – 1 month before the corresponding changes. A Belarusian employee finds himself in a difficult situation: to agree to work in significantly changed working conditions from the next day, or to be dismissed for refusing to continue working due to changes in significant working conditions with the payment of a two-week average salary.

In Paragraph 14 of the Decree No. 143 there is another rule, which also limits the labour rights of workers: employers are entitled to make temporary transfer, including to another branch or another company in connection with production necessity, caused by the unfavourable impact of the epidemiological situation the activity of the employer, and also for replacement of an absent employee without the employee's consent for up to three months. Note that before the adoption of the Decree No. 143 temporary transfers in connection with industrial necessity were limited to one month without the consent of employees (Article 33 of the Labour Code of Belarus³). Moreover, even this rule was criticised by scholars, since it bordered on forced or compulsory labour, which is prohibited both by the Article 41 of the Constitution of Belarus⁴ and by ratified ILO conventions No. 29⁵ and No. 105⁶. We hope that the provisions of Paragraph 14 of the Decree No. 143⁷, which restrict the labour rights of employees and force them to change essential working conditions and forced temporary transfers for them, will be in effect temporarily, only during the period of the epidemic rise of the COVID-19 disease and when the epidemic situation in the country improves, will be cancelled.

In accordance with the requirements of Part 3, Article 32 of the Labour Code of Ukraine⁸ in connection with changes in the organisation of production and labour, it is allowed to change essential working conditions while continuing to work in the same specialty, qualification or position. The employee must be notified in written form no later than two months in advance about changes in essential working conditions – systems and amounts of remuneration, benefits, operating mode, shorter working hour's establishment or cancellation, combination of professions, changes in grades and titles of positions and others. However, in case of emergency, for example, during the spread of COVID-19 period, admittedly, there is no such time reserve. Actions should be done quickly and decisively. The disadvantage of the current labour legislation of Ukraine is the absence of a legal provision that would allow changing the essential working conditions for the period of a pandemic in a simplified manner and as soon as possible.

In the full absence of work that could be entrusted to employees for the quarantine period, the employer has the right to declare a downtime by his/her order. The employee's

1. Law of Ukraine No. 1213-IX “On Amendments to Certain Legislative Acts of Ukraine Concerning Improvement of Legal Regulation of Home, Remote Work and Work with Application of Flexible Working Hours”. (2021, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/1213-IX#Text>

2. Decree of the President of the Republic of Belarus No. 143 “On Support of the Economy”. (2020, April). Retrieved from https://pravo.by/upload/docs/op/P32000143_1587762000.pdf.

3. Labour Code of the Republic of Belarus. (1999, July). Retrieved from <https://cis-legislation.com/document.fwx?rgn=2562>

4. Constitution of the Republic of Belarus. (1994, March). Retrieved from <https://president.gov.by/en/gosudarstvo/constitution>

5. Home Work Convention of the International Labour Organization (No. 29). (1930, June). Retrieved from <https://www.ilo.org/global/standards/lang--en/index.htm>

6. Home Work Convention of the International Labour Organization (No. 105). (2000, October). Retrieved from Retrieved from <https://www.ilo.org/global/standards/lang--en/index.htm>

7. Decree of the President of the Republic of Belarus No. 143 “On Support of the Economy”. (2020, April). Retrieved from https://pravo.by/upload/docs/op/P32000143_1587762000.pdf

8. Labour Code of Ukraine. (1971, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/322-08#Text>.

consent is not required in that case, and the downtime lasts until the work resumes. At the same time, employees retain the right to be paid for the downtime in the amount of at least 2/3 of the rate (wage) in the absence of work, including for the quarantine period.

According to Art. 103 of the Labour Code of Ukraine¹, the employer must inform the employee about new or changes in the existing conditions of remuneration to the side of deterioration not later than two months before their introduction. Thus, the introduction of a distance working regime at the enterprise is not a basis for a unilateral reduction of wages for employees. The employer notifies the employee about the reduction in wages 2 months in advance in any case and is able to introduce such a reduction only after the end of this period.

Decree of the President of the Republic of Belarus No. 512 of 31.12.2020², which entered into force on 08.01.2021 (hereinafter referred to as “the Decree No. 512”), made some changes and amendments to the Decree No. 143. The Decree No. 512 grants employers the right to “declare down time caused by the adverse impact of the epidemiological situation on the employer’s activities, without limiting the total duration during the calendar year. The employee is idle, the total duration of which exceeds a total of six months in a calendar year, a valid reason for early termination at the request of the employee fixed-term employment agreement (contract) in the period of downtime”. To clarify this rule, let us recall what is meant by downtime in the labour legislation.

According to Part 1, Article 34 of the Labour Code of Belarus³, downtime is a temporary absence of work due to an industrial or economic nature (failure of equipment, mechanisms, lack of raw materials, materials, electricity). In this case, the total duration of downtime, as a general rule, may not exceed a total of six months during a calendar year.

Thus, the Decree No. 512⁴ essentially removed the restrictions for employers on the duration of downtime caused by the adverse impact of the epidemiological situation on the activities of this organisation. If previously the downtime was limited to only 6 months during a calendar year, now it can last for the entire calendar year or most of it. This provision, on the one hand, allows retaining labour relations with an employee longer, without resorting to staff reduction, and on the other hand, it carries a negative aspect for employees: a low level of their income during downtime (only 2/3 of the wage rate of a worker or employee’s salary). Under Part 1, Article 71 of the Labour

Code of Belarus, in case of non-performance of production standards, defects, idle time through no fault of the employee, the wages may not be less than two thirds of installed him tariff rate (tariff salary), salary. Admittedly, this rule sets only the lower threshold of the guarantee payment in case of downtime not caused by the employee. In cases stipulated by a collective agreement, an agreement, local legal acts, an employment agreement (contract) or an order of the employer, you can increase this guarantee payment, for example, to the amount of the salary (tariff rate).

The Decree No. 512⁵ also granted employers the right to release an employee from work due to his or her sick condition for up to three calendar days in total during the term of this Decree without providing the employee with a certificate of disability. Moreover, the preservation of average earnings for the period of release from work may be provided for by a collective agreement or other local legal act of the organisation, with the exception of budget organisations and other organisations receiving subsidies, whose employees are equal in remuneration to employees of budget organisations. This provision is an innovation in the labour legislation of Belarus, since the Labour Code does not contain legal provisions that allow “releasing an employee from work” in connection with their worsened condition before allowing their suspension if said condition hinders work.

2.4. Payment of temporary disability benefits, guarantees for employees returning from foreign business trips: experience of Belarus and Ukraine

The single real form of material support for the population in the conditions of the epidemic upsurge and the global economic crisis on the part of the Belarusian state at the moment can be considered the expansion of the grounds for temporary disability benefits.

Paragraph 15 of the Decree No. 143⁶ prescribes that temporary disability benefits should be paid to persons actually caring for a child under the age of 10 who attend a pre-school or general secondary education institution, if this child is a first-level contact with persons with COVID-19 infection, or a second-level contact with persons with COVID-19 infection, if there have one or more respiratory symptoms. This allowance is assigned in accordance with the procedure established by the Council of Ministers of the Republic of Belarus for granting temporary disability benefits in the case of caring for a sick child under the age of 14.

If the temporary incapacity for work of the insured

1. Labour Code of Ukraine. (1971, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/322-08#Text>.

2. Decree of the President of the Republic of Belarus No. 512. (2020, December). Retrieved from https://pravo.by/upload/docs/op/P32000512_1609966800.pdf

3. Labour Code of the Republic of Belarus. (1999, July). Retrieved from <https://cis-legislation.com/document.fwx?rgn=2562>.

4. Decree of the President of the Republic of Belarus No. 512. (2020, December). Retrieved from https://pravo.by/upload/docs/op/P32000512_1609966800.pdf

5. *Ibidem*, 2020.

6. Decree of the President of the Republic of Belarus No. 143 “On Support of the Economy”. (2020, April). Retrieved from https://pravo.by/upload/docs/op/P32000143_1587762000.pdf.

person is caused by quarantine, imposed by the sanitary-epidemiological service bodies in Ukraine, financial assistance from the Social Insurance Fund of Ukraine is provided from the first day and for the entire period of absence at work for this reason [16]. Assistance for temporary disability as a result of staying in health care institutions, as well as self-isolation under medical supervision in connection with the implementation of measures aimed at preventing the occurrence and spread of COVID-19, is paid by the Social Insurance Fund to insured persons, starting from the sixth day of disability for the entire period up to complete recovery. Employees for the period of stay in specialised health-care institutions, as well as for self-isolation under supervision in connection with the implementation of measures aimed at preventing the emergence and spread of COVID-19, will be paid assistance in the amount of 50 percent of the average wage (income), regardless of the length of insurance period. Persons whose work is related to serving the population can receive a certificate of temporary disability due to suspension from work during quarantine, if: 1) these persons have been in contact with infectious patients or are carriers of bacteria; 2) if it is impossible to temporarily transfer these persons with their consent to another job that is not associated with the risk of the spread of infectious diseases.

An uncountable achievement of Ukraine is the introduction of partial unemployment benefits for the quarantine period. This benefit is provided by the employment centre to employers and is paid to employees according to the request of the employer for its payment (except for persons who receive a pension and work part-time) in the event that they lose part of their salary as a result of a forced reduction in the duration of working hours due to the termination (reduction) of activities. Partial unemployment allowance (benefit) for the quarantine period is provided for each hour by which the employee's working hours are reduced, at the rate of 2/3 of the tariff rate (wage) established for the employee of the corresponding category. However, the amount of the allowance cannot exceed the amount of minimum wage. The amount is provided to employers for the period of stopping (reducing) activities and within 30 calendar days after the end of quarantine in the event that the employer pays a single social contribution within six months that precede the date of stopping (reducing) activities [17].

Resolution of the Council of Ministers of the Republic of Belarus No. 194 "On Official Business Trips Abroad" dated 03.04.2020¹ established that if an employee cannot return to the Republic of Belarus from a business trip from a foreign country where cases of infection caused by the COVID-19 coronavirus are registered, the period of official business trip for sent employees is extended until the day of their arrival in Belarus, inclusive. For these employees, the place of work (service) and the position of an employee (worker's profession), a civil servant are preserved, and expenses are reimbursed in accordance with

the legislation for employees sent on official business trips. From the date of extension of business trips before the day of arrival to the Republic of Belarus, inclusive, and also at impossibility of execution of the employment agreement (job duties) during the period of seconded workers after their return from a business trip in isolation (10 days) they retained the wages in the amount of not less than two thirds of the salary, unless otherwise determined by collective agreement or another local legal act of the organisation.

The legislation of Ukraine does not provide for any special procedure for sending employees on a business trip (including abroad one) during quarantine. General procedure is used in that case. A business trip, in which the employee is sent by order of the head of the enterprise to perform work specified in the employment agreement, is mandatory for the employee. At the same time, an employee who is performing his/her labour duties has the right to safe working conditions in accordance with the legislation on labour protection. Therefore, the employer, in order to prevent COVID-19 infection, is obliged to provide employees with antiseptic and disinfectants and inform them about preventive measures.

CONCLUSIONS

Summing up we formulate the main conclusions: pandemic coronavirus COVID-19, created a real threat to the life and health of millions of inhabitants of planet Earth, including citizens of the Republic of Belarus and the Ukraine, required the adoption by governments of most countries of the world emergency measures, some of which restricted human rights (freedom of movement, right to privacy etc.); the legislation of the Republic of Belarus legally stipulated the concept of "self-isolation", defines categories of citizens who are subject to isolation (arriving from abroad within 14 calendar days, cases of coronavirus COVID-19 and undergoing outpatient treatment to recovery, as well as persons related to pins 1 and 2 levels).

Ukrainian legislation defines the terms "self-isolation" and "observation", fixes a list of citizens in need of self-isolation (persons who have had contact with a patient with a confirmed COVID-19 case; persons in relation to whom there is a suspicion of infection, or persons who are sick with COVID-19 in a mild form and do not require hospitalisation; persons who have consented to self-isolation using the "Act at Home" application of the Unified State Web Portal of Electronic Services before crossing the state border or checkpoints of entry into and out of the temporarily occupied territory; persons who have reached 60 years of age). However, Ukrainian legislation does not define a state or other authorised body establishing a list of reasonable grounds to believe that a citizen has a risk of COVID-19 infection or can spread it oneself; extending the rights of employers to change essential working conditions with a one-day warning and to temporarily transfer

1. Resolution of the Council of Ministers of the Republic of Belarus No. 194 "On Official Business Trips Abroad". (2020, April). Retrieved from <https://pravo.by/document/?guid=3961&p0=C22000194>.

employees without their consent for up to three months can only be a temporary, exceptional measure that must be immediately cancelled after reducing the spread of COVID-19 to Belarus. At the same time, there is no legal rule in the labour legislation of Ukraine that would allow changing the essential working conditions for the period of a pandemic in a simplified manner and as soon as possible; the disadvantage of Ukrainian legislation is the lack of a legislative ban to entrust remote workers with performing those types of work that create inconveniences for their neighbours; since 2020, changes and additions to the Labour Code have come into force in Belarus, and in Ukraine – in the Labour Code, which introduced the concept of remote work, although the approaches of the Belarusian and Ukrainian legislators differ in many ways. However, the Belarusian legislator does not regulate the mechanism for switching to remote work with an employee who

previously worked in an office, that is, at the employer's location. Similarly, there are no rules in Belarus that allow for a combination of office work and remote work, although such forms of employment are used in practice during the period of COVID-19 distribution. We believe that in the future, the mode of remote work and partially remote work should be regulated in Chapter 10 of the Labour Code of Belarus “Working time”, including the minimum period for warning an employee about switching to this mode. The motioned shortcomings are largely typical to the legislation of Ukraine; the introduction of partial unemployment benefits for the quarantine period in Ukraine deserves respect. The mentioned benefits are provided for each hour by which the employee's working time is reduced, at the rate of 2/3 of the tariff rate (wage) established for the employee of the corresponding category. However, the amount of the benefit could not exceed the minimum wage.

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ПРОФСПІЛКОВИЙ ЗАХИСТ ТРУДОВИХ ПРАВ В ОКРЕМИХ ПОСТРАДЯНСЬКИХ КРАЇНАХ

Анотація. Профспілки відіграють усе більшу роль у захисті працівників кожної держави. Ця стаття має на меті встановлення проблем у правовому регулюванні профспілкового захисту в пострадянських країнах. Дослідження ґрунтується на низці загальнофілософських методів (діалектичний метод), загальнонаукових методів, як от: методи синтезу та аналізу, індукції та дедукції і спеціальних методів, включаючи порівняльно-правовий метод та метод моделювання. Вибір згаданих методів визначається метою наукової розвідки. Правове регулювання профспілкового захисту трудових прав в пострадянських країнах здійснюється низкою міжнародних конвенцій, конституцій таких країн (оскільки це є особливим конституційним правом, що перебуває під особливим захистом держави) та їх національним законодавством. Наразі деякі пострадянські держави є членами ЄС (Литва, Латвія, Естонія) і на них поширюються регіональні норми ЄС. Кожна пострадянська держава має особливу доктрину, юридичну практику та традиції захисту трудових прав, а отже, має свої національні особливості цього захисту, представництва працівників та архітектури трудового законодавства. Аналіз, проведений авторами, свідчить, що національні законодавці не завжди дотримуються міжнародних стандартів, встановлених Міжнародною організацією праці, і не забезпечують у повній мірі свободу права на об'єднання в асоціації. Деяким країнам було рекомендовано або внести зміни до певних законодавчих актів, або здійснювати контроль за поданими законопроектами, щоб вони відповідали вимогам, встановленим низкою міжнародних конвенцій. Автори також дійшли висновку, що діяльність профспілок в пострадянських країнах не завжди є ефективною

Ключові слова: профспілки, право на профспілковий захист, пострадянські країни, трудові права, Комітет з питань свободи об'єднань

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PROTECTION OF LABOUR RIGHTS BY TRADE UNIONS IN SEPARATE POST-SOVIET COUNTRIES

Abstract. *Trade unions play an increasingly more critical role in protection of the employees of every state. This article aims to outline the problems with regard to the legal regulation of labour rights protection by trade unions in post-Soviet countries. The research is based on a system of various general philosophical methods (dialectical method), general scientific methods, such as methods of synthesis and analysis, induction and deduction, and special legal methods, including comparative legal method and the method of modelling. The choice of the mentioned methods was determined by the purpose of this study. The legal rules on protection of labour rights by trade unions in post-Soviet countries are set up by a number of international conventions, Constitutions of such countries (as this is a special constitutional right, being under a special protection of the state) and their national legislative acts. Some of the post-Soviet states are now members of the EU (Lithuania, Latvia, Estonia) and are subject to regional EU regulations. Every post-Soviet State has its own jurisprudence, legal practice and traditions of labour rights' protection and hence has its own national peculiarities with regard to this protection, the representation of employees and the architecture of labour legislation. The analysis conducted by the authors shows that the national legislators were not fully following the international standards established by the International Labour Organization and did not fully secure the freedom of association. All the mentioned countries were recommended either to change some pieces of legislation or to supervise the existing draft of laws to make them meet the rules set in a number of international conventions. The authors have also stated that trade unions in post-Soviet countries are not always effective*

Keywords: *trade unions, right to protection by trade unions, post-Soviet countries, labour rights, the Committee on Freedom of Association*

INTRODUCTION

It seems impossible to deny that, due to the globalisation of economic life, protection of labour rights by trade union is becoming more and more significant for employees of every state. History has shown cases where big employers were trying to minimize social expenses whilst limiting or infringing the labour rights of their employees. The trade unions' protective activities include resisting such limitations, and establishing preventive defence and protection of employees' labour rights along with their legitimate labour interests. This serves to protect the balance of rights between the employer and the employee. The efficiency of this protective mechanism is reflected by the trade unions' establishment and functioning.

Trade unions form an important element in the structure of any modern civil society, they tend to be "par excellence form or workers' organisation" [1]. A right to form trade union is now understood as one of the main components of the international human rights system [2]. A progressive civil society should pursue the freedom of association of people, who are connected by common professional, social, economic interests that were developed while they fulfilled their labour activity (e.g., powerful trade unions were created in France, Germany, United Kingdom, Ukraine, Poland). As V. Lambropoulos notes, "the legislative history reveals how the concept of freedom of association was reframed over the last century" [3], it

is necessary to add that trade unions can be very effective even in times of economic and political crisis [4], they can narrow or broaden their agenda to respond to challenges (e.g., a migration challenge) [5], they can even influence a climate-change policies [6]. A trade union may become the main actor of the workplace democracy [7], no surprise the workers can even use hybrid forms of organising [8].

The trade unions' activities are an illustration of each society's social and economic life. The analysis of special literature shows that while perceiving the nature-labour relationship different models can be formed: "the container model, nature as a mediator of survival, and the nature-labour alliance" [9]. The sphere of protection of labour rights by trade unions in post-Soviet countries has its own peculiarities. Common problems and tendencies can be outlined in the Republics of Kazakhstan, Uzbekistan, Tadzhikistan, Moldova, Belarus, Ukraine, Lithuania, Latvia, Estonia and other post-Soviet countries.

This article aims to outline the problems with regard to the legal regulation of labour rights protection by trade unions in post-Soviet countries, based on international, regional legislation, Constitutions as well as on jurisprudence.

1. LITERATURE REVIEW

The protection of labour rights by trade unions was studied by a number of Soviet and modern authors, such as: N. Aleksandrov, V. Chibisov, M. Chos, V. Dogadov, G. Goncharova, N. Iefremova, M. Inshyn, Ie. Ivanov, N. Lyutov, B. Nurashva, V. Prokopenko, O. Protsevskiy, Yu. Schotova, I. Snigiriova, F. Tsesarskiy, V. Tsvyh, S. Vavzhenchuk and others.

The protection of labour rights by trade unions was also studied in a number of dissertation theses, defended during Soviet and post-Soviet times. In 1975 Valeriy Chibisov devoted his dissertation to the protective function of Soviet trade unions [10]. In 1988 Irina Snigiriova defended her dissertation thesis called "Trade Unions as Subjects of Soviet Labour Law" [11]. Mykhail Zelenov defended his thesis "Legal Problems of Participation of Trade Unions in Solving Collective Labour Disputes" in 1999 [12]. In 2004, the problem of protection of social-labour rights of employees in a market-driven economy by trade unions was analysed by Veniamin Nikiforov [13]. This very year Feliks Tsesarskiy devoted his dissertation thesis to the protective function of the trade unions and its peculiarity [14]. In 2013, Yulia Schotova studied the realisation of trade unions' function on the level of individual and collective legal relations in her dissertation for Dr. Habil, named "Legal Mechanism of Realisation of Trade Unions' Function as Subjects of Labour Law" [15]. In 2015 Bibigiul Nurashva devoted a separate chapter in her dissertation to trade unions as the main element of protection of labour rights, in which she outlined perspectives on the development of a mechanism

for legal protection of labour rights by the trade unions in Republic of Kazakhstan [16].

A significant number of studies devoted to the legal status of trade unions was written *during Soviet times*: Vasiliy Dogadov (studied legal status of trade unions in the Soviet Union and was the first to mention Trade Union Law) [17], Volodymyr Prokopenko (researched the peculiarities of subjects in relations between the trade unions and administration of the company) [18], Ievgeniy Ivanov analysed trade unions in the socialist system [19]. In *post-Soviet times*, problems concerning the protection of labour rights by trade unions continued to be a popular field of research: Volodymyr Tsvyh examined trade unions in civil society [20] and Nikita Lyutov researched the peculiarities of protection of rights by trade unions in the United Kingdom [21]. Some separate questions of trade union activity were raised by the authors in a manual "Theoretical foundation of Labour Law of Ukraine" [22]. Serhii Vavzhenchuk, in his monograph called "Protection and Defence of Labour Rights of Employees" [23], considered the mechanism of protection labour rights by the trade unions.

Scientific articles were also devoted to the problems concerning the legal regulation of trade unions' activity. During the *Soviet period*, the following scholars were dedicating their papers to the protection of rights by trade unions and their activities: Nikolai Aleksandrov described the notion of protection of employees' rights in his article [24]; Nadezhda Iefremova studied the role of trade unions in the period of communism building [25]; and Boris Shelomov devoted his research to the representation of trade unions [26]. During the post-Soviet period the authors also chose the protective function of trade unions as the object for scientific research. Anatoliy Appakov studied the problems concerning the protective function of trade unions [27]. Galina Goncharova described trade unions and labour relations through the application of Ukrainian legislation [28]. Mykola Chos analysed the Law of Ukraine, regulating the activity of trade unions [29]. Olga Zadorozhna considered the issue on the development of collective contract relations though the activity of trade unions [30]. Bahodyr Ergashev researched the problems that trade unions in Central Asia and the Caucasus encountered [31]. Oleksandr Protsevskiy studied the consent of the trade union to the termination of contract [32]. Zinaida Bilous has highlighted the role of trade unions in the sphere of control upon meeting the rules of the labour legislation [33]. Pavlo Lukianchuk has studies the role of trade union's control in developed countries of the world [34].

2. MATERIALS AND METHODS

The article is based on international universal and regional European legal instruments, such as: Right to Organise and Collective Bargaining Convention¹, Workers' Representatives

1. Right to Organise and Collective Bargaining Convention No. 98. (1949, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_INSTRUMENT_ID:312243.

Convention¹, Freedom of Association and Protection of the Right to Organise Convention², International Covenant on Economic, Social and Cultural Rights³, International Covenant on Civil and Political Rights⁴, Directive 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community⁵, EU Directives No. 94/95/EC (no longer in force)⁶, 97/74/EC (no longer in force)⁷, 2006/109/EC (no longer in force)⁸ and 2009/38/EC⁹, Constitutions of the post-Soviet Countries, the case law of the Committee on Freedom of Association and a number of scientific works.

The research is grounded on a system of various general philosophical methods (dialectical method), general scientific methods, such as methods of synthesis and analysis, induction and deduction, and special legal methods, including comparative legal method and the method of modelling. The choice of the mentioned methods was determined by the aims of this research. The dialectical method gave the possibility to review the interrelation between the international and regional European legal instruments regulating protection of labour rights by the trade unions and national legal framework of post-Soviet Countries and helped to identify that in general the national legislation of post-Soviet Countries does not always provide for direct implementation the international standards.

Such general methods as induction and deduction, were used to evaluate the exercising of the right to protection by trade unions in post-Soviet Countries and formulate the conclusion that the efficiency of the traditional model of labour rights' protection by labour unions is still insufficient in post-Soviet countries. The methods of synthesis and analysis were used to assess the existing Constitutional norms in the post-Soviet countries on trade unions and formulation and formulate the conclusion that in most post-Soviet Countries the right to establish and join a trade union is either directly or indirectly foreseen in

their Constitutions and also that the mentioned right is a peculiar right: a so-called constitutional labour right. The constitutional labour rights of employees are natural human rights, envisaged in the Constitution as opportunities for the person to apply his/her capability to certain labour, which is a minimal necessity for decent living, development and the securement of quality of life, all of which are realised within the labour legal relations.

Comparative legal method was used when accessing the international legal instruments, regulating the freedom of association and the trade unions' legal status and when examining the case law of the Committee on Freedom of Association, being an international body authorised to decide cases in violation of freedom of association, brought by the trade unions against the member states. The empirical base of the relevant case-law is broad, as the Committee on Freedom of Association has already examined more than 3 300 cases, including the cases brought against some post-Soviet countries. The method of modelling was used while formulating conclusion that the traditional models of labour rights' protection by labour unions needs revision and renovation of the legal framework.

3. RESULTS AND DISCUSSION

3.1 *The Constitutions of post-Soviet Countries and Protection by Trade Unions*

In most post-Soviet countries, the right to establish and join a trade union is either directly or indirectly foreseen in their Constitutions. This is a special constitutional right, being under a special protection of the state, just as much as other human rights (including such basic rights as the right to life, reproduction rights, rights to healthcare etc.).

In the *Constitution of the Republic of Kazakhstan* this right is not directly mentioned. Rather, the right to establish and enter a union is envisaged, as follows from the analysis, Article 32 of the Constitution of the Republic of Kazakhstan. In accordance with Part 1, Article 23 of the

1. Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX_PUB:12100:0::NO::P12100_ILO_CODE:C135.

2. Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX_PUB:12100:0::NO::P12100_ILO_CODE:C087.

3. International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

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

5. Directive No. 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. (2002, March). Retrieved from <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32002L0014>.

6. EU Directive No. 94/95/EC. (1995, October). Retrieved from <https://www.epchungary.hu/>.

7. Council Directive No. 97/74/EC. (1997, December). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31997L0074>.

8. Council Directive No. 2006/109/EC. (2006, November). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0109>.

9. Directive No. 2009/38/EC of the European Parliament and of the Council on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (2009, May). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0038>.

Constitution of the Republic of Kazakhstan, citizens of the Republic of Kazakhstan have freedom of association¹. Such a broad definition allows the citizens to form and enter any types of associations, including the trade unions. The text of *Constitution of the Republic of Latvia* also does not provide a direct indication to trade unions and the right to form and enter them, however as derived from Article 102 of the Constitution of the Republic of Latvia, everyone has the right to enter companies, political parties and other non-governmental organisations². Trade unions are one of the types of non-governmental organisations and, therefore, this article entails the right to establish and enter trade unions. A very similar approach was used by the lawmaker of the Republic of Estonia. Pursuant to Article 48 of *the Constitution of the Republic of Estonia*, everyone has the right to join non-commercial associations and unions³. Therefore, unlike the Constitution of the Republic of Kazakhstan, under the Constitutions of the Republic of Latvia and the Republic of Estonia, the mentioned right is vested not only in the citizens of the relevant state, meaning that under the Constitutions of the Republic of Latvia and the Republic of Estonia, the right to enter trade unions is granted not only to citizens of these states, but also to the foreign citizens and stateless persons. This shows that the focus, Article 48 of the Constitution of the Republic of Estonia and Article 102 of the Constitution of the Republic of Latvia are much wider than the range of Part 1, Article 23 of the Constitution of the Republic of Kazakhstan. Moreover, the Constitution of the Republic of Estonia provides for the principle of voluntariness of employees in the trade unions. The mentioned principle is directly listed in Article 29 of the Constitution of the Republic of Estonia, due to which the participation of the employee and employer in the associations and unions is voluntary⁴.

A number of constitutions of post-Soviet countries directly list the right to enter trade unions. The mentioned right is a peculiar right: a so-called constitutional labour right. The constitutional labour rights of employees are natural human rights, envisaged in the Constitution as opportunities for the person to apply his/her capability to certain labour, which is a minimal necessity for decent living, development and the securement of quality of life, all of which are realised within the labour legal relations [22]. In particular, Article 36 of the *Constitution of Ukraine*

precludes that Ukrainian citizens are entitled to freedom of association in political parties and non-governmental organisations for realisation and protection of one's rights and freedoms and serving political, economic, social, cultural and other interests, excluding the limitations foreseen by the law in the interests of national security and public order, health care of the population or protection of rights and freedoms of other people⁵. Part 3, Article 36 of the Constitution of Ukraine stipulates that citizens have the right to participate in trade unions with the aim to protect one's labour and social economic rights and interests. The *Constitution of the Republic of Uzbekistan* directly stipulates the right to enter trade unions. Pursuant to Article 23 of the Constitution of the Republic of Uzbekistan, the citizens of Uzbekistan are entitled to join trade unions, political parties and other non-commercial organisations, taking part in public events⁶. Moreover, the mentioned right is recognised as a political right, because the lawmaker included it in Chapter 8 of the Constitution of the Republic of Uzbekistan, titled "Political rights". The right to freely create trade unions is foreseen in the *Constitution of the Republic of Moldova*, in accordance with Part 1, Article 42, in which it is listed that anyone is entitled to create trade unions and join them for the protection of one's interests⁷. *The Constitution of the Republic of Lithuania* also stipulates the right to free creation and activity of trade unions. Therefore, according to Article 50 of the Constitution of the Republic of Lithuania, trade unions are established and function independently. Apart from that, the Lithuanian lawmaker also listed the aim of trade unions' establishment, namely: protection of professional interests and social-economic rights and interests of the employees⁸. Article 41 of *the Constitution of the Republic of Belarus* also stipulates the right to enter trade unions. However, the mentioned right is defined by the Belarus lawmaker as one of the competences of the right to protection of economic and social interests, despite the fact that the right to protect one's economic and social interests and the right to enter unions have a different legal nature. The mentioned thesis is derived from the analysis, Article 41 of the Constitution of the Republic of Belarus, in accordance with which the citizens have the right to protect their economic and social interests, including the right to enter trade unions⁹. If we have a look at *the Constitution of the Republic of Poland*, we may find not only

1. Constitution of the Republic of Kazakhstan. (1995, August). Retrieved from https://www.akorda.kz/ru/official_documents/constitution.

2. Constitution of the Republic of Latvia. (1922, February). Retrieved from <https://likumi.lv/ta/en/en/id/57980>.

3. Constitution of the Republic of Estonia. (1922, June). Retrieved from https://www.concourt.am/armenian/legal_resources/world_constitutions/constit/estonia/estoni-r.htm.

4. *Ibidem*, 1922.

5. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-бп#Text>.

6. Freedom of Association and Protection of the Right to Organise Convention No. 87, op. cit.

7. Constitution of the Republic of Moldova. (1994, August). Retrieved from <http://www.presedinte.md/rus/constitution>.

8. Constitution of the Republic of Lithuania. (1992, October). Retrieved from https://www.lrs.lt/home/Konstitucija/Konstitucija_RU.htm.

9. Constitution of the Republic of Belarus. (1994, March). Retrieved from <http://pravo.by/pravovaya-informatsiya/normativnyedokumenty/konstitutsiya-respubliki-belarus/>.

the principle of voluntariness of entering trade unions, but also a duty of the Republic of Poland to guarantee the realisation of this principle, as foreseen by Article 59 of the Constitution of the Republic of Poland, pursuant to which the freedom of association in trade unions, socio-occupational organisations of farmers, and employers' organisations shall be ensured¹.

3.2 Protection by Trade Unions as Defined by the International Legal Framework

The right to protection by trade unions is prescribed by a number of international acts. The international standards of the relevant right are set forth by the *Freedom of Association and Protection of the Right to Organise Convention (No. 87)* (hereinafter – Convention No. 87). As envisaged by the Article 2 of the Convention No. 87, workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation². Article 2 of the Convention No. 87 is formulated very broadly, focusing on recognition of human social and labour rights and freedoms. Part 3, Article 36 of the Constitution of Ukraine³, Article 23 of the Constitution of the Republic of Uzbekistan⁴, Article 41 of the Constitution of the Republic of Belarus⁵, Article 2 of the Convention No. 87 do not mention citizenship as necessary pre-condition of establishing or joining trade unions, unlike Part 1, Article 23 of the Constitution of the Republic of Kazakhstan. Therefore, in accordance with Article 3 of Convention No. 87, no person is restricted in his/her right to establish trade unions and enter them. It is important that the mentioned right is not just granted to people, but is also recognised by the Convention.

Bearing in mind the aforesaid, it is worth noting that Convention No. 87 establishes the rules on balance of norms of national legislation in the sphere of freedom of association and guarantees protection of labour rights by trade unions with the rules specified in Convention No. 87. In accordance with Article 8 of Convention No. 87, in exercising the rights provided for in this Convention, workers and employers and their respective organisations, like other persons or organised groups, will respect the law of the land. The law of the land will not be such as to impair, nor will it be so applied as to impair, the guarantees provided

for in this Convention⁶. Thus, the guarantees and rights recognised by Convention No. 87 have priority over the national legislation and the national law-maker cannot limit the international guarantees in the pieces of national legislation.

Also, it is noteworthy to mention that, due to the imperative rule, Article 4 of the Convention No. 87, workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority⁷. The norms of Convention No. 87 contain the guarantee of non-interference of the state, under the jurisdiction of which the trade union was established, into the activity of such trade union (Article 3)⁸. Convention No. 87 also envisages the right of workers' and employers' organisations to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. Thus, trade unions have the rights to organize their activity based on their action plans, forming additional guarantees to realisation of protection of employees' rights by trade unions.

Another fundamental international instrument, establishing standards for activity of trade unions, is the *Right to Organise and Collective Bargaining Convention (No. 98)* (hereinafter – Convention No. 98)⁹. Convention No. 98 lays down the principle of non-interference in the activities of trade unions either “by each other or each other's agents or members in their establishment, functioning or administration” and provides a definition of the act of interference, being the act which is “designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations” (Article 2 of Convention No. 98). Moreover, in order to ensure the freedom of association, machinery appropriate to national conditions shall be established (Article 3 of the Convention No. 98)¹⁰. Some additional guarantees, protecting activity of trade unions, are laid down by the *Workers' Representatives Convention (No. 135)*¹¹ (hereinafter – Convention No. 135). In accordance with the Articles 1,3 of the Convention No. 135, trade union's representatives, namely representatives designated or elected by trade unions or by members of such

1. Constitution of the Republic of Poland. (1997, April). Retrieved from <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

2. Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.

3. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254k/96-bp#Text>.

4. Constitution of the Republic of Uzbekistan. (1992, December). Retrieved from <https://lex.uz/acts/35869>.

5. Constitution of the Republic of Belarus. (1994, March). Retrieved from <http://pravo.by/pravovaya-informatsiya/normativnyedokumenty/konstitutsiya-respubliki-belarus/>.

6. Freedom of Association and Protection of the Right to Organise Convention No. 87, op. cit.

7. *Ibidem*, 1948.

8. *Ibidem*, 1948.

9. Right to Organise and Collective Bargaining Convention No. 98. (1949, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C098,%2FDocument.

10. *Ibidem*, 1949.

11. Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312280.

unions, shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements¹.

Analysing the normative fundamentals of the trade union's protection and the guarantees of its realisation, it is necessary to mention the *International Covenant on Economic, Social and Cultural Rights (hereinafter – the Covenant)*². As established in Part 1, Article 8 of the Covenant, the State Parties to the present Covenant undertake to ensure: (a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations; (c) the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) the right to strike, provided that it is exercised in conformity with the laws of the particular country³.

Having analysed these rules provided by the Covenant, one can come to conclusion that the norms of Part 1, Article 8 of the Covenant complement the provisions of Convention No. 87. The norm of Part 1, point a), Article 8 of the Covenant further develops the contents, Article 2 of the Convention No. 87 regarding the right to establish trade unions and freely join them. Part 1, point b), Article 8 of the Covenant correlates to Article 5 of the Convention No. 87, as the latter provides that workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers⁴. Part 1, point c), Article 8 of the Covenant meets the norms, Article 3 and Article 4 of the Convention No. 87 with

regard to the unrestricted functioning of trade unions. *The International Covenant on Civil and Political Rights*⁵ also lays down the basics of protection of labour rights by trade union. Because of Part 1, Article 22 of the International Covenant on Civil and Political Rights, everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of one's own interests⁶. It is very positive that two capabilities that form the right to freedom of association are outlined in this article. The first capability is the right to form trade unions. Its recognition as the separate element shows a very special attitude from the side of international law-makers. The second capability will be the right to join trade unions with the defined aim – protection of interests.

As commanded by Part 2, Article 2 of the International Covenant on Civil and Political Rights, no restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others⁷. This rule contains limitations on everyone's right to freedom of association. Such limitations are appropriate when prescribed by law and should meet special requirements, i.e., to be necessary: 1) in a democratic society; 2) in the interests of national security; 3) in the interests of public safety; 4) in the interests of public order; 5) in the interests of the protection of public health; 6) in the interests of morals; 7) in the interests of protection of the rights and freedoms of others.

Special attention should be paid to criterion No. 6 (in the interests of morals) and criterion No. 7 (in the interests of protection of the rights and freedoms of others). The term "moral" has 12 meanings as defined by the Oxford English dictionary [32], with the first meaning being as follows: of or pertaining to character or disposition, considered as good or bad, virtuous or vicious; of or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings; ethical (e.g., Aristotle distinguished the moral from intellectual virtue) [32]. Thus, the term "moral" is not a legal term, because it is based on moral norms but not on legal rules, and should therefore not be regulated by legal acts. It must also be mentioned that morality is subjective and not legal category, meaning it has very broad frames of

1. Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312280.

2. International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

3. *Ibidem*, 1966.

4. Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.

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

6. *Ibidem*, 1966.

7. *Ibidem*, 1966.

understanding within society. Thus, there is no established rule for a qualification that should regulate the limitation of right to freedom of association as such a criterion as morality cannot serve as grounds for limitation or termination of the human right to association.

Regarding criteria No. 7 (in the interests of protection of the rights and freedoms of others), it should be noted that the conflict between the right of one person and the interest of the other person is a questionable one: on the one hand we have the freedom of association and on the other hand – the protection of the rights and freedoms of others. Moreover, under such a formula it may occur that the right to freedom of association contradicts the interest of the employer to minimize the importance and capability of trade union, limit its independence etc. In the light of this argument, it seems impossible to talk about a grounded and possible conflict between the right of one person and the interest of another one.

Apart from the mentioned exceptions, Article 22 of the International Covenant on Civil and Political Rights¹ correlates with Article 4 of the Convention No. 87² and is specified in Part 1, point c), Article 8 of the Covenant.

3.3 Evaluation of Exercising the Right to Protection by Trade Unions in post-Soviet Countries

It is not a secret that not all trade unions in post-Soviet countries are fully working towards the aim of protecting the labour rights and interests of the employees, despite the existence of legally established guarantees. This is causing tension in society and is leading to a number of employee strikes, who are attempting to protect those labour rights.

A lot of trade unions created in post-Soviet countries have the distinctive features of hostage institutions, as they are either dependent from the employer or have lost their independence under pressure of the employer. In this context it is very interesting to read the outcome of the research on exercise of labour rights, conducted by the Solidarity Centre in cooperation with the Uzbek-German Forum for human rights. In accordance to the report of the Solidarity Centre “*There is No Work We Haven’t Done*”, published in 2019, trade unions in Uzbekistan are weak and dependent from the state or employer and are incapable to represent the interests of the employees and protect them from forced labour. The employees who were interviewed acknowledge that their trade unions were ineffective and sometimes even helped to organize and manage forced labour [33]. The conclusions of the Report of the Solidarity Centre contain a number of interesting observations. First of all, it is mentioned that the central government “has recently taken a stand against the forced labour of public-sector employees that has begun to influence regional and local officials, including some to stop using forced labour or take steps to

try to hide it” [33]. Secondly, the dependence of the trade unions is underlined. The report stresses that the trade unions “are weak and subordinate to influence from both government and management... This undermines the perceived effectiveness of union-led mechanisms for grievance and remedy” [33].

The final report of *international research project “Trade unions in post-socialist society: overcoming the state-socialist legacy”* mentions that in the Republic of Belarus, the federation of trade unions was built into the state system of power and was turned from a non-governmental organisation into the “Labour Ministry with Employees”. The organisation is now called “Federation of Trade Unions of Belarus” and this very fact is extremely demonstrative: under the legislation of Belarus, the official name of the state can only be used in the titles of the state structures. Therefore, the “Federation of Trade Unions of Belarus” became a state instrument by its title and by its substance [34].

In the Republic of Moldova, the establishment of the trade unions’ protection of labour rights is considered to be a geopolitical process. In legal literature it is mentioned that forcing the establishment of “alternative” trade unions in October-December 2000, completed by the Establishing Conference of the Confederation of Free Trade Unions of the Republic of Moldova “Solidarite”, was a part of a unified geopolitical process in the country. Therefore, stating that this process is a renaissance of the communist trade unions is justified as a consequence of close cooperation of the mentioned trade unions with the state governing party [35].

One of the problems of development of trade unions’ activity in Estonia, Poland, Lithuania is that the employees are not very active in the trade unions’ movement with regard to the protection of labour rights. In the report, published in the framework of the project “*Europe 2020 and the Baltic Region*”, titled “*Employee participation in Poland, Lithuania, Latvia, Estonia and Great Britain*”, it is underlined that very limited participation in the trade unions (5% in Estonia, 12% in Poland, 15% in Lithuania) directly affects the restricted possibilities of influencing the employer and the decisions taken by the employer [36]. In the meantime, the legal model of the protective function of the trade union is recognised by a number of scholars as an effective one, because it allows for the development of a mechanism of protection of labour rights and balances the interests of the employers and the employees. E.g., the experts from Poland, Lithuania, Latvia, Estonia and Great Britain have outlined trade unions as the most effective model of support and representation of the employees in their reports, elaborated in 2016 [36].

In EU countries, under Directive 2002/14/EC of the

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

2. Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.

European Parliament and the Council of 11 March 2002¹, work councils had to be set up. By their nature, they are new forms of alternative representation in labour law. However, setting up such work councils on the level of EU Directive 2002/14/EC appeared to be not very effective from the point of view of protection of the employees' labour rights. I.e., in the Report "Employee participation in Poland, Lithuania, Latvia, Estonia and Great Britain", it is underlined that such councils haven't been used in Estonia, except by international corporations, and in Latvia there are no such councils at all. In Lithuania they are called councils and are functioning only within the enterprises where trade unions have been established [36].

European Work Councils (EWC) is an alternative form of employees' representation in the countries of the EU, foreseen by the *EU Directives No. 94/95/EC (no longer in force)*², *97/74/EC (no longer in force)*³, *2006/109/EC (no longer in force)*⁴ and *2009/38/EC*⁵. The preventive protection of labour rights is realised by EWC by conducting representational, consultative and informative functions. EWC is an intermediate between the representatives of the employees and the employer in questions concerning organisational and management changes in the enterprise, and in the establishment, change and closure of the subdivisions of the enterprise. A number of functions which are conducted by the EWC are overlapping with the functions of the trade unions (representational, informative, consultative). Additionally, representatives of the trade unions are usually the first to enter the EWC created within the enterprise, due to their knowledge on representation and protection of labour rights. This situation has caused

differences in the application of the EWC mechanism in different states, notwithstanding the stimulation of application of EWC by the EU through its directives etc. In a number of states, EWCs are integrated only partly in transnational corporations (Latvia, Lithuania). The Report "Employee participation in Poland, Lithuania, Latvia, Estonia and Great Britain" stresses that, in Latvia, EWCs are not widespread and there is little knowledge on its functioning and advantages [36]. EWCs are also not widely used in Estonia, because the national legislation on EWC has not been adopted and the EU Directives are not a legal basis for their functioning [36].

The International Labour Organisation established the *Committee on Freedom of Association* (hereinafter – CFA), which is an international body authorised to decide cases in violation of freedom of association, brought by the trade unions against the member states. The CFA has already examined more than 3 300 cases, including the cases brought against some post-Soviet countries. E.g., during the last 10 years, CFA has heard:

- *4 cases against Poland* and issued recommendations for the Polish government concerning the collective bargaining procedure and safeguarding the right to protests⁶; to review the situation of the trade unions activists that were allegedly fired due to their organisation of industrial action⁷ and even to amend the Act on Trade Unions so as to ensure that home-based workers can establish and join organisations of their own choosing⁸;

- *3 cases against Ukraine*, with the following recommendations for the Ukrainian government: to ensure independent inquiries in the cases on interference in trade

1. Directive 2002/14/EC of the European Parliament and the Council establishing a general framework for informing and consulting employees in the European Community. (2002, March). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0014>.

2. Council Directive 1994/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (1994, September). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31994L0045>.

3. Council Directive 1997/74/EC extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (1997, December). Retrieved from <https://www.legislation.gov.uk/eudr/1997/74/contents/adopted>.

4. Council Directive 2006/109/EC adapting Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, by reason of the accession of Bulgaria and Romania. (1996, November). Retrieved from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:363:0416:0417:EN:PDF>.

5. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (2009, May). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0038>.

6. Case No. 3111 (Poland): Definitive report of the Committee on Freedom of Association No. 378. (2016, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3282128.

7. Case No. 2972 (Poland): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 368. (2013, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3128190.

8. Case No. 2888 (Poland): Definitive report of the Committee on Freedom of Association No. 363. (2012, March). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057194.

union's affairs¹; to amend the Civil Code of Ukraine to fully guarantee the right of workers to establish their organisations without previous authorisation²;

- *1 case against Kazakhstan*, where the FCA requested entering amendments into the Law on Trade Unions so as to ensure the right of workers to freely decide whether they wish to associate with or become members of a higher-level trade union structure and to lower thresholds requirements to establish higher-level organisations³;

- *2 cases against Lithuania* and asked the government to inform the CFA on developments relating to the draft law on police activities insofar as it has an impact on organisations and bargaining rights⁴; to review the relevant provisions governing collective bargaining⁵.

This analysis shows that the national legislators were not fully following the international standards established by the International Labour Organization and did not fully secure the freedom of association. All the mentioned countries were recommended either to change some pieces of legislation or to supervise the existing draft of laws to make them meet the rules set in a number of international conventions.

CONCLUSIONS

Trade unions form an important element in every civil society, because one of their main functions is the protection of labour rights with the aim to establish a fair balance between employers and employees. A number of legal guarantees to ensure a smooth fulfilment of the protective function of the trade unions is foreseen by international legal instruments: Freedom of Association and Protection

of the Right to Organise Convention (No. 87)⁶, Right to Organise and Collective Bargaining Convention (No. 98) (hereinafter – Convention No. 98)⁷, Workers' Representatives Convention (No. 135)⁸, International Covenant on Economic, Social and Cultural Rights⁹ and the International Covenant on Civil and Political Rights¹⁰. The international standards, set forth by these conventions, are not always directly implemented in the legislation of post-Soviet Countries, despite the fact that trade unions' activities are directly or indirectly mentioned in the Constitutions of the mentioned countries.

Some of the post-Soviet states are now members of the EU (Lithuania, Latvia, Estonia) and are subject to regional EU regulations. The EU legislator provides special additional representational instruments of the rights of employees, which duplicate the functions of trade unions – such as European work councils. However, these instruments are only used in big transnational corporations and aren't popular in Lithuania, Latvia, and Estonia.

Every post-Soviet State has its own jurisprudence, legal practice and traditions of labour rights' protection and hence has its own national peculiarities with regard to this protection, the representation of employees and the architecture of labour legislation. All of this should be taken into account when implementing or unifying international or European labour legislation. When studying the cases heard by the Committee on Freedom of Association, established by the International Labour Organization, one notices that in post-Soviet countries there had been a number of norms, provided by national laws, which were not meeting the international standards. Moreover, as the international

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1. Case No. 2890 (Ukraine): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 367. (2013, March). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3112068.
 2. Case No. 2843 (Ukraine): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 362 (2011, November). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2912587.
 3. Case No. 3283 (Kazakhstan): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 386 (2018, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3950243.
 4. Case No. 3073 (Lithuania): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 374. (2015, March). Retrieved from http://ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3237748.
 5. Case No. 2907 (Lithuania): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 367 (2013, March). Retrieved from http://ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3112089.
 6. Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.
 7. Right to Organise and Collective Bargaining Convention No. 98. (1949, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C098,%2FDocument.
 8. Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312280.
 9. International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.
 10. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

independent reports show, trade unions in post-Soviet countries are not always effective, despite the fact that national legislation duly meets the standard of international practices. Notwithstanding mistakes of certain trade unions, the efficiency and popularity of the traditional model of labour

rights' protection by labour unions is still insufficient in post-Soviet countries. These models need revision and renovation of the legal framework, which will allow the rebooting of the protective mechanism of the trade unions, aligned with the modern needs of post-Soviet societies.

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ПРАВОВЕ ЗАБЕЗПЕЧЕННЯ ДІЯЛЬНОСТІ АГРАРНИХ ТРАНСНАЦІОНАЛЬНИХ КОРПОРАЦІЙ В УКРАЇНІ

Анотація. *Аграрні транснаціональні корпорації завжди виявляли інтерес до України, як до держави з потужним природним потенціалом та гарними і надійними перспективами для ведення агробізнесу. Під впливом таких чинників, як зміна клімату, безпрецедентне збільшення населення планети та, як наслідок, висока потреба в аграрній продукції, цей інтерес буде посилюватися, а роль аграрних транснаціональних корпорацій з кожним роком зростати. Тож однією з актуальних науково-практичних проблем, яку належить розв'язати правознавцям, є визначення ключового поняття «аграрні транснаціональні корпорації» та встановлення їх характеристик. Це дасть змогу українському законодавцеві якомога точніше унормувати складні й багатоаспектні відносини за їхньої участі в аграрній сфері і, зокрема, ті, що стосуються діяльності зазначених суб'єктів аграрного бізнесу, та усунути прогалини в їхньому правовому регулюванні, які нині існують. Зважаючи на це, метою статті є спроба на основі поглибленого аналізу з'ясувати сутність аграрних транснаціональних корпорацій як правового явища та надати визначення цьому поняттю, класифікувати їх за певними підставами та встановити особливості їхньої діяльності. Дослідження проведено з урахуванням наявного правового забезпечення цих учасників відносин у сфері агробізнесу. Методами дослідження є сукупність філософських, загальнонаукових та спеціально-правових методів, зокрема синергетичний метод дослідження виступає основоположним методом пізнання правового забезпечення діяльності аграрних транснаціональних корпорацій. Доведено, що аграрна транснаціональна корпорація є складним суб'єктом, який здійснює сільськогосподарську діяльність у двох чи більше країнах, управляється та контролюється з єдиного центру та складається з материнської компанії, дочірніх підприємств, філіалів та відділень. Проаналізовано позитивні та негативні аспекти діяльності аграрних транснаціональних корпорацій. З'ясовано, що в Україні діють такі аграрні транснаціональні корпорації: у сфері рослинництва, тваринництва, переробки, обслуговування сільськогосподарських товаровиробників та зі змішаною діяльністю (одночасно займається як рослинництвом, так і тваринництвом). Підкреслено, що аграрний ланцюг транснаціональної корпорації може охоплювати різні країни*

Ключові слова: *агробізнес, аграрний, сільськогосподарський, виробництво, ланцюг, правове регулювання*

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LEGAL SUPPORT FOR THE ACTIVITIES OF AGRICULTURAL TRANSNATIONAL CORPORATIONS IN UKRAINE

Abstract. *Agricultural transnational corporations have always expressed interest in Ukraine as a state with a strong natural potential and good and reliable prospects for agribusiness. Under the influence of factors such as climate change, an unprecedented increase in the world's population and, as a result, a high demand for agricultural products, this interest will increase, and the role of agricultural transnational corporations will grow every year. Therefore, one of the most urgent research and practical problems that lawyers will have to solve is the definition of the key term “agricultural transnational corporations” and the identification of their features. This will allow the Ukrainian legislator to regulate complex and multidimensional relations with their participation in the agricultural sector as accurately as possible and, in particular, govern relations concerning the activities of these subjects of agricultural business, and eliminate gaps in the current legal regulation. Considering this, the purpose of this study was to attempt establishing the essence of agricultural transnational corporations as a legal phenomenon based on an in-depth analysis and to define this term, classify these corporations on certain grounds and establish the specific features of their activities. The study was conducted considering the existing legal support of these participants in agribusiness relations. Research methods included a set of philosophical, general scientific, and special legal methods. The synergetic research method was the fundamental method of understanding the legal support of agricultural transnational corporations. It was proved that an agricultural transnational corporation is a complex entity that engages in agricultural activities in two or more countries, is managed and controlled from a single centre and comprises a parent company, subsidiaries, branches, and departments. The study analysed positive and negative aspects of the activities of agricultural transnational corporations. It was established out that the following agricultural transnational corporations act in Ukraine: in the field of crop production, animal husbandry, processing, servicing agricultural producers, and with mixed activities (simultaneously engaged in both crop production and animal husbandry). It was emphasised that the agricultural chain of a transnational corporation can cover different countries*

Keywords: *agribusiness, agrarian, agricultural, production, chain, legal regulation*

INTRODUCTION

Since 2017, Ukraine has introduced international standards for investment and operation of transnational corporations. This was made possible by the signing of an agreement with the Organisation for Economic Cooperation and Development (OECD) on Ukraine's accession to the Declaration on International Investment and Transnational Corporations [1]. The application of international standards for the activities of transnational corporations means the introduction of a national regime for these large business entities, which are

centres of influence on economic processes [2, p. 748]. This situation in the current conditions is important for the development of the modern agricultural sector of the Ukrainian economy, since it is agricultural transnational corporations that have a considerable influence on the development of national agribusiness. Among them, the most powerful are considered to be *Cargill* (crop and animal husbandry, food products), *McDonald's*, *Nestle*, *KraftFoods* (TM “Lux”), *Lactalis* (TM “President”),

Kernel (TM “Shchedry Dar”, “Stozhar”), *Pepsico*, *Danone* (“Danissimo”, ‘Actimel’) [3]. The products of these companies are familiar to the Ukrainian consumer because their products and services are of high quality, and they are also well-advertised. This position in the market was achieved not only by the availability of financial, labour, modern material and technical, innovative resources, but also by their rational use and a high level of management. Notably, Ukrainian farmers, mainly due to a lack of funds, an unfavourable lending system and lack of state support, etc., cannot create the necessary infrastructure at the proper level. For example, the state of material and technical support for agricultural producers is described by disappointing data: if 3,688 agricultural tractors were purchased in 2017, then in 2018 – 305 units, in 2019 – 209 units, that is, the trend of rapid decline in purchases of agricultural machinery is evident [4].

It is also important to pay address such a feature of the present as the predominance of private relations in agrarian relations, which considerably affect the completion of land and agrarian reforms. Thus, on March 31, 2020, the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Concerning the Turnover of Agricultural Lands” was adopted¹, which stipulates the introduction of the land market in Ukraine from July 1, 2021. The prospect of participation of transnational corporations in relations concerning the land market is explained by the fact that they can be registered as national subjects of Ukraine in the form of corresponding subsidiaries [5, p. 1]. This, admittedly, increases the interest of such corporations in investing in the agricultural market of Ukraine.

One cannot ignore an important fact – it is the agricultural market that is the most stable in the context of the COVID-19 pandemic, which considerably affected the state of global investment [6, p. 1]. Moreover, in the context of a general decline in investment and the spread of the pandemic, not only economic relations arise around transnational corporations, but also an opportunity to support and ensure human rights occurs, namely healthcare, access to essential products [7]. Considering the importance of agricultural transnational corporations for the development of Ukrainian agribusiness, the need for a separate study of the legal support of their activities is being updated.

At the level of scientific research, the features of transnational corporations were analysed in the works of J. Kapler (described the effect of intensity and accumulation of resources in the structure of transnational corporations) [8], M.I. Romanova (justified the position of multinationality of corporations) [9], O. Tahirli (indicated the implementation of corporate activities in individual states) [10], O. Cheku (identified the history of the development of transnational corporations) [11], etc. Despite their contribution to the development of this subject, many problematic issues remain (namely the lack of a definition

of the key term “agricultural transnational corporations” in the legislation) that have yet to be solved by modern lawyers and legislators. Understanding the essence of the phenomenon under study in the legal aspect, studying the features and significance of the activities of such agribusiness entities for society will not only offer the legislator its scientific definition, but also contribute to a more balanced and high-quality legal regulation of relations in the agricultural sector with the participation of agricultural transnational corporations. Given the above, one cannot ignore the fact that along with the positive manifestations of their activities, there are also negative manifestations that cause reasonable concern in Ukrainian society. Thus, large agricultural businesses around the world are associated with the use of genetic engineering, which allows getting a quick guaranteed profit. Furthermore, transnational corporations can influence the political processes of countries that are in a state of reform and economic development. Strengthening the role of these actors in the life of any society should be treated critically, giving preference to public and national interests. There is an absolute need for their separate research in order to develop and improve legislation governing relations involving transnational corporations. This area is particularly relevant for Ukrainian legislation, since it does not contain special provisions that would govern the activities of these entities, in particular, in agricultural relations. The issue of the impact (both positive and negative) of transnational corporations on the development of the agricultural sector of the economy was ignored by lawyers, which led to the existence of gaps in the legal regulation of the activities of agricultural transnational corporations. Therefore, the subject of legal support for the activities of agricultural transnational corporations appeared relevant and required scientific understanding and solution of pressing issues in law-making.

The purpose of this study was an identification of the specific features of legal support for agricultural transnational corporations in Ukraine.

1. MATERIALS AND METHODS

The methodological framework of this study included a set of philosophical, general scientific, and special legal methods of scientific cognition, the use of which is explained by the specific features of the subject matter. The dialectical method allowed identifying various trends that develop around the activities of transnational corporations in the field of agribusiness, namely consideration of the opposites in their activities, which are explained by the focus of corporations on making a profit. The hermeneutical methodological approach was fundamental in the process of understanding the activities of agricultural transnational corporations and provided an opportunity to interpret the law. The axiological method allowed conducting research considering the values that exist and arise around the subject

1. Law of Ukraine No. 552-IX “On Amendments to Certain Legislative Acts of Ukraine Concerning the Turnover of Agricultural Lands”. (2020, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/552-20#Text>.

under study. It was this method that allowed justifying the position that the activities of agricultural transnational corporations have positive (use of innovations, creation of new jobs in rural areas) and negative aspects (their activities can considerably affect the deterioration of the environment, in particular, soil degradation can occur).

The synergetic research method was the fundamental method of studying the legal support of agricultural transnational corporations. It allowed considering a transnational corporation as a complex system of mutual relations, in particular, to identify integration between the participants of the corporation, that is, to emphasise that they are described by self-organisation. Furthermore, this approach allowed identifying the specific features of the activities of agricultural transnational corporations that are constantly influenced by political, economic, and social systems. Concretisation of scientific cognition of the legal support of the activities of agricultural transnational corporations occurred through the use of general scientific methods, namely the method of analysis and synthesis, the historical method. The use of the analysis method allowed identifying the current scientific opinions regarding the definition of agricultural transnational corporations, at the applied level it provided an opportunity to establish the structural elements of this business entity (the existence of a parent company and subsidiaries, branches), the features of an agricultural transnational corporation, to identify their typical division.

The synthesis method allowed combining various types of activities that create a single agricultural chain, which can be covered by one agricultural transnational corporation. This method provided an opportunity to elaborate the definition of an agricultural transnational corporation. The historical method was used to prove a retrospective of the emergence of these complex agribusiness entities at the global level. The identification of a retrospective of the activities of transnational corporations allowed asserting the growing role of agricultural transnational corporations in the system of agribusiness relations. The formal legal method allowed investigating agricultural transnational corporations within the framework of the dogma of law, that is, considering the express regulation of their activities, both at the level of international and national legislation. The use of the system-structural method allowed establishing the features of an agricultural transnational corporation, determining their division depending on the type of agricultural production. The comparative legal method allowed searching for the provisions of international and national law towards the task set, identifying the levels of legal regulation of the activities of these subjects. The structural logical method made it possible to identify mandatory structural elements of a transnational corporation. In particular, the parent company manages subsidiaries, taking natural and climatic conditions that directly affect the cultivation of agricultural products in a specific country into account.

During the study of legal support for the activities of agricultural transnational corporations, a comprehensive

(interbranch) research method was applied. This method allowed conducting research considering the knowledge of various sciences, combining the achievements of economic and legal science. Furthermore, agricultural transnational corporations have an influence on the development of the economic system, so to investigate the subject of this study, economic opinions regarding the activities of transnational corporations were used. The statistical method was used, in particular, to identify quantitative indicators of the acquisition of material and technical resources by agricultural enterprises of Ukraine for the production needs of agricultural producers in 2017, 2018, and 2019.

The study materials included indicators of the number of purchased agricultural machinery for production needs from 2017-2019 and the number of agricultural transnational corporations among other transnational corporations. The study used materials in the form of scientific publications, background information, international and national legislation.

2. RESULTS AND DISCUSSION

2.1 Definition of an agricultural transnational corporation as a subject of agribusiness legal relations

Initially complex business entities, whose activities covered several countries, appeared in the 16th-17th centuries as a result of the colonial development of the New World [11, p. 171]. Gradually, such entities started being regarded as independent participants in legal relations and came to the attention of lawyers as the subject of research, thanks to which the modern term “transnational company” subsequently emerged. In 1974, this term was consolidated in the texts of documents of the Group of Seventy-Seven (G-77), which operates within the UN. It was this organisation that advocated the terminological separation of its international corporations, calling them “transnational corporations” (MNCs), from the corporations of the largest industrially developed countries, which were called “transnational corporations” (TNCs) [9, p. 168]. Despite progress in attempts to define the term “transnational corporation”, a special, as it were, branch term “agricultural transnational corporation” was not introduced. However, this did not prevent the successful operation of such companies as *Cargill*, *Nestle*, *Monsanto*, *ConAgra* and *Archer Daniels Midland* which successfully dominate the world food system. They control extremely large shares of international markets for grain, fertilisers, pesticides, and seeds. They are involved in the food system – from the farm to the supermarket [12]. And this is understandable because first the phenomenon itself arises, then “declares” itself and, subsequently, strengthens its position in society, which, for its part, noticing and recognising this phenomenon, gives it a name. Evidently, the role of agricultural transnational corporations will grow every year under the influence of objective factors, and the theoretical and practical need to determine agricultural TNCs based on the analysis of the features of a transnational corporation is also obvious, since the legislator has not provided a separate definition of this key concept.

The broadest definition of TNCs is proposed in the

Oxford Handbook as a company that is controlled from its own country (country of origin) and performs business operations in different countries [13]. At the level of Ukrainian legislation, the concept of TNCs is not identified, but the authors of this study recall that the definition of TNCs is stipulated in the Convention on Transnational Corporations¹ of the CIS dated 06.03.1998. Thus, Article 2 of the Convention establishes that TNCs should be interpreted as a legal entity (a set of legal entities), which owns, controls, or manages separate property in the territories of two or more countries; is created by legal entities of two or more countries; registered as a corporation in accordance with the legislation, in particular in the form of a financial and industrial group, company, concern, holding, joint venture, joint stock company with foreign participation, etc². The above definition is quite narrow in legal sources, a broader approach to understanding this subject is proposed.

O. Tahirli, along with international, multinational, and global companies, identifies transnational companies and defines them as complex structures with a developed internal system that are managed from one central or regional office [11, p. 80]. That is, the scientist based the concept of TNCs on the presence of a central office and an extensive system of enterprises.

According to J. Kapler, TNCs form the dominant group of firms that apply a qualitatively different, more intensive competitive regime, indicators of profitability of TNCs are explained by (a) a higher level of new capital investments and the evident ability to focus these investments on particularly profitable sectors, (b) the degree of internationalisation of production assets and (c) the presence of intensive search for new production technologies, advertising [9, p. 54]. O. Cheku proved that TNCs are a hierarchical entity, the unity of which lies in the binding decisions of the control centre of this entity for all its structural divisions [12, p. 174]. E.M. Limonova pointed out that they constitute an association of enterprises that engage in commercial activities in two or more countries, which allows, due to cross-border mobility, to acquire economic and political power that exceeds the limits of power of any subject of the national economy, which is regulated at the state, interstate, supranational and public levels, and ensures its trans-level [14, p. 28]. Analysing the different opinions of researchers on TNCs, it is advisable to highlight their features and emphasise that TNCs appear as associations of enterprises that centralise and consolidate capital, extend their activities to two or more countries, should act considering their own and public interests, while the latter are determined by the needs of the country where the activity is carried out.

Thus, the features of TNCs are as follows: 1) these are vertically integrated structures in the form of an association of enterprises; 2) an association of enterprises of different national origin; 3) the management structure

makes provision for the existence of a parent company and subsidiaries, branches; 4) they are a subject of capital concentration; 5) the activities of TNCs are spread to several states; 6) can influence the economy and policy of an individual state; 7) structural parts of TNCs operate under different national jurisdictions; 8) they have a single strategic plan of action and development.

Based on these features, considering the particulars of agribusiness, the authors can offer the following definition: an agricultural transnational corporation is a complex entity that engages in agricultural activities in two or more countries, is managed and controlled from a single centre and comprises a parent company, subsidiaries, branches, and departments. Attributes of an agricultural TNC are as follows: 1) it is an integrated structure in the form of a vertical or horizontal association of enterprises; 2) its activities cover the entire chain of agribusiness (agricultural innovation activities; activities for the production, storage and processing of agricultural products; agrologistics; provision of material and technical equipment (supply of agricultural machinery, agroservice maintenance, etc.); sales (marketing) of agricultural products), which is realised in different countries; 3) the management structure assumes the existence of the parent company and controlled entities; 4) it is a subject of concentration and integration of capital; 5) activities of a TNC are extended to several states; 6) it can influence the economy, politics, and ecology of an individual state; 7) planning of TNCs' activities factors in the natural and climatic conditions of production in different states.

2.2 Classification of agricultural transnational corporations

TNCs can be classified according to various criteria. According to its legal form, TNCs in Ukraine can be created in the form of a concern, a consortium, a holding company, or a joint-stock company. Depending on the organisation of business activities, TNCs can have the following types: cartel (associations of institutions whose members agree among themselves on the volume of goods produced, the division of sales markets, requirements for the sale and hiring of labour, prices, and other payment terms); syndicate (participants of the organisation have a certain production independence, but, according to joint contracts, lose commercial independence); pools (monopoly organisations, for which revenue goes to the general reserves, that is, there is a corresponding division according to the results of the operation of a separate part of the market in a pre-determined proportion); trust (structure of the organisation, within which members lose business independence); concern (statutory association of enterprises); consortia (temporary contractual association of enterprises); transnational strategic alliances (TSA) (a specific form of inter-corporate relations between two or more organisations) [15, p. 57].

Depending on the structure of the management

1. Convention on Transnational Corporations. (1998, March). Retrieved from https://zakon.rada.gov.ua/laws/show/997_193#Text.

2. *Ibidem*, 1998.

organisation, TNCs can be divided into: “1) horizontally integrated TNCs – manage divisions located in different countries that produce the same or similar goods; 2) vertically integrated TNCs – manage divisions in a certain country that produce goods delivered to their divisions in other countries; 3) separate TNCs – manage divisions located in different countries that are not combined vertically or horizontally” [16, p. 77].

According to structural features, there are international (a national dominant company with foreign assets), multinational (an international corporation that unites national companies of several states on a production and scientific and technical basis) and global corporations (a corporation that integrates economic activities carried out in different countries). To determine the legal forms, it is important to divide TNCs into holding (based on the shareholder form of control) and non-holding (relations in the association are based on the principles of special agreements) [17, p. 115-116]. It is advisable to add that TNCs can be divided according to the industry activities: machine-building companies, agribusiness, light industry, medicine, etc.

Notably, the capital of TNCs can combine state and private property because the growth of the economic power of TNCs contributes to the development of a cooperative option for interaction with states, international government organisations and subjects of public associations. As a result, a new structure for managing global economic processes will arise, which will be based on both mixed (with the participation of governmental and non-governmental actors in world politics) and private mechanisms that are created by TNCs independently or with the support of the international community [18, p. 42].

Proceeding from the above, it is possible to divide agricultural TNCs into types depending on the type of production of agricultural products: 1) TNCs that are mainly engaged in the production of agricultural products, their processing, sale; 2) TNCs with mixed activities (can be engaged, for example, in the production of agricultural products, and means of material and technical support for such activities).

2.3 Features of the activities of agricultural TNCs

The specific features of the activities of agricultural TNCs are conditioned by the fact that their production is located in developing countries, while the source of capital origin is concentrated in developed countries. The availability of financial support opens the way for TNCs to innovate, which makes it possible to be constantly competitive and have super-large profits. As a result, international corporations, as experts emphasise, continue their large-scale expansion not only in industry-specific commodity markets, but also in the innovative sector of the economy, which produces high-tech products with a fairly high added value [9, p. 179]. They are subjects of capital concentration. At the same time, the concentration of capital occurs in the country of the parent company, while the effect from applying investment occurs in the country of production. Along with

the positive aspects of implementing activities in TNCs, there are also some negative aspects – environmental pollution, intervention into political processes, etc. Thus, intensive TNC production directly affects the environment. Irrational and short-sighted farming substantially worsens the state of the environment, in particular, contributing to soil degradation, pollution of air and water bodies, violations in the use of agrochemicals lead to the extinction of bees and birds, and the transformation of forests into new agricultural land increases the area of deforestation and negatively affects biodiversity. Intensive farming, at the same time, depletes water resources (thereby increasing water scarcity) and causes soil erosion, leading to climate change. These environmental issues should also be considered upon determining the level of state support. Thus, farm production has less negative impact on the environment, and therefore the farming movement requires additional support and attention from both the state and society, while the activities of TNCs raise reasonable doubts and criticism. TNCs and international strategic alliances form global (cross-border and interstate) chains, which does not cause the dissolution of national states in them, which, as a rule, retain their integrity, although in a modified form [19].

The specific feature of TNCs' activities in the agricultural segment of the economy is also manifested in the fact that they currently give preference to crop production. Out of 25 TNCs in agriculture, only 4 companies fully or partially specialise in the production of livestock products. Thus, the American company “Tyson Foods Inc.” produces and sells chicken, beef, and pork in Brazil, India, China, England, Ireland, Japan, Mexico, Panama, Puerto Rico, Singapore, South Korea, Taiwan, and the United Arab Emirates. Another feature of agricultural TNCs is that all world-leading TNCs in the agricultural production actively use GMOs in their activities and develop ecological agricultural production (focusing on consumers) at the same time; herbicides, fungicides, insecticides, a system of protection of seed material (seeds), plant growth regulators, and various agrochemicals are widely used. TNC's innovative research also includes areas related to agribusiness, including medical research. For example, BASF conducted a study of the innovative area called Nutrigenomics in 2016, which investigates the effect of nutrition and nutrients on human genes [20, p. 18].

Notably, during the development of an agribusiness chain at the TNC level, the parent company can plan and implement its activities factoring in natural and climatic conditions that directly affect the cultivation of agricultural products in a particular country. It is known that agriculture depends on natural resources (availability of arable land, fertile soil), climatic conditions and availability of water resources. These conditions vary significantly around the world, which is why TNCs can take this into account and produce agricultural products in countries that are favourable for cultivation, and organise processing of these products elsewhere. Thus, TNCs have certain advantages among other agribusiness entities in terms of reducing

risks from agricultural activities. Recently, researchers of agricultural TNCs have noticed that in economically underdeveloped countries, transnational corporations often change the scheme of land use for a long period, due to the cultivation of mainly industrial crops and expensive environmentally friendly food products for export to rich countries, thereby worsening the land. This was the case, for example, in Ethiopia, where in the Awash Valley cotton and coffee plantations were extended to traditional pasture zones of nomadic tribes, or in the Sahel region of West Africa, where transnational corporations profitably used thousands of hectares for agriculture, cotton cultivation, and cattle breeding at the expense of their grain production [21, p. 93]. Furthermore, agricultural TNCs are changing the food culture, in particular in TNCs, whose headquarters are always located in the United States and Europe, they are steadily replacing conventional food systems in the world [22]. It is also necessary to consider that agricultural TNCs can increase the shortage of agricultural products, which eventually leads to an increase in prices for these products on the internal market.

Thus, the specific features of the activity of agricultural TNCs lie in the presence of certain positive and negative aspects. The first aspects include the fact that TNCs allow the country to solve a number of problems: improving the efficiency of national exports; intensifying mutually beneficial cooperation with countries receiving investments; ensuring uninterrupted supply of raw materials, skilled labour and innovative technologies; effective use of competitive advantages by national corporations to achieve competitiveness at the international level; overcoming (by concluding special agreements with the government of the recipient country) barriers to entry of national TNCs into the host country market; establishing regional cooperation within the home country and stimulating further development of investment abroad [23, p. 118]. The negative aspects of TNCs' activities include the fact that these entities are associated with the tendency to create their individual autonomous economic system, which threatens to replace the interstate economic order or substantially modify it. TNCs may challenge the principles on which the international economic order is currently based [24, p. 6].

2.4 Current issues of legal regulation of the activities of agricultural TNCs in Ukraine

Despite the global economic crisis associated with the pandemic, TNCs continue to express interest in the agricultural sector of the Ukrainian economy, which has recently significantly increased, which is obviously explained by the possibility of opening the agricultural land market. Despite the fact that foreign companies are deprived of the right to

be participants in the land market, they can create national enterprises that will have the right and opportunity to purchase land that will actually become the capital of TNCs. This gives grounds to state the activation of the presence of TNCs in Ukrainian agribusiness. Therewith, national legislation does not systematically regulate the activities of TNCs. In this regard, the government of Ukraine does not have the opportunity to set certain restrictions and social obligations of TNCs. This constitutes a considerable gap in relations between TNCs, the government, and society. The specific features of legal regulation of agricultural TNCs are also not considered. This situation may negatively affect the development of the national agricultural sector of the country, as TNCs influence the pricing of agricultural products, the distribution of domestic agricultural markets, and food security of the state. Considering the above, it is necessary to clearly set out legal provisions to optimally regulate complex and multidimensional legal relations involving agricultural TNCs.

In the Charter of Economic Rights and Duties of States¹ approved by the UN General Assembly resolution of 1974, it is established that every state has the right to regulate and control the activities of transnational corporations within its national jurisdiction and to take measures to ensure that such activities do not contradict its laws, provisions, and regulations and comply with its economic and social policies. Transnational corporations should not interfere in the internal affairs of the host state (Paragraph 2, Article 2 of the Charter)². In its activities, TNCs should be guided by the provisions of the Declaration on International Investment and transnational Companies of June 21, 1976, which was supported by Ukraine, but has not yet been ratified. According to this declaration, TNCs are obliged to comply with the provisions of national legislation; promote economic, social, and environmental progress to achieve sustainable development; refrain from seeking and receiving benefits that are not provided for in laws or other regulatory provisions related to human rights; encourage local capacity-building through close cooperation with the local community³. In accordance with the positions of the United Nations Conference on Trade and Development (UNCTAD), TNC (transnational corporation, transnational corporation, transnational company, transnational enterprise) is an enterprise that unites legal entities of any legal forms and types of activity in two or more countries and pursues a single policy and common strategy thanks to one or more decision-making centres [25, p. 36]. According to the UN Code of Conduct of TNCs, a transnational corporation is an enterprise described by the location of subsidiaries in two or more countries of the world, regardless of the field of activity and legal form of

1. United Nations General Assembly Resolution 3281 (XXIX). Charter of Economic Rights and Duties of States. (1974, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_077?#Text.

2. *Ibidem*, 1974.

3. Declaration on International Investment and transnational Companies C(76)99/FINAL. (1976, June). Retrieved from https://investment.zoda.gov.ua/frontend/web/userfiles/view/files/deklaratsia_oesr.doc.

the institution; it uses such a decision-making system that ensures the implementation of effective management strategies from several centres and contributes to a coordinated policy within the company's divisions [26, p. 95].

Analysis of the provisions of legal regulation of TNCs' activities reveals three levels of legal regulation of the activities of these agribusiness entities: domestic legislation, agreements between the two states, and international acts. For the legal regulation of TNCs, the most promising is the international legal unification of the provisions governing the creation and operation of TNCs. This means that the unified provisions included in the relevant universal international treaties are implemented in the national legal systems of the participating countries [27, p. 430].

In Ukraine, the concept of TNCs is still not defined at the level of national legislation. Part 3, Article 120 of the Economic Code of Ukraine is applied to their activities, according to which a corporation is recognised as a contractual association created based on a combination of production, scientific, and commercial interests of the combined enterprises, with their delegation of separate powers of centralised regulation of the activities of each of the participants to the corporation's management bodies¹.

CONCLUSIONS

In the overall structure of Ukrainian agribusiness, TNC activities form an important component that actively influences the development of the state's agro-industrial sector. TNCs as complex integrated subjects of agricultural activity in Ukraine are mainly created due to foreign direct investment, which, in turn, opens up access to new technologies of agricultural production. One of the important features and at the same time features that determine the essence of the activities of agricultural TNCs is that the production chain that unites the production of agricultural products with the participation of TNCs covers several states. That is what accounts for the specific features of

their activities in agribusiness. In particular, agricultural products grown in Ukraine can be processed, packaged in another country, and offered for sale in several countries. Agricultural value chains can be long, and different actors – both national and foreign – are involved at each stage of the chain. Each participant performs certain functions (supply, transportation, processing, sales, and retail trade).

The conducted research allowed formulating the concept of a transnational corporation, its varieties. The activities of any transnational agricultural corporation can have both positive and negative effects. After all, due to globalisation processes, climate change, and the constant threat of food shortages in individual states, the activities of these corporations constitute a necessary element of the global economy. The study of the practice of TNC functioning indicated that there are three levels of legal regulation of TNC activities: internal legislation, treaties between two states, and international acts. The lack of legal regulation of the activities of agricultural TNCs at the level of Ukrainian legislation indicates obstacles to the development of Ukrainian agricultural producers, the presence of threats to environmental and food security for the country's population in general. Notably, this is a negative phenomenon that needs to be eliminated as soon as possible. When improving the legal regulation of TNCs' activities, it is necessary to consider the following details: 1) the public and private interests of both the state and TNCs; 2) the ability to have guarantees to reduce the negative impact of TNCs' activities on the environment; 3) the ability to oblige TNCs to bear social responsibility to the local population.

RECOMMENDATIONS

This study may be of interest to researchers of problems of economic and agricultural law, practising lawyers in the field of agribusiness. The materials of this study can be used to prepare methodological recommendations, textbooks on agricultural law, and agribusiness law.

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ПРАВОВИЙ ПОЗИТИВІЗМ У КРИМІНАЛЬНОМУ ПРАВІ ТА КРИМІНОЛОГІЇ: РЕТРОСПЕКТИВНИЙ АНАЛІЗ

Анотація. У статті проаналізовано ідеї представників напрямів у позитивістській школі кримінального права та кримінології, а саме: кримінально-антропологічний (біологічний), кримінально-соціологічний (соціологічний), біосоціологічний (позитивістський) напрями. Дослідження вказує на те, що головна особливість кримінально-антропологічного (біологічного) напрямку полягає в тому, що його представники розглядали злочинця як особливий вид людської раси та особливу ненормальну істоту, наділену певними фізичними та психічними аномаліями. Вчинення злочину для такої людини є природною необхідністю. Представники кримінально-соціологічного (соціологічного) напрямку в основному скептично оцінювали висновки прихильників антропологічного напрямку, які шукали причини злочинності саме в соціальних факторах, відзначали важливість взаємодії соціальних, політичних та економічних факторів і висловлювали впевненість, що марно намагатися впливати на злочинність, не змінюючи соціальних умов, що призводять до злочинності. Розглянуто основні ідеї представників різних напрямів у правовому позитивізмі в кримінальному праві та кримінології та визначено їх значення для сучасності. Встановлено, що соціально-філософська методологія характеризується тісним зв'язком між спекулятивними методами пізнання та емпіричними дослідженнями. Зазначається, що вплив суспільного життя на всі сфери є одним із найефективніших способів боротьби зі злочинністю. Усі органи влади, а також науковці мають визначити та проаналізувати існуючі зв'язки між сучасними соціальними змінами та кримінальними процесами, що відбуваються в суспільстві. Комплексний аналіз причин злочинності може допомогти зменшити рівень злочинності

Ключові слова: соціологія, злочин, покарання, соціальні фактори, юридична філософія

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LEGAL POSITIVISM IN CRIMINAL LAW AND CRIMINOLOGY: A RETROSPECTIVE ANALYSIS

Abstract. *The article analyzes ideas of representatives of the directions in the Positivist School of Criminal Law and Criminology, namely: criminal-anthropological (biological), criminal-sociological (sociological), bio-sociological (positivist) direction. The research indicates that the main feature of the criminal-anthropological (biological) direction lies in the fact that its representatives considered the criminal as a special kind of the human race and a special abnormal creature endowed with certain physical and mental anomalies. The commission of a crime for such a being is a natural necessity. The representatives of the criminal-sociological (sociological) direction mainly skeptically assessed the conclusions of supporters of the anthropological direction, who looked for the causes of crime precisely in social factors, noted the importance of the interaction of social, political and economic factors and expressed confidence that it would be useless to try to influence crime without changing the social conditions that lead to crime. The main ideas of representatives of different directions in legal positivism in criminal law and criminology are considered and their significance for the present is determined. It was established that the socio-philosophical methodology is characterized by a close connection between speculative methods of cognition and empirical researches. It is noted that the impact of public life on all spheres is one of the most effective ways to combat crime. All authorities, as well as scientists, should identify and analyze the existing links between modern social changes and criminal processes taking place in society. A comprehensive analysis of the causes of crime can help reduce crime rates*

Keywords: *sociology, crime, punishment, social factors, legal philosophy*

INTRODUCTION

At all times, crime has evoked an acute social response. This is one of the most pressing problems that has produced considerable controversy. Crime is multifaceted and extremely complex in modern society. In the world of science there are many theories and research traditions, which compete and even complement each other. For example, some

scientists consider crime as a sign of a weakened or socially disorganized society. Paradoxical as it may sound, but others believe that criminal behavior within acceptable limits can serve to strengthen the existing legal and social order. However, other scientists examine crime as a socially conditioned result of competition and conflict between

different groups in society, believing that criminal behaviour poses a threat to certain group or class interests. Crime is considered as a recursive product, a relational and conventional social construct and a part of the historical and cultural context within the phenomenology and post-modern criminology [1].

We are convinced that criminality is a combination of crimes of one or several types, which are widespread and are regularly repeated in a country or in a particular region over a certain period of time. Crime is an integral part of human relationships. It accompanies society at all stages of its development and reflects the behaviour of individuals that are perceived as crimes by other members of society. However, it is not a social phenomenon. The authors, who consider crime as a social phenomenon, often rely only on the fact that crime is a feature of society that naturally gives rise to individual crimes. Nevertheless, the concept of “social phenomenon” does not contain the characteristics of the object that characterizes. In this case, we are not talking about crime, but about its causes and factors. In addition, a phenomenon in philosophy is a manifestation and expression of what the essence is manifested in [2].

A specific crime can be recognized as a social phenomenon. At the same time, not every crime is a necessarily consequence of relations between people. It can even be a psychological need of an insane person. The preliminary relationship between people in the case of a careless crime is out of question. The multiple offenses and their repetition are the most essential features of crime. Any one crime, for example, fraud cannot be classified as criminality just because it has become widespread. It is only a widespread fraud. However, criminality includes repeated multiple frauds, robberies, murders, etc. Therefore, it will not be correct to claim that crime is a social phenomenon. It is a set of social phenomena [3].

Modern criminology is widely based on legal, sociological, psychological and biological knowledge and the achievements of other sciences about society and man. In addition, it is rapidly developing. It is also no coincidence that discussions still continue in this field of knowledge [1]. The process of finding responses to the challenges of science is stimulated by practice and by the needs of everyday life. The global process of criminalization of society, which is aggravated every day in the world, is also palpable in Ukraine [4; 5]. The report of the Cabinet of Ministers of Ukraine states that “the number of particularly serious crimes have decreased by 17% compared to the previous year in Ukraine for 2019. A total of 142,500 cases were recorded. The number of other crimes has also decreased: crimes related to theft of vehicles have decreased by 17% (5400); crimes against property, traffic safety and the operation of transport vehicles have decreased by 15% (289000)” [6]. The crime situation remains quite alarming despite a slight decrease in the crime rate compared to 2018. Perhaps not every person in Ukraine can feel safe. A citizen usually remains defenseless in the face of criminality, and criminals are not always punished. This fact

forces modern science to turn to understanding a number of pressing problems of criminal law and criminology from the point of view of social philosophy, which considers social structures, systems and processes at the macro level and combines speculative methods of cognition with empirical research.

The philosophical study of issues related to the existence of crime, its causation, attitude to law, as well as the problems of the relationship between crime, morality and retaliation, is rooted in ancient times. The ontological problems of evil have already been mentioned in the works of famous thinkers of the ancient world, the Middle Ages and the New Age. Radical changes in the field of philosophical and world view ideas have always led to the emergence of new directions in the development of social sciences. It is known that the subject-methodological relationship of philosophy and social sciences is one of the conditions for the progress of these sciences. This relationship applies to both legal science in general and criminal law and criminology in particular, the development of which is directly related to the development of philosophy and sociology. Combating crime requires appropriate knowledge of the factors that affect it and the causes of a particular crime. It is impossible to obtain such knowledge without philosophy, because any particular scientific problem can not be solved without understanding the general problem. The study of the scientific heritage of our predecessors, who developed or used in their research a methodology borrowed from philosophy, helps to find new ways of developing modern legal science in terms of asserting the priority of individual rights and recognizing its place in a civilized society [7].

Modern scientists have already addressed the works of representatives of the Positivist School of Criminal Law and Criminology. According to N. Medvedeva, the Positivist School of Criminal Law has filled the “gaps” of the Classical school, bringing its vitality and prospects. The ideas and theories of this school should be approved in the sciences of the criminal cycle, criminal law and the practice of combating crime in accordance with the progress of the sciences that study man and society [8]. A. Sitkovskaya also states that the ideas of positivism are recognized by science and are widely used in practice [9]. M. Kostitskiy, who critically assesses the positivism of legal practice, took quite the opposite view. He noted that it is necessary to revise the methodology, both in theory and in practice, in jurisprudence. Not only practitioners, but also theorists operate with “dead” information, as a result of which life, the functioning of society, the state and law is reduced to simplified logical schemes in which real life is not visible. Practical jurisprudence degenerates into dogma and scholasticism, and the main task for lawyers is to combine the diversity of social life with ready-made schemes and standards [10]. A. Kostenko highly criticized positivism [11].

It is necessary to state our point of view regarding the main ideas of the supporters of legal positivism in criminal law and criminology and determine their significance for

the present, taking into account the different positions of modern scholars in connection with the methodology of positivism (from strong approval to critical assessments) and different interpretations of its significance for theory and practices of combating crime.

1. LEGAL POSITIVISM AS A SPECIAL COURSE OF LEGAL PHILOSOPHY: EMERGENCE AND EVOLUTION

The methodology of knowledge occurred in the the 30s-40s of the 19th century. The French philosopher and sociologist Auguste Comte (1798-1857) is considered to be the founder of positivism. A. Comte's work coincided with a period of profound social changes, which he perceived as a general moral, intellectual and social crisis. The scientist saw the reasons for this crisis in the destruction of traditional institutions and spiritual foundations of society and in the absence of a system of beliefs and views that would correspond to new social requirements, which could become the ideological basis for future social transformations. According to Auguste Comte, the transition of society to a new state cannot occur without the active participation of a person and his determined and creative efforts [12].

Auguste Comte sought to theoretically synthesize "positive knowledge" and substantiate the principles of sociology as a new science about society. The term "positive knowledge" was introduced into scientific parlance by Comte, who created sociology by analogy with the exact sciences, proving that this science should study the objective laws that govern the phenomena of reality. In his opinion, science should dispense with such provisions that cannot be verified. The person should be guided by the following three basic principles of sociology: empiricism, positivism and physicalism to obtain reliable knowledge. Empiricism means that the only source of true science about the world is experience. Positivism considers that the subject of science is only facts. Physicalism claims that the most perfect are the concepts that are created by physics. Positivism explains only the knowledge that is obtained through the method of observation and experiment. The task of the researcher is to explain the essence of phenomena and to establish causal relationships between them, but not to describe facts and build theoretical constructions that have nothing to do with real life. A. Comte notes that "the human spirit recognizes the impossibility of achieving absolute knowledge, refuses to study the emergence and purpose of the existing world, knowledge of the internal causes of phenomena, and, correctly combining judgments and observations, strives for knowledge of the real laws of phenomena, i.e., their constant relations of sequence and similarity in a positive state" [12]. The legal science of the 19th century was influenced by the ideas of A. Comte about the need of the researcher to identify the laws of the historical process and to study social institutions and structures. The understanding of society as an organic whole, the differentiation of the laws of functioning and the laws of development of society, and the search for factors of integration and stability became

useful in the scientific and cognitive terms. Two tendencies of positivist methodology occurred on the basis of the philosophy of positivism: legal positivism (formal-dogmatic) and sociological positivism (based on positivist methodology and sociology).

The ideas of positivism found resonance and further development among representatives of the science of criminal law in the last third of the 19th century. The essence of the positivist approach was the use of experimental researches in the study of crimes and penalties. The applying of this approach was prompted by the needs of practice that suffered from the inability of the Classical school (C. Beccaria, I. Bentham and others) to offer society effective ways to combat crime. Representatives of the Classical school associated the choice of behaviour only with the fact how a person learned the moral rules of life, considering a crime as a consequence of the conscious behaviour of a person who has complete free will and chooses options for his actions at his own discretion. They did not pay enough attention to both the personality of the offender and the objective social factors that determine this behaviour. Crime prevention was limited only to measures of upbringing and education, which did not give the expected results. Therefore, there was a need to determine the reasons that led a person to commit a crime.

The Positivist School of criminal law, the ideas of which were widespread in European countries, was formed in Italy in the 70s-80s of the 19th century. The name of the school is associated with the use of a positivist (experimental) approach in studies of criminal phenomena, the personality of the offender as a biosocial creature and the influence of punishment on him. This scientific school was based on the recognition of social and biological determinants of crime and called for the use of data from various sciences (sociology, psychology, biology, physics, etc.). The Positivist School demanded a reform of criminal legislation in order to create an effective system of measures to protect society from crime, ensure its safety and prevent offences. Moreover, the Positivist School of criminal law has been represented by three main scientific areas: criminal-anthropological (biological), criminal-sociological (sociological) and bio-sociological (positivist) [8].

Cesare Lombroso (1835-1909) was an Italian psychiatrist, professor of psychiatry and criminal anthropology, and a prominent representative of this school. He is regarded primarily as the author of the theory of the biological predisposition of certain people to commit crimes. His theory laid the foundations for modern criminal anthropology and criminal psychology. C. Lombroso was one of the first to place the individual himself in the center of the study of deviation from the stand point of his bodily and anthropological characteristics in his work "The Criminal Man" (1876). He was a born collector and actively engaged in this issue, but neglected to systematize the accumulated knowledge. He collected and studied those aspects that did not interest others wherever he went, whoever he communicated with, in whatever scientific discussions he

participated, in cities and villages, in prisons and abroad, and thus, accumulated many curiosities which true value was unclear even to himself. However, all this knowledge was somehow associated with already done or upcoming research in his mind. He was sent skulls, brains, skeletons, photographs of criminals, madmen and epileptics and samples of their work, as well as graphs and diagrams that clearly represented the criminal development of Europe". According to the description of his contemporaries, the "material basis" of criminal anthropology was formed in this way. For a long time C. Lombroso served as director of a psychiatric clinic in Pesaro and often communicated with criminals who were brought in for examination. Therefore, based on rich factual material, he was one of the first to use the method of anthropometric measurements in criminological practice. According to C. Lombroso, it is possible to determine whether a person has criminal inclinations by the appearance of this person (by the shape of the face, the shape of the eyes, the shape of the nose). C. Lombroso believed that based on the identified features, it is possible not only to identify the "criminal element" of society, but also to distinguish between the types of criminals, namely: murderers, thieves, rapists, [13]. C. Lombroso and his followers focused on the personality of the criminal for the first time. Thanks to the efforts of this school, the theory of clinical criminology (dangerous state of personality) became widespread that explained criminality as a propensity to offences inherent in individuals. According to representatives of this school, correction of the behavior of potential or real criminals can be carried out using electroshock, surgery, sterilization, medication, etc.

Raffaele Garofalo (1851-1934), an Italian lawyer and criminologist, was one of the most famous representatives of this school and the student of C. Lombroso. R. Garofalo considered the reasons for the crime in the offender himself, who, like a virus, began to commit increasingly dangerous acts when he got into the appropriate environment. According to the scientist, the defectiveness of the offender's moral feelings and the lack of compassion and honesty lead to a crime. A criminal is a person who cannot adapt to normal life, and a crime is only a symptom of this abnormality. R. Garofalo believed that there was no need for society to spend funds for maintaining the courts and on attempts to change the criminal. The commission of experts should identify the degree of danger of the offender to society and impose a punishment that can isolate him from society (death penalty, hard labor, refusal of conditional sentences). The purpose of punishment was to neutralize or destroy criminals [14; 15].

The concept of mental retardation of criminals, substantiated by psychologists R. Dugdale (1841-1883) and G. Goddard (1866-1957) and the concept of hereditary predisposition (A. Kinberg, A. Longuet, etc.) was similar in content and meaning to the theory of C. Lombroso. Thus, R. Dugdale established the relationship between intellectual and mental disabilities with a propensity to crime on the basis of a study of the genealogies of mentally

retarded families. They found that a significant proportion of relatives in some families were socially unadapted individuals for several generations. The research of these scientists laid the foundations for studying the hereditary nature of dementia and other psychological defects, but they could not convincingly explain the reasons for the commission of crimes. The downside of all these teachings was precisely that they did not take into account the social factors of crime [16].

The head of the Russian branch of the Positivist criminal-anthropological school Dmitry Dril (1846-1910) substantiated his version of the anthropological theory. He criticized the extremes of this theory, such as the typology of "born criminals", but highly appreciated the spirit of the "natural-scientific" study of crime using precise scientific approaches applied to study the very fact of criminal behaviour, its causes, conditions and consequences, as well as the subjective and personal element of the crime. D. Dril fully shared the views of those Western scholars who named social problems and, first of all, poverty as the root causes of crime. However, in his opinion, the sociological school almost completely ignores the question of whether these factors "produce psychophysical changes in an offender who gradually prepares to commit a crime" [17]. D. Dril believes that "there is no doubt that the supposed social factors gradually produced all these organic and, at the same time, mental changes in the nature of the personality unfavorable for the person himself and people around him. However, having understood the nature of the necessary consequences of the influence of these unfavorable social factors, he asks a fair question about whether these changes, in turn, become the direct producing reasons for the commission of crimes of a given person...?" In answering this question, the scientist formulates one of his main theses that man, like all other beings, is constantly influenced by external conditions, which are social ones. The person gradually more or less, positively or negatively changes under these conditions, both during the life of rising generations and during his personal life. We do not know a person outside the influences of society and, therefore, cannot reason about him. If the surrounding conditions are unfavourable, but they have not yet become bad and vicious, then there is no predisposition to crime. However, if bad and vicious character traits have already been developed by the influence of a social factor, then they are a more remote cause of crime. In this case, some external conditions play the role of repulsive and prompting reasons. Thus, we should not accept one-sided theories (exclusively social or organic), but we can turn to the socio-organic approach, in which both interacting factors coexist. D. Dril emphasized the importance of individual crime factors, which, in contrast to Western European anthropologists, were completely subordinated by social factors. In his point of view, the source of crime is always two main factors – private and social, and the second factor determines the first one [17].

The ideas of the outstanding Italian criminologist

and politician Enrico Ferri (1856-1929), who proposed to consider all these areas as the Positivist school, were the connecting link between the views of the supporters of the anthropological and sociological schools in criminal law. E. Ferri, as a follower of C. Lombroso, developed the ideas of the anthropological orientations in criminal law, slightly corrected them and emphasized the importance of the interaction of social, political and economic factors. His teaching was based on three postulates: 1) free will disappears with the transformation of criminal law into self-defense techniques of society from criminals, and therefore, there can be no moral responsibility; 2) the offender is a member of the human race and an abnormal being; 3) punishment does not affect the decrease or increase in crime. He proposed the following classification of criminals: 1) "born criminals" (the term by C. Lombroso) with pronounced physiological deviations; 2) criminally insane; 3) criminals with acquired habits, which are most influenced by social factors; 4) criminals due to addiction (hate, revenge, jealousy, love); 5) accidental criminals [18].

It should be noted that following the ideas of C. Lombroso about "born criminals", E. Ferri emphasized that such a criminal is not a person fatally doomed to a criminal path, but a being who is prone to crime to a certain extent. There is a possibility that such a person will never commit a crime. However, it is also possible that a crime will be committed by a person who does not have any signs of a "born criminal". Madness and neurosis will cause crime until the degeneration caused by material and moral problems is eliminated. E. Ferri opposed the death penalty and argued that the cruelty of punishment never led to a decrease in crime. He insisted on improving the social conditions of a person's existence. At the same time he proposed to introduce a system of repressive measures, applied depending on the nature of the offender, but not the crime. He argued that the conditions corresponding to the characteristics of the offender are the most suitable for criminals of a particular type. For example, a criminally insane needs a "criminal house for the insane"; a "born criminal" should be isolated from society; it is necessary to apply measures of public influence, temporary removal from the community and work in agricultural colonies for a criminal with acquired habits; there must be a mandatory monetary reward for damages or work in favor of the state or community for an accidental criminal. A criminal due to addiction, according to E. Ferri, should not be punished at all [19]. The last statement of the scientist gives us serious reasons for doubt. From E. Ferri's point of view, punishment is not the only weapon in the fight against crime. First of all, social preventive measures against crime factors are needed. It is advisable to create such social conditions under which a person would have the opportunity to satisfy his needs honestly, and not to take the path of crime [20]. He saw the solution to the problem in overcoming economic inequality. E. Ferri is a founder of the theory of "social defense" that provides for the creation of a special integrated system to combat crime, which should include both social crime prevention

measures and administrative legal, civil legal and criminal legal measures aimed at ensuring the safety of society and its protection from crime. According to this theory, security measures can be applied to a person only if he has already committed a crime, but not before committing it.

2. ANALYSIS OF SOCIOLOGICAL ASPECT INFLUENCE IN CRIMINAL LAW

The sociological direction in criminal law and criminology was formed by the end of the 19th century and beginning of the 20th. The French and Belgian astronomer and mathematician Adolphe Jacques Quetelet (1796-1874) was one of the founders of the sociological direction. He explained the influence of various social and biological factors on the criminal behaviour, and found that numerous crimes demonstrate the same pattern as natural phenomena. The number of crimes and their nature does not change from year to year. A person's actions, which supposedly depend on his free will, in fact, are not. They are influenced by certain laws that operate independently of human desire and will [21; 22]. A.J. Quetelet came to the conclusion that society itself has the makings of a committed crime, because there are conditions in society that contribute to its development, and a person is only an instrument for its implementation. Each social formation determines a certain number and types of crimes, as a necessary consequence of its structure.

The eminent scientist French sociologist and criminologist Jean Gabriel Tarde (1843-1904) was a well-known representative of this trend. He considered crime and criminality in historical development and in connection with the evolution of society and social relations. In addition, Gabriel Tarde focused on the study of the personality of the criminal. He studied with representatives of the Italian anthropological school, but had diametrically opposed views. Like the Italians, J. G. Tarde is a determinist in some aspects in the science of criminal law, but he is not a fatalist. He is a sociologist [23-25]. As a result of a comprehensive analysis of the anatomical, physiological and psychological characteristics of criminals, he came to the conclusion that "its (crime) origin is primarily historical and its nature is primarily social." [26; 27]. According to J.G. Tarde, no one is born to kill, burn and steal from people. However, there are such concepts as natural inclinations and natural influences, which can lead to crime, because they are a form of social influence. According to J.G. Tarde, a criminal is a person who is forced to be removed from his environment by a properly organized society. The criminal is both a social and a natural being. We can say that this is a social experiment. It is common for prisoners to be ruthless, irritable and vengeful, as a result of a lifestyle that includes the following: visiting bad company; creating conditions for the development of pride, vanity, envy, anger and laziness; insensitivity to tender feelings and a tendency to strong feelings; suffering in childhood (beatings, abuse, physical torment); indifference to evil, insensitivity [28]. In considering the problem of neutralizing crime, J.G. Tarde was rather skeptical about the opinion of his contemporaries

that labor, general welfare and education can be preventive social measures of crime. After all, the spread of education and the accumulation of wealth just contributes to the emergence of new opportunities for enrichment, including illegal. J.G. Tarde saw the way to solve the problem of crime prevention in the expansion of human communication and in its globalization. He argued that the positive and constructive activity of the state is an important condition for the prevention of crime [28].

Behaviour that is harmful to society and the state should be eradicated from the very beginning, i.e., from the moment the personality is formed. Hans Jurgen Eysenck (1916-1997), a famous British psychologist and founder of the factor theory of personality, argued that criminal behaviour is nothing more than a consequence of the interaction of a particular human psychotype with its habitat. Meanwhile, crime cannot be predetermined only by biological factors and genetics, as well as by environmental circumstances. H.J. Eysenck explained why some people commit crimes, while others do not by the fact that the latter have formed conditioned reflexes to social rules and norms from childhood, which they simply cannot violate. This fact indicates the importance of social factors in determining the causes of criminal behaviour. The obvious ineffectiveness of the methods used to predict and prevent criminal behaviour indicates the need to pay attention specifically to the study of the motivating factors of social significance, because "crime, as well as society is eternal... The more complex it becomes, the more difficult it is for an individual and the more frequent its breakdowns are. The huge numbers of sanctions and laws that must be respected only exacerbate the evil" [29; 30].

The well-known Russian and later American philosopher, sociologist and culturologist Pitirim Sorokin (1889-1968) approached the consideration of crime from a psychological point of view. He interpreted crime on the basis of the classification of "patterns" of people's behaviour in society and the forms of response to them, considered it as a psychological phenomenon that arose in social relations. He found the main reason for the crime in the differences in the "patterns of behavior" of various groups of the population, united (most often as a result of a victorious war of conquest) into a single "group with collective consciousness". However, different people choose different patterns of behavior [31]. P. Sorokin proposed to classify the act as criminal on the basis of specific experiences of the person, as a result of which the individual himself considers the act to be criminal. At the same time, taking into account the social and political practice at that time, P. Sorokin admitted that at present a crime is an act (action) that is prohibited by the existing law, namely, violating the norms protected by the criminal law. He considered crimes as public evils, and believed that the whole society should fight them. From the point of view of P. Sorokin, crime and punishment are the implementation of certain behavioral patterns, which differ from each other in that crime is the cause, and punishment is the effect. The function of punishment is to motivate

people's behaviour by threatening future disadvantages. P. Sorokin suggested that the role of punishment, as well as reward, is to create, maintain and strengthen solidarity within a group or between groups.

The scientist considered the main source of crime to be social division into classes, which leads to an uneven distribution of wealth, as a result of which some classes receive an excess of wealth, while others are doomed to poverty and need. Hunger, uncertainty about the future, fear for themselves and their children instills enmity in society, leads to despair and drunkenness. This is a constant source of crime. Referring to statistical research, P. Sorokin argued that there is a direct relationship between the state of life of various segments of the population and crime. The main source of crime is the economic poverty of the lower strata of the population. It entails the inability to get a decent education, lack of rights, wildness, lack of reasonable and useful entertainment. A person who once embarked on the path of crime, mechanically continues to commit crimes, goes off the deep end, and finally turns into a confirmed criminal "who can only be corrected by a grave lost in the taiga or in a convict cemetery." [32]. According to P. Sorokin, fight crime by punishment alone is a hopeless case. In general, punishment should assume a complementary role. The system of punishment itself should be radically changed in the direction of reducing cruelty, abolishing the death penalty, and changing the regime of prisons and other educational institutions, which finally deform a person's consciousness, but do not correct "miserable outlaws of life who are called criminals" [33]. It is rather difficult for us to agree with the last quoted phrase of P. Sorokin. This assessment is not acceptable to all criminals. We share the opinion of P. Sorokin that the state should make efforts to deter crime. These efforts should be multifaceted and concern not only the usual measures of criminal law to combat crime, but also extend to all spheres of public life.

The Ukrainian legal scholar Mikhail Chubinskiy (1871-1943) was the representative of sociological positivism in criminal law and criminology, who emphasized the need to study the causes of crime. The person cannot change the consequences without knowing the causes and without influencing them. He called for paying more attention to the objective side of the crime. In his opinion, the objective side of the crime is most pronounced when we pay attention to the interests of the victim. If material damage is caused to the victim, then it is enough to compensate for the damage for his satisfaction, and punishment may imply only the protection of public interests. If the victim suffered moral damage, then only the punishment of the guilty person can be compensation for him in this case: this punishment must be consistent with the objective side of the crime, and not only with considerations of public interest [33]. Taking this fact into account, M. Chubinskiy shared the point of view, according to which the main goal of the state's punitive activities should be the protection of public interests [34].

Many changes have taken place in the criminal behaviour research methodologies since the time of the Classical school. Most modern criminologists have no doubt that the nature of a person's criminal behaviour is profoundly social. Thus, the individual, as a fundamental unit of society, and his behaviour (criminal in particular) is a reflection of this society and its rules. Moreover, if at the dawn of criminology, biological indicators were mainly taken into account, then they began to gradually recede into a secondary plan against the background of social indicators with the further development of science and society [30].

CONCLUSIONS

We can draw the following conclusions. The Positivist School of Criminal Law and Criminology relied on the results of a statistical analysis of crime, the social characteristics of a criminal's personality, and took into account environmental factors affecting crime. Each direction of this school has made its contribution to solving the problem of combating crime. Proponents of legal positivism in criminal law and criminology explained mainly the reasons for criminal behaviour, but not the reasons for crime. Socio-philosophical methodology is characterized by a close connection of speculative methods of cognition with the results of empirical research. The main feature of the criminal-anthropological (biological) direction lies in the

fact that its representatives considered the criminal as a special kind of the human race and a special abnormal creature endowed with certain physical and mental anomalies. The commission of a crime for such a being is a natural necessity. Sociological and biological theorists equated social factors of crime with biological ones. The representatives of the criminal-sociological (sociological) direction mainly skeptically assessed the conclusions of supporters of the anthropological direction, who looked for the causes of crime precisely in social factors, noted the importance of the interaction of social, political and economic factors and expressed confidence that it would be useless to try to influence crime without changing the social conditions that lead to crime. However, sociological theories have not found an explanation for the fact that different people demonstrate fundamentally different behaviour under the same social conditions. The methodological basis of the socio-philosophical study of crime should be a synthetic approach based on a combination of various methodologies and allowing to consider all known factors of crime in interrelation and interaction. The impact of public life on all spheres is one of the most effective ways to combat crime. All authorities, as well as scientists, should identify and analyze the existing links between modern social changes and criminal processes taking place in society. Only a comprehensive analysis of the causes of crime can help reduce its rates.

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ОЦІНКА ДОСТОВІРНОСТІ ВИСНОВКУ СУДОВОГО ЕКСПЕРТА: СВІТОВІ ПРАКТИКИ ТА УКРАЇНСЬКІ РЕАЛІЇ

Анотація. *Вдосконалення діяльності з досудового розслідування та судового розгляду багато в чому залежить від активізації використання спеціальних знань у судово-слідчій практиці й передусім залучення експерта і проведених ним досліджень. Актуальність досліджуваної в статті проблематики обумовлена необхідністю запровадження нових форм і підходів до оцінки достовірності висновків експертів, зокрема із залученням незалежних фахівців відповідної спеціалізації. Метою дослідження є надання аргументів щодо доцільності залучення обізнаних осіб в якості рецензентів для оцінки об'єктивності та повноти експертного дослідження, правильності застосованих експертом методів і методик, обґрунтованості висновку. Задля досягнення зазначеної мети були використані такі загальнонаукові та спеціальні методи дослідження, як формально-логічний, порівняльно-правовий, функціональний, соціологічний, статистичний, системного і формально-юридичного аналізу, правового моделювання та прогнозування. Встановлено, що в у переважній більшості країн світу, окрім України, для допомоги в оцінці достовірності висновків експерта залучається незалежна обізнана особа, яка має спеціальні знання у відповідній галузі. Доведено, що звернення до обізнаних осіб задля оцінки об'єктивності, обґрунтованості, повноти експертного дослідження допомагає з'ясувати причинно-наслідковий зв'язок між виявленими ознаками об'єкта експертизи і встановлюваним фактом, а також дає підстави для визначення належності, допустимості, достовірності й достатності висновку експерта. Водночас, рецензія фахівця не може слугувати джерелом доказів, а має лише допоміжний (консультативний, технічний) характер і може слугувати підґрунтям для призначення повторної (додаткової) експертизи або проведення перехресного допиту експерта та рецензента. Для реалізації прав осіб на справедливе правосуддя запропоновано такий порядок оцінки достовірності висновків експерта запровадити й в Україні, з внесенням необхідних змін до чинного вітчизняного процесуального законодавства щодо надання можливості учасникам кримінального процесу та потерпілому залучати обізнаних осіб в якості рецензентів висновків експерта*

Ключові слова: *доступ до правосуддя, обґрунтованість висновку експерта, об'єктивність висновку експерта, обізнані особи, рецензування висновку експерта, оскарження висновку експерта*

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RELIABILITY EVALUATION OF A FORENSIC EXPERT'S OPINION: WORLD PRACTICES AND UKRAINIAN REALITIES

Abstract. *Improving the activities of pre-trial investigation and judicial review largely depends on the increased use of special knowledge in forensic investigative practice and, above all, the involvement of an expert and their analysis. The relevance of the subject matter is explained by the need to introduce new forms and approaches to evaluating the reliability of expert opinions, in particular with the involvement of independent specialists of the corresponding speciality. The purpose of this study was to provide arguments regarding the expediency of attracting knowledgeable persons as reviewers to evaluate the objectivity and completeness of forensic analysis, the correctness of the methods and techniques applied by the expert, and the validity of the opinion. To achieve this purpose, the following general scientific and special research methods were used: Aristotelian, comparative legal, functional, sociological, statistical, system and formal legal analysis, legal modelling, and forecasting. It was established that in the vast majority of countries of the world, except Ukraine, an independent, knowledgeable person with special knowledge in the corresponding field is involved to help evaluate the reliability of an expert opinion. It was proved that contacting knowledgeable persons to evaluate the objectivity, validity, completeness of expert research helps establish the causality between the identified features of the object of analysis and the fact that is subject to establishment, and also gives grounds for determining the affiliation, admissibility, reliability, and sufficiency of the expert opinion. At the same time, a specialist's review cannot serve as a source of evidence, but only has an auxiliary (advisory, technical) nature and can serve as a basis for appointing a second (additional) forensic analysis or a cross-examination of the expert and the reviewer. To exercise the rights of individuals to fair justice, it is proposed to introduce this procedure for evaluating the reliability of expert opinions in Ukraine, with the necessary changes in the current procedural legislation of Ukraine to provide an opportunity for participants in criminal proceedings and the victim to attract knowledgeable persons as reviewers of expert opinions*

Keywords: *access to justice, validity of the expert opinion, objectivity of the expert opinion, knowledgeable persons, reviewing the expert opinion, appealing the expert opinion*

INTRODUCTION

Technological advance is changing the ways of illegal activities. Criminals actively use modern technological means and innovative technologies, leaving at the same time specific traces, including digital ones. This complicates the work of an investigator or detective in gathering evidence and requires the use of special knowledge. As V.V. Vapniarchuk fairly notes, “the specificity of the expert opinion in the system of other forms of existence of evidentiary information is that

thanks to special knowledge of the expert and analyses conducted by them, it becomes possible to identify hidden information, inaccessible to immediate perception, establish circumstances substantial for criminal proceedings (for example, the sanity of a person, pertinence of an object to cold-arms or fire-arms, pertinence of a certain substance to a narcotic, etc.)” [1, p. 307]. The results of a survey of 125 investigators of the Ministry of Internal Affairs of Ukraine in

the Poltavska, Sumska, and Kharkivska Oblasts indicated that 76.9% of them always involve an expert during the investigation of crimes. 16.2% of respondents reported that they had to appoint a forensic analysis twice (primary and repeated) to solve the same issues. In some cases (2.4%), the expert's opinions even refuted the investigative lead. 85% of respondents noted that the involvement of an expert has a positive effect on their activities and considerably accelerates the collection of evidence.

According to Part 2, Article 84 of the Criminal Procedural Code of Ukraine¹, expert opinions are procedural sources of evidence, which are evaluated according to their inner conviction by the investigator, detective, prosecutor, investigating judge and court. The criteria for evaluating an expert opinion are its relevance, admissibility, and reliability. The first two criteria are usually clear to the evaluation subjects, while evaluating the reliability of an expert opinion in some cases causes certain difficulties. On this occasion, M.H. Shcherbakovskyi claims that the investigator and the court are incapable of independently evaluating either the scientific validity of the expert's conclusions, or the correct choice and application of analysis methods, or the compliance of the method with modern achievements of this branch of scientific knowledge because for such an assessment they must have the same special knowledge as the expert [2, p. 369]. The same opinion is shared by Canadian [3; 4], Australian [5; 6] and Chinese researchers [7]. At the same time, some scientists even warn about the possible loss of opportunities for the investigator and the court in evaluation of scientific validity of the expert opinion, the effectiveness of the research methods and techniques applied by the expert, objectivity of conclusions through the emergence of new types of forensic analysis and modern high-tech expert methods and techniques [8, p. 318]. Considering the above, O.S. Panievin and H.Ye. Sukhova especially emphasise the importance of evaluating the scientific validity of the expert opinion and the compliance of the analysis with expert methods [9, p. 143].

Notably, the problems of evaluating an expert opinion have been investigated by researchers for more than a hundred years. In particular, as early as the beginning of the 20th century, L.Ye. Vladymyrov argued that since judges do not have special knowledge and cannot evaluate the expert opinion unassisted, the reliability and objectivity of the expert opinion should be presumed [10, p. 236], that is, considered true until it is refuted. Yu.K. Orlov noted that due to the lack of special knowledge in the subjects of evaluating the expert opinions, they cannot establish their reliability unassisted, fully trust the expert opinions and overestimate their evidentiary value [11, p.40]. For his part, V.B. Romaniuk warns that unreliable expert opinions can mislead the investigator (prosecutor, judge) and lead to errors in making procedural decisions [12, p. 161].

The problems of using special knowledge in criminal proceedings were addressed by such leading Ukrainian and foreign scholars as H.K. Avdieieva [13], O.I. Haliashina [8], V.A. Zhuravel [13], O.M. Zinin [8], Yu.K. Orlov [11], V.B. Romaniuk [12], O. R. Rossynska [8], V. Ya. Tatsiy [13], M.H. Shcherbakovskyi [2], and others. Despite a fairly wide scope of issues investigated in this area, some issues remain understudied. In particular, this concerns the evaluation of the reliability of the expert opinion, which includes an evaluation of its scientific validity, the effectiveness of the analysis methods and techniques used by the expert, and the objectivity of the expert opinion formulated.

Considering the above, *the purpose of this study* was to investigate the possibility and procedure for evaluating the reliability of expert opinions in Ukraine, the USA, Germany, Italy, France, the Netherlands, Australia, China, the Russian Federation, and other countries, to carry out a comparative legal analysis of the statutory regulation of such activities in different countries, to determine the effectiveness of assessing the reliability of expert opinions as sources of evidence using special knowledge in various forms, to identify issues preventing a qualitative evaluation of the reliability of expert opinion by the prosecution and the court, as well as issues related to the implementation of the rights of the defence and the victim to appeal against the expert opinion, to develop proposals to improve the quality of evaluation of expert opinions based on the reliability criterion.

1. MATERIALS AND METHODS

To achieve the purposes of this study, the authors visited the official website of the European Court of Human Rights (ECHR)² and selected 15 decisions of the European Court of Human Rights on applications of individuals who failed to challenge the opinions of officially appointed experts in national courts by providing alternative opinions of independent experts involved by them or reviewing the expert's opinions. Additionally, the legal positions of the US Supreme Court were investigated in 17 decisions³, which contain recommendations on the procedure for evaluating evidence, including expert opinions. The analysis of the legal opinions of the ECHR and the US Supreme Court in these decisions helped formulate proposals for improving the quality of evaluation of expert opinions according to the reliability criterion. To identify the issues of evaluating the reliability of expert opinions in Ukraine, 45 sentences of criminal courts and 75 decisions and rulings of courts of civil and economic jurisdiction of Ukraine were analysed, in which the defence attempted to challenge the opinion of an officially appointed expert. To determine the role of forensic analysis in the investigation of crimes, 125 investigators of the Ministry of Internal Affairs of Ukraine were surveyed in the Poltavska, Sumska, and Kharkivska Oblasts. An anonymous survey of 220 potential participants in criminal proceedings

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

2. European Court of Human Rights. (n.d.) Retrieved from <https://www.echr.coe.int/Pages/home.aspx?p=home>.

3. Supreme Court of the United States. U.S. Reports. Retrieved from <https://www.supremecourt.gov/opinions/USReports.aspx>.

(150 investigators, 15 employees of intelligence units, 16 prosecutors, 28 advocates, and 11 judges) was conducted to resolve issues regarding the ability to evaluate the scientific validity of the expert opinions unassisted.

To conduct a comparative legal analysis of the procedure for evaluating evidence in conditions of respect for human rights, the relevant legal provisions of numerous international, Ukrainian, and foreign regulations were studied and analysed, namely the Universal Declaration of Human Rights¹, Convention for the Protection of Human Rights and Fundamental Freedoms², International Covenant on Civil and Political Rights³, Constitution Of Ukraine⁴, Criminal Procedural⁵ and Civil Procedural⁶ Codes of Ukraine, the Law of Ukraine “On Forensic Examination”⁷, Criminal Procedural Code of the Federal Republic of Germany⁸, Criminal Procedural code of Italy⁹, Criminal Procedural Codes of the Russian Federation¹⁰, Turkmenistan¹¹, Republic of Azerbaijan¹², Republic of Armenia¹³, US Federal Rules of Evidence¹⁴, Decree of the President of Ukraine No. 837/2019 “On Urgent Measures to Implement Reforms and Strengthen the State” of November 8, 2019¹⁵.

The study used methods of theoretical analysis and synthesis in the investigation of the content of legal provisions and concepts contained in international regulations, Criminal and Civil Procedural Codes of Ukraine, the Law of Ukraine “On Forensic Examination”, in scientific publications of foreign and Ukrainian researchers, in judgements, decisions, and rulings of courts, which contain the results of evaluating evidence, including expert opinions according to the reliability criterion. The method of systematic analysis was used to clarify the content of human rights to fair justice and the rights of the defence and the victim to appeal the expert opinion and determine ways to implement them in Ukraine.

Formal legal analysis of the provisions of international and Ukrainian legislation on evaluating the reliability of an expert opinion allowed identifying the shortcomings and contradictions inherent in legal acts and formulate proposals for improving legal regulation, namely on the need for regulatory consolidation of the possibility of attracting knowledgeable persons to help evaluate the reliability of an expert opinion and its reasoned appeal. Using the comparative legal method, the experience of individual countries in evaluating the reliability of a forensic expert's opinion as a source of evidence was studied. The method of legal forecasting allowed identifying further likely areas for implementing the procedure for evaluating expert opinions in Ukrainian forensic investigative practice. In the process of solving the problems under study, other separate scientific methods of cognition were also employed, namely Aristotelian (to typify expert errors and their consequences), functional (to establish the influence of unreliable expert conclusions on the procedure of gathering and evaluating evidence-based information), legal modelling (to clarify the state and prospects of implementing the procedure for evaluating expert opinions), sociological and statistical (to analyse the results of applying special knowledge in the work of an investigator, generalising expert errors), etc.

2. RESULTS AND DISCUSSION

Making any intellectual and volitional decision, including an expert opinion, has a certain logic and does not exclude the possibility of individual errors. As Jonathan Koehler correctly states, an expert opinion is the result of a person making a certain decision, which, like all other decisions, contains the inevitable potential for errors [14, p. 89]. That is why Anglo-American criminal proceedings pay considerable attention to evaluation of the scientific validity

1. Universal Declaration of Human Rights. (1948, December). Retrieved from <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.
2. The European Convention on Human Rights. (1950, November). Retrieved from <https://www.coe.int/en/web/human-rights-convention/the-convention-in-1950>.
3. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
4. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.
5. Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.
6. Civil Procedural Code of Ukraine. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15#Text>.
7. Law of Ukraine No. 4038-XII “On Forensic Examination”. (1994, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/4038-12#Text>.
8. Criminal Procedural Code of Germany. (1987, April). Retrieved from https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.
9. Criminal Procedural Code of Italy. (2011). Retrieved from https://www.legislationline.org/download/id/4357/file/Italy_CPC_updated_till_2012_Part_1_it.pdf.
10. Criminal Procedural Code of the Russian Federation. (2001). Retrieved from <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102073942>.
11. Criminal Procedural Code of Turkmenistan. (2009, April). Retrieved from https://online.zakon.kz/document/?doc_id=31344376.
12. Criminal Procedural Code of the Republic of Azerbaijan. (2000, July). Retrieved from https://online.zakon.kz/document/?doc_id=30420280.
13. Criminal Procedural Code of the Republic of Armenia. (1998, July). Retrieved from https://www.legislationline.org/download/id/4261/file/Armenia_CPC_am2006_ru.pdf.
14. Federal Rules of Evidence. (1975, January). Retrieved from https://www.uscourts.gov/sites/default/files/federal_rules_of_evidence_-_dec_1_2019_0.pdf.
15. Decree of the President of Ukraine No. 837/2019 “On Urgent Measures to Implement Reforms and Strengthen the State”. (2019, November). Retrieved from <https://www.president.gov.ua/documents/8372019-30389>.

of expert opinions because without such an assessment, courts sometimes made unjust decisions. In particular, in the United States, as part of the Innocence Project, which aims to analyse unjust judgements based on the genetic examination opinions, 375 people have been rehabilitated so far (among them, 21 people were sentenced to death, and 44 people have pleaded guilty to crimes that they did not commit). In 259 cases, experts made mistakes when identifying individuals based on DNA [15].

In the United States, according to Rule 702 of the Federal Rules of Evidence, the court, upon evaluating evidence, including expert opinions, involves persons (witnesses) who have special knowledge, skills, experience, and appropriate education to give evidence in the form of an opinion or other form¹. At the same time, according to the Daubert standard, one of the methods for evaluating evidence-based information is its review [16]. According to the U.S. Supreme Court decision in the case of *Kumho Tire Co. v Carmichael*, “Daubert criteria” should be used upon evaluating the opinions and testimony of experts [17]. The means of evaluating the reliability of evidence-based information of all types in the United States are their peer review and analysis by representatives of the corresponding scientific community [16, p. 39]. William King and Edward Maguire also argued that for a rational assessment of the evidentiary value of an expert opinion, an investigator needs to verify its reliability with the help of another expert [18, p. 159].

Interesting and exemplary were the studies of members of the American Psychological Association Margaret Bull Kovera and Bradley D. McAuliff, who conducted a survey of 554 judges and found that 17% of them always recognise the expert opinions as reliable, regardless of their completeness and correctness of justification. The decision of this part of the judges is not influenced even by negative scientific publications about the unreasonableness of the expert opinions. 12% of judges indicated that they had to deal with unreliable expert opinions, but they found out about this after the procedural decision was made. Having received such results of the study, the scientists concluded that the judges are incapable of evaluating the reliability of the expert opinions unassisted and suggested that the advocates involve a specialist of the corresponding speciality to explain and verify the objectivity of the expert opinions. They also note that to recognise an expert opinion as evidence, Canadian judges can involve another expert to analyse and explain it, and advocates can involve knowledgeable persons to evaluate the reliability of opinions [3, p. 582-584].

The report of the group of advisers to the President of the United States on science and technology indicates the presence of numerous expert errors during the study of various objects. Most mistakes are made by experts in the process of comparative research of analysis objects, when the subjective factor plays the greatest role in the

formulation of an expert opinion [19, p. 3-5]. According to the Federal Bureau of Investigation (USA), the results of microscopic expert examination of hair contain errors in at least 90% of cases [20]. Errors also occur during DNA analysis, when an expert accidentally mixes samples, uses “contaminated” laboratory utensils, or misinterprets the result of the study. The statistical analysis conducted by scientists indicated that the frequency of such errors reaches 1 in 306 cases [19, p. 7-10]. An independent generalisation of criminal proceedings demonstrated that some procedural decisions were made based on erroneous expert opinions obtained using incorrectly selected analysis methods [19, p. 26].

Considering these and other negative examples, scientists and practitioners suggest various measures aimed at eliminating these shortcomings. Thus, scientists at the University of Denver (USA, Colorado) believe that independent review of expert opinions allows identifying substantial methodological shortcomings that misled judges [16, p. 95]. Based on the analysis of materials of the investigation of crimes and court sentences, scientists of the University of Melbourne note the presence of investigative and judicial errors in cases when investigators and judges, upon evaluating the expert opinions on the analysis of hair, lead bullets, hand marks, voice, bites, etc. objects, did not involve knowledgeable persons to analyse unreliable expert opinions, but recognised them as sources of evidence only because the experts had certificates for conducting analysis [5, p. 984].

In the Netherlands, an investigating judge may, at the request of an accused person, invite knowledgeable persons to analyse the opinion of an officially engaged expert. M. Malsch and J. Frekelton note that the courts of the Netherlands, relying on the decision of the European Court of Human Rights, provide an opportunity for the accused to appeal the opinions of an officially appointed expert by hearing another expert proposed by the accused [21, p. 42].

In Germany, in accordance with Part 2, Article 245 of the Criminal Procedural Code of Germany, the court is obliged, at the request of the defendant or prosecutor, to attract a knowledgeable person to obtain new and analyse existing evidence, including the opinion of an officially involved expert². The explanations of the Supreme Court of Germany state that during the evaluation of the expert opinion it is necessary to verify the content and logical validity of the opinions, the correctness of the methods used by the expert and the compliance of these features with expert methods published in the literature. The German Supreme Court strongly recommends that such an evaluation be carried out particularly carefully in criminal proceedings if the defence appeals against the opinion of an officially appointed expert through a review or the opinion of an independent expert, comparing all materials with each other [22].

The United Kingdom Forensic Regulator's newsletter emphasises the importance of expert witness assistance

1. Federal Rules of Evidence. (2021). Retrieved from <https://www.rulesofevidence.org/table-of-contents/>.

2. Criminal Code of Germany. (1871, May). Retrieved from <https://www.gesetze-im-internet.de/stgb/BJNR001270871.html/>.

in evaluating expert opinions and states that such persons are obliged to assist judges and jurors in forming their independent opinions on the validity of expert opinions [23, p. 7]. The UK's Forensic Regulator's Annual Report for 2020 points to the need for a more thorough examination of scientific evidence (expert opinions) in order to adhere more strictly to quality standards and proposes to increase the requirements for the work of independent expert witnesses to help make such an assessment, to the quality standards of forensic examination [24, p. 12]. These proposals are included in the draft law on the activities of the Forensic Regulator and Biometric Strategy, which is under consideration in the parliament [25].

Shaofang Wang, a researcher in the Department of Forensic Science at Wuhan University (China), emphasises the importance of analysing the reliability of an expert opinion in order to avoid mistakes in the investigation of crimes. The author suggests that investigators, judges, prosecutors, advocates, victims, suspects, accused, and other participants in the proceedings, in order to analyse the expert opinions and explain them, involve special subjects – expert assistants and even presents a model of the procedural status of such persons (their rights and obligations, level of education and training). The author also proposed an algorithm for evaluating the reliability of an expert opinion [26].

In Australia, to recognise an expert opinion as a source of evidence upon its evaluation, courts establish whether the parties to the case had access to expert advice on this opinion (especially in criminal proceedings) [5]. According to Article 225 of the Criminal Procedural Code of Italy, each of the parties has the right to involve its “technical consultants” not only to conduct a forensic analysis, but also to review expert opinions¹.

Notably, an independent review of expert opinions is widespread in the judicial practice of the Russian Federation, where reviewers are private experts and employees of state forensic institutions, and reviews are used both in procedural form (receiving testimony from a specialist or inclusion of a review to the case as a specialist's judgement) and in non-procedural form (written consultations commissioned by the defence and the victim). At the same time, Russian researchers argue that to refute the position of the prosecution, the defence should involve independent specialists to analyse the scientific validity of the expert opinion [27, p. 150; 28, p. 1665].

Thus, the analysis of the legislation and numerous studies of scientists from the USA, Canada, Great Britain, Germany, Italy, the Netherlands, Australia, China, the Russian Federation, and other countries demonstrated that in these countries, to help evaluate the reliability of the opinion of a forensic expert, the investigator and the court involve knowledgeable persons (mainly, they are called

expert witnesses). The defence party engages an independent expert (technical assistant) to conduct an alternative forensic analysis or review the opinion of an officially appointed expert. In some countries (USA, Germany, Italy), if the defence disagrees with the opinion of an officially appointed expert, the involvement of an independent expert to analyse the reliability of their opinion is mandatory. Moreover, in Germany, Australia, and other countries, an expert opinion is recognised by the court as a source of evidence only after it is convinced that the defence party has exercised the right to involve an independent expert or reviewer of an expert opinion.

These provisions are important for implementing the procedure for reviewing forensic expert opinions in the legal system of Ukraine, which is discussed in numerous publications and public discussions [13; 29-31]. Notably, nowadays, in accordance with Paragraph 2 of the Procedure for Reviewing the Opinions of Forensic Experts², the purpose of reviewing opinions is solely to improve the professional skills of experts, improve the quality and validity of their future opinions, and not to help evaluate the expert opinion. Review is not conducted to refute or confirm the opinions. At the same time, the opinion of a forensic expert can only be reviewed by a person who is an employee of a state forensic institution. Moreover, state forensic institutions are not required to report negative results of their review to the persons who commissioned the review. In other words, there is a possibility that the basis of judgements and court decisions may be erroneous expert opinions.

Such monopolisation of the practice of evaluating the results of forensic expert activity is erroneous and does not meet international and European standards. On the other hand, independent review of the expert opinion by a person who has special knowledge in the same area of expertise would make it possible to establish the facts of compliance of the expert research with special methods, verify the completeness of the analysis and the objectivity of the opinions, make sure that the results obtained are justified, etc. Undoubtedly, a review of the expert opinion received by the defence party, the victim, a representative of a legal entity, etc. by directly contacting their chosen specialist who has scientific or other special knowledge in the corresponding field would contribute to establishing the objective truth in the case and would encourage forensic experts to conduct better expert analysis. Furthermore, the prohibition of independent review of the expert opinion may prevent the prosecutor, the head of the pre-trial investigation body, the investigator from fully and impartially investigating the circumstances of criminal proceedings, identifying both those circumstances that incriminate and those that justify the suspect, the accused, as well as circumstances that mitigate or aggravate their punishment,

1. Criminal Procedural Code of Italy. (2011). Retrieved from https://www.legislationline.org/download/id/4357/file/Italy_CPC_updated_till_2012_Part_1_it.pdf.

2. Order of the Ministry of Justice of Ukraine No. 335/5 “On Approval of the Procedure for Reviewing the Opinions of Forensic Experts”. (2020, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0131-20#Text>.

providing them with a proper legal evaluation and ensuring the adoption of legal and impartial procedural decisions (Part 2, Article 9 of the Criminal Procedural Code of Ukraine)¹.

This position is supported not only by legal scholars, but also by practitioners. Thus, a survey of 220 people (including 150 investigators, 16 prosecutors, 15 employees of intelligence units, 11 judges, and 28 advocates) indicated that a total of 75% of respondents are incapable of evaluating the reliability of an expert opinion without the help of knowledgeable persons. This opinion was expressed by 65% of investigators, 64% of prosecutors, 87% of intelligence unit officers, 73% of judges, and 86% of advocates. The overwhelming majority of respondents (78%) consider it necessary to legislate the involvement of knowledgeable persons (independent experts, specialists, reviewers, professionals in a particular field) to help evaluate the reliability of the expert opinion.

The courts of Ukraine, due to the complexity of evaluating an expert opinion without the help of knowledgeable persons, are forced to recognise the importance and legality of independent review of expert opinions. Thus, the Decision of the Supreme Court of Ukraine of 14.01.2021 in case No. 922/2216/18² noted that the courts' "failure to consider" the review as evidence violates the adversarial principle, and "the review is not inherently a repeated or additional analysis, as it does not evaluate evidence. The expert who provides the review evaluates, in particular, the methods and completeness of the analysis, the logic of the conclusion". In the verdict of the Svyatoshynskiy District Court of the city of Kyiv dated January 15, 2018 in case No. 759/846/17, it is indicated that according to the results of the analysis of an independent review of the expert opinion as written evidence, the court considered the expert opinion No. 64/9/2016 unfounded, biased, and inconsistent with the legislation of Ukraine³.

Thus, in Ukraine, the judicial practice of using reviews of forensic experts' opinions is starting to develop. Moreover, this practice is quite consistent with the ECtHR decisions, which note that it can be difficult to challenge a forensic report without the help of another expert in the corresponding area of expertise, and in such cases, it would be useful to review the expert opinion [32]. In particular, the ECHR decision in the case of *Borgers v. Belgium* (*Borgers v. Belgium*) dated 30.10.1991 stated that the parties to the trial must be given the opportunity to get acquainted

with all the evidence and comment on it, to involve an "independent representative of the national legal system" to influence the court's decision"⁴.

Therefore, to receive assistance in verifying the objectivity and reliability of the expert opinion, each party to the proceedings must have the legal right to contact the appropriate specialist. The specialist may present the results of the analysis of the expert opinion in the form of a written document – a review, consultation, analytical note, expert opinion, etc. Such a document is not a source of evidence, but if errors are found in the expert opinion that affected the wording of the conclusions, it should be considered by the investigator (court) and serve as a basis for appointing a second or additional forensic analysis. An additional forensic analysis may be assigned to verify or clarify disputed information that the reviewer drew attention to upon reviewing the expert opinion.

Legalisation of reviews of expert opinions will not only reduce the number of investigative (judicial) errors, but also prevent illegal actions of incompetent and dishonest reviewers to provide biased reviews by publishing information about them in the review text (last name, education, academic degree, academic title, length of service and place of work, etc.). It would also be appropriate to make provision for the possibility of cross-examination of the reviewer and the executor of the reviewed expert opinion.

The importance of introducing independent review of expert opinions is also confirmed by the fact that the President of Ukraine issued Decree No. 837/2019⁵ in which, as urgent measures for the implementation of reforms, the development and submission to the Verkhovna Rada of Ukraine of a draft law on amendments to certain legislative acts of Ukraine on the introduction of peer review of a forensic expert opinion and the introduction of a mechanism for evaluating the quality of legal aid provided using *peer review*. In compliance with this Decree, it would be correct to supplement Part 1, Article 94 of the Criminal Procedural Code of Ukraine⁶ with the following text: "To help evaluate the reliability of an expert opinion, it can be analysed (reviewed) by a person who has the appropriate higher education, scientific degree, and practical work experience of at least 10 years in forensic examination. The results of such an analysis do not constitute a source of evidence, but are of an auxiliary (advisory) technical nature, cannot contain an evaluation of the evidence or instructions on procedural decision to be made, but if errors are found in the

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

2. Resolution of the Supreme Court of Ukraine No. 922/2216/18. (2021, January). Retrieved from <https://reyestr.court.gov.ua/Review/94151198>.

3. Judgement of the Svyatoshynskiy District Court of Kyiv No. 759/846/17. (2018, January). Retrieved from <https://reyestr.court.gov.ua/Review/71570540>.

4. Decision of the European Court of Human Rights "Case of *Borgers v. Belgium*". Application No. 12005/86. (1991, October). Retrieved from <http://hudoc.echr.coe.int/rus?i=001-57720>.

5. Decree of the President of Ukraine No. 837/2019 "On Urgent Measures to Implement Reforms and Strengthen the State". (2019, November). Retrieved from <https://www.president.gov.ua/documents/8372019-30389>.

6. Criminal Procedural Code of Ukraine, op. cit.

expert opinion that affected the wording of the conclusions, it should be considered by the investigator (investigating judge, court) and serve as a basis for ordering a second (additional) expert examination or cross-examination of the expert and the reviewer”.

Legalising reviews of expert opinions would also allow the defence to independently gather information and evaluate the reliability of the expert opinion as a source of evidence, which, for its part, would reduce the number of investigative (judicial) errors. The defence's lack of the right to appeal against expert opinions leads to appeals to the European Court of Human Rights, which in its decisions has repeatedly noted cases of violation of the principle of equality of arms, considering the difficulties faced by clients upon trying to challenge the prosecution's expert opinions. In particular, in the ECHR decision in the case of *Khodorkovsky and Lebedev v. Russia* of 25.07.2013, applications Nos. 11082/06 and 13772/05¹, it is indicated that the court's rejection of reports of specialists made by examining the expert opinions (without examining the objects of forensic analysis), which constitute nothing more than reviews of the expert opinions, is a violation of Article 6 of the Convention (the right to a fair trial). The European Court also believes that to effectively challenge expert opinions, the defence party must be capable of providing alternative expert opinions, and the domestic court's refusal to review expert opinions in court violates the balance between the defence and prosecution parties in the matter of gathering and providing expert evidence and disregards the principle of equality of arms.

CONCLUSIONS

Based on a comparative legal analysis of the legislation of the countries of the Anglo-American legal system (USA, Canada, Great Britain, Australia), continental (Italy, Germany, Netherlands, Russian Federation, Ukraine), and Far Eastern system (China), which regulate the procedure for evaluating evidence, including expert opinions according to the reliability criterion, it was established that in all these countries, except Ukraine, an independent knowledgeable person is involved with special knowledge in the corresponding area of expertise. Such a person is obliged, orally or in writing, to provide the court, jury, parties to the proceedings and the victim (at their request) with their judgements on the essence of the facts established by the expert, the completeness of the analysis, the correctness of the

methods and techniques used by the expert, and the validity of the conclusions. Contacting knowledgeable persons to evaluate the objectivity, validity, completeness of expert research helps establish the causality between the identified features of the object of analysis and the fact that is subject to establishment, and also gives grounds for determining the affiliation, admissibility, reliability, and sufficiency of the expert opinion as a source of evidence. The involvement of knowledgeable persons to help evaluate the expert opinions is associated with the fact that scientists have proven the presence of errors in expert opinions, which served as the basis for making unfair procedural decisions (even regarding death sentences). If the opinions of an officially appointed expert and an independent expert or reviewer differ, the court cross-examines them to form an unbiased objective opinion regarding the expert opinion. To exercise the rights of individuals to fair justice, it would be advisable to introduce such a procedure for evaluating the reliability of expert opinions in Ukraine.

Generalisation and analysis of the results of the survey conducted among investigators, judges, employees of operational units, prosecutors, and lawyers demonstrated that these persons are incapable of evaluating the reliability of the expert opinion without the help of knowledgeable persons with special knowledge in a particular area of expertise. The overwhelming majority of these individuals support the introduction of amendments to the procedural legislation of Ukraine regarding the possibility for participants in criminal proceedings and victims to attract knowledgeable persons to help evaluate the reliability of expert opinions.

To normalise the procedure for evaluating the reliability of expert conclusions by reviewing them by knowledgeable persons from the same field of knowledge, it is considered appropriate to introduce the necessary changes to the procedural legislation of Ukraine. At the same time, such a review cannot serve as a source of evidence, but only has an auxiliary (advisory, technical) nature. The review cannot contain an evaluation of the evidence or a reviewer's judgement regarding the procedural decision to be made by the procedural person. If errors are found in the expert opinion that affected the wording of the conclusions, the review should be considered by the investigator (investigating judge, court) and serve as a basis for assigning a second (additional) expert examination or conducting a cross-examination of the expert and the reviewer.

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ФІТОСАНІТАРНА ЕКСПЕРТИЗА: ДОСВІД УКРАЇНИ ТА МІЖНАРОДНІ СТАНДАРТИ

Анотація. У статті досліджується досвід України у проведенні фітосанітарної експертизи на основі міжнародних стандартів. Було заявлено, що Україна має розробити низку проектів національного законодавства у галузі карантину та захисту рослин, які будуть адаптовані до законодавства Європейського Союзу та одночасно відповідатимуть вимогам Міжнародної конвенції про захист рослин. У цій галузі Україна вже частково здійснила деякі структурні реформи у фітосанітарному секторі, але ці процеси вимагають постійної державної підтримки та заохочення, міжнародної координації, що сприятиме розвитку сільського господарства загалом. Така координація може здійснюватися насамперед у рамках міжнародних універсальних організацій в системі ООН, зокрема в рамках ФАО. Було наголошено, що Закон України № 2501-VIII «Про внесення змін до деяких законодавчих актів України щодо врегулювання проведення деяких фітосанітарних процедур» набрав чинності 2 лютого 2019 року. Серед нововведень – надання права на здійснення експертної експертизи приватних лабораторій, нові терміни у галузі карантину рослин і створення Реєстру виданих фітосанітарних сертифікатів. Зроблено висновок, що в даний час Україна активно застосовує міжнародні стандарти, бере участь у їх розробці та реєструє офіційні переклади міжнародних стандартів з фітосанітарних заходів. Розробка національних і застосування міжнародних стандартів, як ключового чинника створення системи якості в галузі карантину рослин, не лише забезпечує повне виконання Україною своїх зобов'язань за МКЗР та СФЗ, узгоджуючи фітосанітарну безпеку експортованих карантинних вантажів, але й також підвищує конкурентоспроможність українських рослинних продуктів на світовому ринку. Це створює позитивний імідж України як надійного торгового партнера, який не порушує вимог інших країн і гарантує відповідність якості продукції, фітосанітарних процедур міжнародно визнаним стандартам. Тому для кваліфікованих фітосанітарних експертиз перспективним напрямком повинен бути механізм гарантування відповідності національним та міжнародним стандартам, внесення змін до законодавства, запровадження ефективних покарань за порушення правил та порядку проведення фітосанітарних експертиз

Ключові слова: *фітосанітарні процедури, фітосанітарний контроль, міжнародні стандарти, Світова організація торгівлі, Міжнародна конвенція про захист рослин*

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PHYTOSANITARY EXAMINATION: UKRAINE EXPERIENCE AND INTERNATIONAL STANDARDS

Abstract. *The article explores Ukraine's experience in conducting phytosanitary expertise based on international standards. It was stated that Ukraine should develop a series of draft in national legislation in the field of quarantine and plant protection, which would be adapted to the legislation of the European Union and at the same time meet the requirements of the International Plant Protection Convention. In this area, Ukraine has already partially implemented some structural reforms in the phytosanitary sector; but these processes require continued state support and encouragement, international coordination that will facilitate the development of agriculture in general. Such coordination can be undertaken primarily in the framework of international universal organisations within the UN system, in particular within FAO. It has been emphasised that Law of Ukraine No. 2501-VIII "On Amendments to Certain Legislative Acts of Ukraine on Regulation of Some Phytosanitary Procedures" came into force on February 2, 2019. Among the innovations are the granting of the right to carry out expert examination to private laboratories, new terms in the field of plant quarantine and the creation of the Register of Phytosanitary Certificates issued. It has been concluded that Ukraine is currently actively applying international standards, participating in their development and registering official translations of international standards for phytosanitary measures. Developing national and applying international standards, as a key factor in creating a quality system in the field of plant quarantine, not only ensure full fulfilment by Ukraine of its obligations under the IPPC and SPS, agreeing on the phytosanitary safety of exported quarantine cargoes, but also increase the competitiveness of the domestic vegetal products in the world market. This creates a positive image of Ukraine as a reliable trading partner that does not violate the requirements of other countries and guarantees the conformity of product quality, phytosanitary procedures to internationally recognised standards. Therefore, for qualified phytosanitary examinations, the mechanism of guaranteeing compliance with national and international standards, amending legislation, introducing effective penalties for violation of the rules and procedure for conducting phytosanitary examinations should be a promising area*

Keywords: *phytosanitary procedures, phytosanitary control, international standards, World Trade Organisation, International Plant Protection Convention*

INTRODUCTION

Membership of Ukraine in international organisations, in particular in the World Trade Organisation (hereinafter – the WTO), the International Convention for the Protection of Plants (hereinafter – the IPPC), the Food and Agriculture Organisation of the United Nations (hereinafter – the FAO), provides for mandatory observance of the basic principles and requirements in the field of quarantine and plant protection at the international level. In view of this, the State Consumer Service of Ukraine is actively working on the harmonisation and adaptation of national phytosanitary legislation to international norms and standards.

Accordingly, the requirements for the level of work of the National Organisation for Quarantine and Plant Protection are increasing. Ukraine needs to develop a series of draft national legislation in the field of quarantine and plant protection, which would be adapted to European Union legislation and at the same time meet the requirements of the International Plant Protection Convention.

It is worth noting that Ukraine has partially implemented some structural reforms in the phytosanitary sector, but these processes require constant state support and stimulation, international coordination, which will

contribute to the development of agriculture in general. Such coordination can be undertaken primarily in the framework of international universal organisations within the UN system, in particular within the FAO. FAO's technical assistance, on the other hand, will enhance international phytosanitary cooperation between national quarantine and plant protection organisations. Thus, the revised International Standards on Phytosanitary Measures (ISPM) were adopted at the 13th session of the Commission on Phytosanitary Measures (2018): ISPM No. 5 – Glossary of Phytosanitary Terms; ISPM No. 6 – Supervision; ISPM No. 15 – Wood Packaging Regulation in International Trade (Appendix 1 – Approved Wood Packaging Approaches (2018) and Appendix 2 – Sign (Marking) and its Use (2018)); ISPM No. 42 – Requirements for the use of temperature treatments as phytosanitary measures [1]. Ukraine has also participated in the discussion and adoption of these standards. These standards are actively used by both quarantine and plant protection professionals and manufacturers to ensure that their products comply with international phytosanitary legislation. In addition, on February 2, 2019, Law of Ukraine No. 2501-VIII “On Amendments to Certain Legislative Acts of Ukraine Regulating the Implementation of Some Phytosanitary Procedures”¹ came into force. Among the innovations are the granting of the right to carry out expert examination to private laboratories, new terms in the field of plant quarantine and the creation of the Register of Phytosanitary Certificates issued². The updated Act introduced a number of terms: arbitrage, recess, visual inspection, laboratory, pooled sample, review, party, medium trial, safe deposit box, etc. In particular, this Law stipulates that in some cases there may be a visual check when phytosanitary examination (i.e. analysis) is not carried out. And pest detection products are only examined using a magnifying glass, binoculars or a microscope. The concept of phytosanitary laboratory has also expanded. From now on, it is an institution of any form of ownership authorised by a public authority to carry out appropriate examinations and analysis.

According to the Law³, private laboratory specialists were granted the right to carry out plant phytosanitary examination. However, only exporters can use these services. The owner of the cargo can choose in which laboratory to carry out an analysis – public or private. In order to use the services of a private laboratory, the exporter must inform the regional representatives of the State Consumer Service of Ukraine about: transport, cargo, date and time of the beginning of the analysis by specialists of a private laboratory. The fact is that a private laboratory can carry out the analysis on its own, but the state representative must monitor the sampling and inspection of a cargo. Then the

samples are packed in safe packages, the state phytosanitary inspector signs the act on the sampling, so the products are sent for examination. Phytosanitary examination report is valid for 14 days.

The Law⁴ also provides for the creation of an electronic register of phytosanitary laboratories. Access to the list will be open and public. It is planned that the Register of Phytosanitary Laboratories will include information on: the name and address of a phytosanitary laboratory with indication of the validity of its accreditation certificate; number and date of issue of the phytosanitary examination report (analysis). The state phytosanitary laboratories will automatically enter there. In addition to the electronic register of laboratories, a list of phytosanitary certificates is also planned. It will include information on exporters or producers of products, the volume of products produced, the date of issue of the phytosanitary examination report and the date of issue of the certificate itself.

Recently, a lot of scientific developments have been devoted to the problems of peculiarities of conducting various examinations, in particular commodity, sanitary-hygienic, veterinary-sanitary, ecological and customs examinations of goods in general and food products in particular. Many scientists and researchers study the methodology and technical features of expertise procedure, in particular, V.A. Makarov, V.P. Frolov, M.F. Shuklin, A.O. Kunakov, I.G. Seryogin, G.A. Talapov et al. Special attention should be paid to the scientific developments of V.I. Khomenko, V.L. Shablii, N.K. Oksamitny, G.N. Kruglyakov, who have improved the methods and methods of performing examinations. V.V. Vlasenko, R.Y. Kravtsov, V.I. Khomenko and others in their studies considered the procedure of documentation preparation and discussed the effectiveness of expertise procedures. I.V. Gushchuk, E.G. Slautenko study the issues of water and air pollution, which directly affects the efficiency of crops. At the same time, the issues of substantiation and modern peculiarities of exactly phytosanitary examinations procedure deserve due attention.

The aim of the article is to consider and analyse the necessity of designation and peculiarities of carrying out phytosanitary examinations in modern conditions in Ukraine on the basis of international experience and international standards.

1. ANALYSIS OF ORGANISATIONS DEALING WITH PHYTOSANITARY EXPERTISE

Standardisation covers most areas of human activity. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) places particular emphasis on the role of international standards in establishing a multilateral system of rules and requirements governing

1. Law of Ukraine No. 2501-VIII “On Amendments to Certain Legislative Acts of Ukraine Regulating the Implementation of Some Phytosanitary Procedures”. (2018, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2501-19>.

2. *Ibidem*, 2018.

3. *Ibidem*, 2018.

4. *Ibidem*, 2018.

the development, adoption and application of sanitary and phytosanitary measures to minimise their environmental impact. Thus, Article 3 of the SPS Agreement refers to international standards¹:

1) in order to harmonise sanitary and phytosanitary measures on a broader basis, members should base their sanitary and phytosanitary measures on international standards, recommendations, if any, unless otherwise provided in this Agreement, and in particular in paragraph 3;

2) sanitary or phytosanitary measures that are consistent with international standards, recommendations, are necessary for the protection of life or health of humans, animals or plants and do not contravene the relevant provisions of this Agreement and GATT 1994.

Of particular importance is paragraph 2 of Art. 3 of SPS agreements². Taking into account the text of the preamble, the Agreement contains a direct reference to the standards developed by these organisations. The SPS Agreement establishes the rights of members to take the sanitary and phytosanitary measures necessary to protect the life or health of humans, animals or plants, which may be different from the standards set out in the Codex Alimentarius [2]. However, such a presumption is established: measures based on international standards meet the requirements of the WTO provisions, which may serve as a basis for protection in the event of a dispute [3]. This *de facto* speaks of the special status of the Codex Alimentarius Commission standards [2].

Also in 1952, a global instrument for the harmonisation of phytosanitary measures in commercial activities was created – the already mentioned International Plant Protection Convention (IPPC)³, the secretariat of which oversees the development of IPPC. The IPPC activities, to which 177 countries have now joined, are part of the UN's global program on food and agriculture for plant quarantine policies and technical assistance. The main body of the Convention is the Commission on Phytosanitary Measures (CPM)⁴, whose function is to approve international standards for phytosanitary measures.

The Regional Plant Protection and Quarantine Organisation (RPPQO) is an intergovernmental organisation that acts as the Coordinating Body of national quarantine and plant protection organisations at the regional level. There are now ten RPPQOs, but the development of regional standards is carried out by the following organisations: the European and Mediterranean Organisation for Quarantine and Plant Protection, whose standards cover phytosanitary regulations and plant protection products against pests; The North American Quarantine and Plant Protection Organisation, standards designed to protect agricultural, forestry and other plant resources; The South Cone Regional Phytosanitary Committee (COSAVE), which regulates plant

protection issues of particular interest to Member States.

Some issues of standardisation in the field of plant quarantine are also addressed by the International Organisation for Standardisation (ISO), created in 1946 by 25 national standardisation organisations. Its purpose is to promote the development of standardisation worldwide to facilitate international trade and mutual assistance, as well as to enhance cooperation in the fields of intellectual, scientific, technical and economic activities. Ukraine has been a full member of ISO since 1993. Member of the Committees: CASCO, STACO, INFCO. A national committee member of the DEVCO, REMCO, COPOLCO. 25 TCs of the State Standard of Ukraine cooperate with 96 TCs and ISO PCs. Ukraine is actively involved in the work of the joint TC ISO/IEC STK1 “Information Technology”, which was established in 1987.

2. FEATURES OF PHYTOSANITARY EXAMINATION IN UKRAINE

Ukraine actively applies international standards, participates in their development and registers official translations of international standards on phytosanitary measures. International Phytosanitary Standards cover a range of issues – the phytosanitary certification system, phytosanitary risk analysis, invasive alien species and pest control, and many other elements necessary for the effective functioning of the phytosanitary control system any country.

In addition, in recent years, information systems (technologies) in many countries have become increasingly widespread in agriculture that help producers manage technological processes competently, with the least risk. They are used in all fields of agricultural production, including in the field of plant protection. Phytosanitary, agroecological and economic diversity forces a large amount of information to be analysed when making decisions. In this case, it is no longer enough to only the monitor biological objects – their diagnosis and assessment of the intensity of development. In the conditions of multifactoriality of the analysed processes and multivariate decisions, not only phytosanitary diagnostics of diseased plants, but also their phytosanitary expertise is required. According to Art. 13 of the Law of Ukraine “On Plant Quarantine”⁵, phytosanitary examination of regulated objects is carried out in order to find and/or identify regulated pests.

Phytosanitary examination is a system of phytosanitary, agroecological and agrometeorological observations and analysis, which allows to evaluate the current phytosanitary situation and to predict its development, including crop losses. Phytosanitary examination is provided by the central executive body, which implements the state policy in the field of plant quarantine, in accordance with

1. Agreement “On the Application of Sanitary and Phytosanitary Measures”. (1994, April). Retrieved from https://zakon.rada.gov.ua/laws/show/981_006#Text.

2. *Ibidem*, 1994.

3. International Plant Protection Convention. (2006, January). Retrieved from https://zakon.rada.gov.ua/laws/show/995_805#Text.

4. *Ibidem*, 2006.

5. Law of Ukraine No. 3348-XII “On Plant Quarantine”. (1993, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/3348-12>.

international standards, instructions and recommendations. According to L. Baydakova, S. Naumenko, I. Baydakova [4], phytosanitary examination is an integral part of the state system of phytosanitary control in Ukraine. It is a set of measures aimed at protecting the territory and health of the population of Ukraine from the penetration from abroad of quarantine facilities, which can cause significant damage to the national economy of Ukraine.

The important principle of external plant quarantine is the prevention of the importation of quarantine pests to Ukraine. Many years of practice show that during phytosanitary control at border crossing points harmful organisms that are not present in the territory of our country are often found. Thus, during the period from 17.08.2019 to 12.09.2019, in the process of monitoring and inventory of old quarantine organisms, state phytosanitary inspectors found limited quarantine organisms in Ukraine, in particular:

American white moth (*Hyphantria cunea* Drury): in the Kirovograd region (in one area) on an area of 7 hectares; in the Odessa region (in six districts) on an area of 76.45 ha; in the Ternopil region (in one district) on an area of 0.2 ha; in the Kharkiv region (in four districts) on an area of 1.99 ha. Western corn rootworm (*Diabrotica virgifera virgifera* Le Conte): in the Volyn region (in six districts) on an area of 283.94 ha; in the Transcarpathian region (Beregovo and Chop) on an area of 15 hectares; in the Ivano-Frankivsk region (in one district) on an area of 215.25 ha; in the Odessa region (in four districts) on an area of 329 hectares. Potato scab (*Synchytrium endobioticum* (Schilbersky) Percival): in the Ivano-Frankivsk region (in two districts) on an area of 21.945 ha; in the Lviv region (in one district) on an area of 16.64 ha.

Golden potato nematode (*Globodera rostochiensis* (Wollenweber) Behrens): in the Volyn region (in one area) on an area of 2.94 ha; in the Ivano-Frankivsk region (in one district) on an area of 0.81 ha; in the Lviv region (in one district) on an area of 16.67 ha; in the Chernihiv region (in one district) on an area of 10.92 ha. Ragweed (*Ambrosia artemisiifolia* L.): in the Volyn region (in one area) on an area of 0.97 ha; in the Transcarpathian region (in three districts and three cities) on an area of 0.996 ha; in the Kirovograd region (in eight districts) on an area of 203.46 ha; in the Lviv region (in two districts) on an area of 0.98 ha; in the Mykolaiv region (in 16 districts) on an area of 1044.906 ha; in the Odessa region (in seven districts) on the area of 720.9 hectares; In the Rivne region (in 14 districts) on an area of 89.83 ha; in the Ternopil region (in two districts) on an area of 13.96 ha; in the Kharkiv region (in 16 districts) on an area of 307.976 hectares; in the Kherson region (in 15 districts) on an area of 807.97 hectares; in the Chernihiv region (Nizhyn) on an area of 1.025 hectares.

Cuscuta campestris (*Cuscuta sampestris* Yunck.): In the Kirovograd region (in three districts) on an area of 0.211 ha; in the Odessa region (in one district) on the area of 3.54 ha; in the Kharkiv region (in nine districts) on an area of 5.541 ha; in the Kherson region (in one district) on an area of 46 ha. Russian knapweed (steppe) (*Acroptilon repens* L.): in the Kherson region (in one area) on an area of 2.5 ha. *Cenchrus*

(*Cenchrus longispinus* Fernald.): In the Kherson region (in one area) on an area of 2 ha [5]. These data indicate that the responsible link in the system of quarantine measures is the additional establishment of phytosanitary status of imported goods also at enterprises, since preventing the introduction into the country of quarantine organisms is easier and cheaper than localising and eliminating the outbreak of the pest. The State Plant Quarantine Service of Ukraine is responsible for protecting the territory of Ukraine from the penetration and spread of quarantine pests. Quarantine inspections of quarantine cargo by quarantine inspectors and laboratory examination of samples constitute a single interconnected process. Quarantine phytosanitary control starts from the State border of Ukraine.

The necessity for phytosanitary expertise by control bodies depends on the direction and method of moving the controlled goods. As a general rule, a state phytosanitary inspector is authorised to detain for inspection and examination controlled goods that are imported without a permit for phytosanitary control. In particular, in the absence of the carrier of the International Phytosanitary Certificate of the country of export, the cargo, in agreement with the State Food Safety and Consumer Protection Service, may be detained for issuing a quarantine permit with preliminary examination and examination. If the transported goods have not been inspected during their movement across the state border, they will be subject to phytosanitary examination in the customs territory of Ukraine.

However, before the examination, the care of plant products and other quarantine materials is possible. It is proved practically that the speed and reliability of laboratory examination to determine the presence and species composition of pests, pathogens and weeds in the test material, the correct assessment of their potential dangers and the economic importance of quarantine measures depend on the detail of the development and skilful use of quarantine care. Laboratory examination of sub-quarantine materials covers: carrying out analyses for the detection of pests, plant pathogens, seeds of dangerous weeds. It consists of the following stages: entomological, mycological, bacteriological, phyghelminthological, virologic and weed herbage; determination of species belonging to the detected harmful organisms; the conclusion of the specialists of the laboratory on the potential danger of harmful organisms and the introduction of phytosanitary measures in their control. The results of the examination of each sample, carried out depending on the complexity of the analysis by laboratory specialists or inspectors, determine the phytosanitary status of the entire consignment and recommend certain phytosanitary measures [6]. Phytosanitary examination is carried out directly by phytosanitary laboratories, which are located in every region of Ukraine. Functional flowchart of phytosanitary examination covers four main stages: I – diagnostics of dangerous harmful objects; II – phytosanitary monitoring; III – examination of phytosanitary risks; IV – decisions making about plant protection [7].

National plant protection organisations, carrying out phytosanitary risk analysis (hereinafter referred to as

PRAs), should rely on biological and other scientific and economic data in accordance with relevant ISPMs¹. When performing PRAs, it is also necessary to consider the threats to biological diversity that result from the impact on plants. It is the latest advances in science, technic and technological advances in electronics and information technology that allow to quickly receive and analyse any amount of necessary information. Express methods of diagnostics of harmful microorganisms (express test systems, computer diagnostics, etc.), field microcomputers, automatic weather stations, satellite navigation systems, electronic data warehouses, operational satellite weather maps, geo-information phyto-landscape maps, etc. are now widely available.

The most difficult and responsible stage of adaptation of such systems is the examination of phytosanitary risks. It is based on mathematical, logical, empirical or other modelling of the processes of development and spread of harmful organisms and their loss of harvest against the background of difficult agroecological conditions. Model-based algorithms are the basis for creating computer programs and decision-making systems for plant protection. In the process of performing each stage of phytosanitary examination, many indicators are considered and analysed. For example, when examining cereals affected by only one disease, it is necessary to take into account about ten factors, and in a comprehensive assessment of the condition of all damaged objects (diseases, pests, weeds), their number will be much larger.

Modern advances in information technology (Big Data technologies) make it possible to quickly analyse any volume of information. Today, many countries have developed and are using a variety of decision support systems to manage the protection of agricultural crops, including cereals, from harmful organisms. For example, in Germany, the ProPLANTExpert system has been developed for managing crop protection and operates on the basis of the Internet. It uses information obtained from automatic weather stations. In addition, the user enters into the system the phase of plant development, the intensity of the disease, as well as a list of fungicides and growth regulators (if possible). The user receives recommendations on which preparation to process and in what time frame.

A DESSAC system has been set up in England to support decision-making to protect crops from disease. The system is installed on the user's computer. At program start-up, system users automatically receive meteorological information (current and prior period) from nearby meteorological stations, enter agroecological data, the degree of disease development and spread, and the cost of the fungicide. The program uses mathematical models that mimic the appearance and development of a plant, the development of the disease, the potential loss of a crop because of the disease, and the effectiveness of various fungicides. Control

components such as variety selection, date of treatment, fungicides and consumption rates are recommended [8]. In the Netherlands, Dacom company has developed PLANT-Plus. The model used by the system takes into account information on plant status, disease development, preliminary and prognostic weather conditions (local). It advises when and how to treat fungicides [9].

In the United States, MoreCrop system operates to manage protection of wheat and barley against disease in the Northwest Pacific. It is designed for thirty plant diseases that are spread throughout the United States and in individual regions. Factors that influence the development and harmfulness of the disease, the effectiveness of protective measures and their economic feasibility are taken into account for decision making. In total, 11 factors are analysed [10].

In Denmark, the Landbrugsinfo system has been developed and maintained to help farmers make operational decisions (using the Internet) to grow field crops, considering agro-meteorological and phytosanitary situations. In addition to phytosanitary recommendations for protection against diseases and pests, it provides advice on fertilisers, irrigation and other methods of plant growing [11].

However, many of the systems currently in use are commercial. Users acquire or pay for software on their computers on the Internet. For Ukraine, the use of decision support systems for the protection of, for example, cereals based on phytosanitary expertise is particularly significant. Phytosanitary security of any state means the protection of its territory from the risks that arise in the event of the penetration, spread and mass reproduction of pests, diseases of plants and weeds. The latter poses a real danger and can cause significant economic losses in a very short time. It is known that, as a result of pest activity, national agricultural producers lose more than 30% of their gross harvest annually [12].

CONCLUSIONS

Developing national and applying international standards, as a key factor in creating a quality system in the field of plant quarantine, not only ensure full fulfilment by Ukraine of its obligations under the IPPC and SPS, agreeing on the phytosanitary safety of exported quarantine cargoes, but also increase the competitiveness of the domestic vegetal products in the world market. This creates a positive image of Ukraine as a reliable trading partner that does not violate the requirements of other countries and guarantees the conformity of product quality, phytosanitary procedures to internationally recognised standards. Therefore, for qualified phytosanitary examinations, the mechanism of guaranteeing compliance with national and international standards, amending legislation, introducing effective penalties for violation of the rules and procedure for conducting phytosanitary examinations should be a promising area.

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СУТНІСТЬ ПОНЯТТЯ БЕЗПОРАДНОГО СТАНУ ОСОБИ ЯК ВАЖЛИВА СКЛАДОВА ПІД ЧАС РОЗСЛІДУВАННЯ ЗЛОЧИНІВ

Анотація. Сучасна правова база попри означення безпорадного стану у відповідних нормах кримінального, адміністративного, цивільного законодавства, не дає відповіді на питання, що саме слід розуміти під таким станом, через відсутність будь-яких зафіксованих в її змісті визначень або тлумачень цього поняття. Саме цим визначена актуальність теми дослідження. Метою наукової статті є розробка тлумачення безпорадного або іншого небезпечного для життя стану, з подальшою можливістю відповідного удосконалення чинного законодавства України. Провідним методом дослідження виступає метод порівняльно-правового аналізу. У статті здійснено аналіз наявних у юридичних та наукових джерелах визначень поняття безпорадного стану особи. За результатами проведеного дослідження, представлено авторську позицію щодо сутності поняття безпорадного стану. Ідентифіковано причини, які можуть виступати чинниками безпорадного стану. Наголошується, що безпорадний стан особи, за певних умов, може трансформуватися в небезпечний стан особи, унаслідок якого існує загроза порушення прав громадян. Автори роблять висновок, що безпорадний стан – це не тільки фізичний чи психічний стан, у якому може перебувати особа, а й фізіологічний стан (психофізіологічний), як його чинник, виступає складовою змісту безпорадного стану. Ідентифікація обсягу і змісту прав громадян, які потребують зовнішнього забезпечення через перебування відповідних громадян, володільців цих прав у безпорадному або іншому небезпечному для життя стані, ще одне завдання вирішення якого попередньо потребує з'ясування сутності безпорадного стану або суміжних станів. На основі проведеного аналізу запропоновано авторське визначення поняття безпорадного стану, а також визначено його особливості

Ключові слова: небезпечний стан, порушення, забезпечення, права громадян

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THE ESSENCE OF A HELPLESS STATE OF A PERSON AS AN IMPORTANT COMPONENT IN THE INVESTIGATION OF CRIMES

Abstract. *The modern legal framework, despite the definition of a helpless state in the corresponding provisions of criminal, administrative, and civil legislation, does not answer the question of what exactly should be understood by such a state due to the lack of any definitions or interpretations of this concept. This determines the relevance of this study. The purpose of this study is to develop an interpretation of a helpless or other life-threatening condition, with the subsequent possibility of the corresponding improvement of the current legislation of Ukraine. The leading method of research is the method of comparative legal analysis. The study analyses the definitions of the concept of a helpless state of a person available in legal and scientific sources. Based on the results of the study, the author's position on the essence of the concept of a helpless state is presented. The causes that can act as factors of a helpless state are identified. It is noted that the helpless state of a person, under certain conditions, can transform into a dangerous state of a person, as a result of which there is a threat of violation of citizens' rights. The authors conclude that a helpless state is not only a physical or mental state in which a person can be located, but also a physiological state (psychophysiological), as its factor, acts as a component of the content of a helpless state. Identification of the scope and content of the rights of citizens in need of external security due to the presence of the relevant citizens, owners of these rights in a helpless or other life-threatening state, another task of solving which requires prior clarification of the essence of the helpless state or related states. Based on the analysis, the authors propose an original definition of the helpless state, as well as determine its features*

Keywords: *dangerous condition, violation, security, citizens' rights*

INTRODUCTION

The concept of a helpless state is used by the legislator in many regulations, but the greatest attention is paid to it in the criminal legislation of Ukraine. That explains the fact that most modern scientists refer the term "helpless state" to the category of criminal law concepts, in connection with which they have carried out and are developing various problems related to the being of victims in a helpless state.

Therewith, the correct identification of the essence of a helpless state, according to the authors, is also quite important for the forensic science and for the performance of direct functional duties by officials of pre-trial investigation bodies, because:

1) the current version of the Criminal Code of Ukraine¹ does not contain an interpretation of such a state;

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

2) in order to clarify the circumstances of criminal actions related to the use of the helpless state of a person, their exact qualification, collection, evaluation, research, and use of evidence, it is vital to establish the exact definition of this term.

Furthermore, in the legislation of Ukraine, which regulates the activities of individual state authorities, the concept of a helpless state occupies a separate place, and is quite important, because the correct identification of a helpless state is interrelated with the proper performance of official duties by the relevant authorised persons of some state authorities, which achieves the performance of tasks defined for these bodies. In the context of the above, first of all, this refers to the functioning of those state bodies whose competent component makes provision for ensuring the implementation of citizens' rights, protecting them from any encroachments, as well as restoring them in case of violation, including for persons in a helpless state.

However, the modern legal framework, despite the definition of a helpless state in the corresponding provisions of criminal, administrative, and civil legislation, does not answer the question of what exactly should be understood by such a state due to the lack of any definitions or interpretations of this concept. The situation is further complicated by the fact that special legislation regulating the activities of bodies that investigate crimes, along with a helpless state, mentions the possibility of a person being in another life-threatening state, the interpretation of which is not available. This state of affairs, according to the authors, can negatively affect the process of investigating crimes related to the use of a helpless state of a person, because, for example, the processes of searching, detecting, recording, research, evaluating, and using evidentiary information about such types of crimes are directly related to the accurate identification and introduction of a unified approach to the interpretation of the helpless state.

The study of the concept of helpless and other life-threatening states was carried out by such scientists as: Yu.M. Antonyan [1], S.A. Mironyuk [2], V.Ya. Tatsiy [3], V.I. Tiutiuhin [3], I.A. Fargieva [4], M.I. Khavronyuk [5], M.D. Shargorodsky [6] and others [7]. At the same time, their developments do not take into account those aspects that are related to the activities of pre-trial investigation bodies in the process of investigating crimes related to the stay of injured persons in a helpless or other life-threatening state.

1. LEGAL ANALYSIS OF PHYSICAL AND PSYCHOLOGICAL COMPONENTS OF A PERSON'S HELPLESS STATE

Starting a study, one should pay attention to the content of Paragraph 4 Part 1 Article 18 of the Law of Ukraine "On the National Police"¹ according to which, one of the obligations of a police officer is to provide urgent, in

particular pre-medical and medical care to persons who find themselves in a helpless state or a condition dangerous to their life or health. At the same time, the National Police is an authority whose main task finds its external expression in ensuring a wide range of human and civil rights and freedoms in various situations; in this regard, the duty of a police officer to provide medical or pre-medical care to a citizen who is in a helpless or other life-threatening state is primarily related to ensuring the police the right of such a citizen to life and health.

In turn, this does not mean that the rights of citizens who are in one of the above-mentioned states are limited only to the right to life and health, on the contrary, the content of the rule of law, which is reflected in Paragraph 4 Part 1 Article 18 of the Law of Ukraine "On the National Police"², is conditioned by the lack of a clear interpretation and differentiation of a helpless and other life-threatening state on the part of the legislator, the consequence of which is the lack of a clear idea of the scope of the rights of citizens who need to be secured by the relevant authorised officials. Thus, the identification of the scope and content of the rights of citizens in need of external security due to the presence of the relevant citizens, owners of these rights in a helpless or other life-threatening state, another task of solving which requires prior clarification of the essence of the helpless state or related states.

Turning to the sources that reveal the essence of the concept of a helpless state, first of all, one should consider the Resolution of the Supreme Court of Ukraine No. 5 "On judicial practice in cases of crimes against sexual freedom and sexual inviolability of the individual"³. Thus, paragraph 5 of the resolution states that the condition of the injured person should be recognised as helpless when, due to a minor or elderly age, physical disabilities, mental disorders, a painful or fainting state, or for other reasons could not understand the nature and meaning of the actions performed with them or could not resist.

Analysing the above definition, it should be immediately noted that although it allows understanding the essence of a helpless state, it also has a clear criminal legal aspect, contains the qualification component of the committed crime. Given this, clarifying the essence of the helpless state in the criminal legal field is important in order to correctly understand and determine the circumstances of the case to accurately "form" a measure of punishment proportional to the act committed – a sanction. At the same time, through the lens of forensic science, the helpless state is primarily interesting because its awareness allows exploring and developing both approaches to preventing the commission of crimes that are associated with the presence of victims in a helpless or other life-threatening state, and the methodology for investigating such crimes, which, as a rule, is associated with the specific features of collecting

1. Law of Ukraine No. 580-VIII XII "On the National Police". (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

2. *Ibidem*, 2015.

3. Resolution of the Plenum of the Supreme Court of Ukraine No. 5 "On judicial practice in cases of crimes against sexual freedom and sexual inviolability of the individual". (2008, May). Retrieved from <http://zakon2.rada.gov.ua/laws/show/v0005700-08>.

evidentiary information. Therefore, the definition of the concept of helpless state in the forensic plane should be based on the specific features of investigating the types of such crimes, as well as the corresponding features inherent in evidence.

Considering the above definition of a helpless state, on the one hand, it should be agreed that its main determinants are as follows: 1) infancy; 2) old age; 3) physical disabilities; 4) mental disorder; 5) painful condition; 6) fainting. However, taking into account that the main determining consequence of a person's being in a helpless state, including one associated with the above determinants, is the inability of a person to understand the nature of the actions performed with them or the inability to resist, it is incorrect to say that a person's belonging to the above categories determines their personal helpless state.

The fact is that, for example, despite the clear age limits for defining the categories of "minor", it cannot be said that only before such a person reaches the age of 14, they are not incapable of realising the nature of the actions performed with them, being in a conscious state, since the development of each individual can occur before reaching the age of 14 and after it. In this regard, O. V. Shtyrlov [8] notes that it is not uncommon for a minor to realise the danger or resist even upon reaching the age of 14, due to a mental retardation not related to a mental disorder, during the commission of a crime against him. In such cases, the question of recognition of the helpless state is subject to resolution only through a comprehensive forensic examination, which should determine the minor's mental underdevelopment.

In addition, of interest is Shtyrlov's position regarding the fact that the helplessness of a minor is determined and described by indicators of such components as: 1) physical development; 2) mental characteristics; 3) mental performance [8]. The authors believe that the totality of the components of helplessness of minors proposed by the scientist is sufficient to solve the problem of establishing their immediate helpless state. A similar reverse algorithm for achieving a state that makes it impossible to realise the nature of the actions performed or the ability to resist may be typical for the elderly. However, the physical and psychological changes that occur due to aging and are inherent in the elderly are quite individual in nature. That is why not all elderly people can be in a helpless state.

At the same time, based on the understanding of the essence of the unconscious state, according to the authors, it can be argued that every person who is in an unconscious state cannot be aware of the nature of the actions performed with them and cannot resist. Summarising the above, the conditions that determine the helpless state of a person (adolescence; old age; physical disabilities; mental disorder; painful state; fainting state), in the authors' opinion, should be classified according to the following criteria:

1) those that inevitably lead to a helpless state of the

person, for example, the person being in an unconscious state or in a dream;

2) those that can lead to the onset of a helpless state of the person (significantly increase the probability of a helpless state of the person), for example, old age, adolescence, etc.

A kind of confirmation of the above is that criminal legislation, unlike administrative legislation, does not mention another life-threatening condition of a person. In addition, Paragraph 6 Part 1 Article 67 of the Criminal Code of Ukraine¹ states that upon assigning a sentence, the aggravating circumstances are recognised as follows: the commission of a crime against a minor, an elderly person, or a person who is in a helpless state, which is direct evidence that the legislator does not identify minors, as well as elderly people, with those in a helpless state.

In the context of studying the components of a helpless state, the authors of this study draw attention to the opinion of Ya.V. Hetmantseva [9], who studied the issue of helpless state as a circumstance aggravating criminal liability. By the helpless state of a person, the scientist understands such a physical and mental state when they are incapable of realising the nature of the actions performed with them, or being aware of such actions, cannot resist the criminal. Among the reasons for being in this state, the author cites, in particular: alcohol intoxication of the victim, fainting, physical or mental disabilities, etc.

Analysing the above-mentioned reasons for the helpless state, it is quite interesting that Hetmantseva also refers the state of alcoholic intoxication of a person to such reasons. Sharing this position of the author, it should be noted that the state of intoxication of a person should not be limited to that caused by alcohol consumption. No less dangerous intoxication, as a possible reason for a person's being in a helpless state, can be caused by the use of narcotic drugs, as well as drugs that reduce the level of attention and reaction speed. At the same time, when it comes to the state of intoxication as a cause that can lead to a helpless state, it is impossible to agree that intoxication is a physical and/or psychological state that Hetmantseva mentions in the basis of his definition of a helpless state.

Considering the fact that the helpless state of a person, which can pose a threat of violation of the rights of citizens to life and health, has become most widespread in the field of road safety, it is necessary to pay attention to relevant scientific developments. Thus, exploring the issue of a dangerous driver's condition that increases the risk of a road accident, I.I. Galak [10] notes that the physical and psychological requirements for the driver are determined with the consideration of the driver's activities. The receipt of information is determined by the bandwidth of the driver's psychophysiological state and their ability to process it. Since while driving the driver must perceive a considerable amount of information about the nature and mode of movement, the state of the roadway, the environment, means of regulation, the state of components and

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

assemblies of the vehicle and ensure safe movement on the road, these mandatory functions of the driver are provided by a complex of psychophysiological factors.

In this regard, I.I. Galak fairly notes that the presence of a vehicle driver in a state of alcohol or drug intoxication leads to: 1) a decrease in physiological functions (decreased accuracy and visual acuity, slowing movements); 2) deterioration of psychological functions (decreased attention, dulled sensations). Therefore, considering the above, a helpless state is not only a physical or mental state in which a person can be, as stated by Ya.V. Hetmantseva [9] in his study, but is also a physiological (psychophysiological) state, as its factor, a component of the content of a helpless state, which, in addition, should be recognised as its feature.

2. THE TERM “HELPLESS STATE” IN THE EXISTING SYSTEM OF RELATED CONCEPTS

Continuing the research, one should pay attention to some provisions of the study of the helpless state of a person conducted by S.V. Dyomenko [11], in the content of which, the scientist, relying on the theory of “special victim”, which was proposed by P.S. Dagal [12], makes an attempt to determine the place of the concept of “helpless state” in the existing system of related concepts. For this purpose, the author, having divided the category of special victim based on “victim’s condition”, notes that the analysis of the criminal law allowed him to distinguish the following types of states of victims, namely: 1) a state of pregnancy; 2) a life-threatening condition; 3) a helpless state; 4) a vulnerable state; 5) a forced state; 6) a state of dependence.

Analysing the conditions of a special victim, selected by S.V. Dyomenko [11], it is quite interesting that given the provisions of criminal legislation helpless state and life-threatening condition constitute separate categories. At the same time, since the fact of the onset of a helpless state of a person does not always border on a threat to their life and health, the identification of the concepts of a helpless state and a life-threatening state, according to the authors, is not correct. However, being a person in a helpless state considerably increases the probability of transforming a helpless state into a state dangerous for life and health, as a result of which there is a threat of violation not only of the rights of such a person to life and health, but also of other rights that are related to the person’s social status, as well as the factors that led to the threatening situation.

In addition, the indicated possibility of transforming a helpless state into a dangerous state, as a result of which the rights of citizens may be infringed or violated, largely depends on ensuring the rights of citizens who find themselves in a helpless or dangerous state by the relevant competent public authorities [13]. As for the understanding of the concept of vulnerable state, guided by the provisions of the scientific and practical commentary to the Criminal Code of Ukraine¹, it should be understood as the state of a person that is conditioned by physical or mental properties

or external circumstances, which deprives or restricts their ability to be aware of their actions (inaction) or manage them, make independent decisions of their own free will, resist violent or other illegal actions, a combination of serious personal, family, or other circumstances [14].

An attempt to give a comparative assessment of the helpless state and the vulnerable state was made by S.V. Dyomenko [11]. The author notes that the “helpless state” describes the property of a person opposite to the “vulnerable state” – it implies the inability of a person to understand the nature and significance of actions performed with them. In contrast, a vulnerable state exists when the victim is deprived or restricted of the ability to be aware of or manage their actions (inaction). In addition, the concept of a vulnerable state is broader in its content and has additional features: “make independent decisions at will”, “a combination of difficult personal, family, or other circumstances”. At the same time, these categories have a common feature – the inability of a person to “resist” [11]. Thus, in agreement with the above statements, according to the authors, it should be noted that a vulnerable condition has a number of sufficient differences that allow determining its belonging to the category of a life-threatening condition.

Investigating the state of pregnancy and the state of dependence of a special victim in terms of their attribution to a helpless state, the study of O.V. Shtyrlov [8] is quite interesting. Studying the legislation of foreign countries [15] in order to study the category of helpless state and its components, the researcher draws attention to the fact that the criminal codes of the Azerbaijan Republic [16] and France [17], as a kind of helpless state, determine the state of pregnancy of a woman who is being criminally assaulted. The author adds that the state of pregnancy of a woman, especially at a later date, seems to restrict the physical capabilities of a woman who is being criminally assaulted, and often reduces them to zero, and because of this, a woman cannot independently take measures to eliminate the danger from the criminal, which he or she can take advantage of under certain conditions. Thus, the scientist emphasises that the state of pregnancy refers to a physiological helpless state [8].

As for the state of dependence as a determinant of the helpless state in a broad understanding, O.V. Stirlov emphasises that the Criminal Codes of the Republic of Azerbaijan [16], the Republic of Kazakhstan [18], the Republic of Tajikistan [19], in particular, in the system of terms and concepts, to some extent determining the helpless state of the victim, included the concept of dependence (official or other) of the victim on the person who encroaches on them. The researcher notes that under certain circumstances, official or other dependence can create a state of helplessness for the victim. This is possible when the perpetrator, using the dependence of a particular person on him or her, puts them forcibly in a position where the addict loses the ability to independently take measures to eliminate the danger that threatens them, first of all, from

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

the person on whom they depend. Among the persons who are dependent on the perpetrator, the author refers to those victims whose will is suppressed by dependence on the perpetrator (hence it is also called reactive helplessness) [8].

Notably, the helpless state caused by the dependence of a person on the perpetrator is not in the forensic, but in the administrative and legal plane, because it has a subordinal component of the official relations of the manager with the subordinate (dependent). However, the dependence of a person as a possible cause of a helpless state is not always described by an official (subordinated) component. Thus, in particular, Paragraph 6 of the Resolution of the plenum of the Supreme Court of Ukraine No. 7 “On Judicial Practice in Cases of Inheritance”¹, interprets a helpless state as the condition of a person due to old age, serious illness or injury, when he or she cannot independently provide the conditions of his or her life, requires outside oversight, assistance, and care².

Considering this fact, the helpless state of a person due to the dependence of a person can find its external expression in the civil law plane and be associated with old age, serious illness, or injury. It should be separately noted that in the civil law plane, in contrast to the process of investigating relevant crimes, for a helpless state, the fundamental component is described by the inability of a person to provide living conditions, the need for outside oversight, assistance, and care. Thus, summarising the above, according to the authors, it is necessary to offer an original definition of the helpless state of a person, as a result of one or more physical, mental, physiological features of the state of a person, as a result of which their will is suppressed by dependence on the person who encroaches on them, or they are incapable of realising the nature of the actions performed with them, cannot resist them, cannot independently provide the conditions of their life, require outside oversight, assistance, and care, which can lead or leads to the inability to freely choose the behaviour regarding the exercise of their rights, as a result of which there is a threat of their violation and the need for security provided by officials of the relevant state authorities.

In the process of carrying out activities aimed at preventing crimes, it is necessary to take into account the states that determine the helpless state of a person. In the authors’ opinion, they should be classified according to the following criteria:

1) those that inevitably lead to a helpless state of the person, for example, the person being in an unconscious state or in a dream;

2) those that can lead to the onset of a helpless state of the person (significantly increase the probability of a helpless state of the person), for example, old age, adolescence.

Among the features of the helpless state of a person that must be taken into account in the process of investigating corresponding crimes, the following should be distinguished, in particular:

1. Conditioned by objective and subjective factors.
2. Based on sufficient indicators of physical, mental, and physiological characteristics of the individual.
3. The fact that a person becomes helpless does not always imply a threat to their life and health or the possibility of violating other civil rights.
4. The being of a person in a helpless state significantly increases the probability of its transformation into a life-threatening state, as a result of which there is a threat of violation not only of the rights of such a person to life and health, but also of other rights related to their social status.
5. Finds its external expression in the planes of administrative, criminal, and civil law.
6. Activates the activities of officials of state authorities to ensure the rights of citizens being in such a state.

CONCLUSIONS

Thus, the authors define a helpless state as a state of a person caused by one or more physical, mental, or physiological characteristics, as a result of which their will is suppressed by dependence on the person who encroaches on them, or they are incapable of realising the nature of the actions performed with them, cannot resist such actions, or cannot independently secure the conditions of their life. In the process of carrying out activities aimed at preventing crimes, it is necessary to take into account the states that determine the helpless state. The main determining consequence of a person’s being in a helpless state, including those associated with the above-mentioned determinants, is the inability of the person to understand the nature of the actions performed with them or the inability to resist such actions. In addition, the helpless state of a person conditioned by the dependence of a person can find its external expression in the civil law plane and be associated with old age, serious illness, or injury.

Considering the above, the key feature of the meaning of the helpless state in the process of solving and investigating crimes related to the use of such a state of the injured person is that it makes it possible to realise the role of such a state as a catalyst for the commission of relevant crimes stipulated by the current criminal legislation. As a result, a mechanism for preventing and countering such crimes should be developed in the field of forensic science, as well as the introduction of effective and complete collection of evidence in the event of such crimes, including tactics for their investigation by relevant officials of pre-trial investigation bodies.

1. Resolution of the Plenum of the Supreme Court of Ukraine No. 7 “On Judicial Practice in Inheritance Cases”. (2008, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0007700-08#>.

2. *Ibidem*, 2008.

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ПРОЦЕС ПОМИЛУВАННЯ ЗАСУДЖЕНИХ ДО ДОВІЧНОГО ПОЗБАВЛЕННЯ ВОЛІ ТА ТРИВАЛИХ ТЕРМІНІВ ПОЗБАВЛЕННЯ ВОЛІ ЯК КРИТЕРІЙ ПІДВИЩЕННЯ ЛІБЕРАЛЬНОСТІ СУДОВОЇ СИСТЕМИ

Анотація. *Розвиток демократії, забезпечення прав і свобод громадян нерозривно пов'язаний із підвищенням якості та ефективності роботи установ виконання покарань, під час яких виникають, змінюються та припиняються різні види кримінально-виконавчих правовідносин. Спроби впровадження ліберальних європейських цінностей у повсякденне життя суспільства викликали необхідність модернізувати діяльність пенітенціарної системи відповідно до міжнародних стандартів. Відзначалась необхідність запровадження гуманних підходів і поваги людської гідності в інших спеціальних стандартах, які стосуються конкретно сфери виконання кримінальних покарань. Новизна дослідження визначається тим, що пріоритетним напрямом цієї діяльності має бути процес подальшого вдосконалення кримінального законодавства та практики його застосування, неухильне дотримання прав і свобод людини. Одним із напрямів цих змін має стати вдосконалення механізмів реалізації права засуджених на позбавлення волі на гуманне ставлення та повагу до їхньої людської гідності на основі прогресивних форм її забезпечення відповідно до міжнародних стандартів та існуючої передової практики. Практичне значення визначається тим, що країна, виконуючи норми про помилування, бере на себе зобов'язання послідовніше впроваджувати в законодавство та практику загальновизнані міжнародні норми, насамперед ті, які мають забезпечити реалізацію прав і свобод людини та громадянина*

Ключові слова: *судова законотворчість, право засуджених, пенітенціарна система, ліберальні цінності, виконання вироків*

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THE PROCESS OF PARDONING THOSE SENTENCED TO LIFE SENTENCES AND LONG TERMS OF IMPRISONMENT AS A CRITERION FOR INCREASING THE LIBERALITY OF THE JUDICIAL SYSTEM

Abstract. *The development of democracy, ensuring the rights and freedoms of citizens are inextricably linked with an increase in the quality and efficiency of the work of penal institutions, during which various types of criminal-executive legal relations arise, change and terminate. Attempts to introduce liberal European values into the everyday life of society made it necessary to modernise the activities of the penitentiary system in accordance with international standards. The need to introduce humane approaches and respect for human dignity in other special standards, which relate specifically to the sphere of the execution of criminal punishments, was noted. The novelty of the research is determined by the fact that the priority direction of this activity should be the process of further improvement of the penal legislation and the practice of its application, the strict observance of human rights and freedoms. One of the directions of these changes should be to improve the mechanisms for realising the right of convicts to imprisonment to a humane attitude and respect for their human dignity, based on progressive forms of ensuring it in accordance with international standards and existing best practices. Practical significance is determined by the fact that a country, when implementing the norms of pardon, assumes the obligation of more consistent implementation in legislation and practice of generally recognised international norms, primarily those that should ensure the implementation of human and civil rights and freedoms*

Keywords: *judicial law-making, the law of convicts, the penitentiary system, liberal values, the execution of sentences*

INTRODUCTION

The investigated right of convicts is recognised by the international community as fundamental, such that it is inherent in all human beings from birth [1]. This is enshrined in article 10 of the International Covenant on Civil and Political Rights (ICCPR)¹: “all persons deprived of their liberty shall

be treated with humanity and with respect for the inherent dignity of the human person”. The UN Human Rights Committee has indicated that respect for human dignity is a rule of general international law, and there is no exception [2]. As emphasised by the Inter-American Commission on Human

1. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

Rights, imprisonment establishes a regime of absolute control, loss of confidentiality, restriction of living space and, above all, a radical reduction in the capabilities of the means of personal self-defence. The Commission concluded that, as a consequence, the act of deprivation of liberty carries specific and substantive obligations to protect the human dignity of a prisoner [3]. Although the most fundamental element of this right is the absolute prohibition of torture, the right to respect for human dignity includes the provision of adequate material conditions [4]. Including adequate food, water and access to health care. And although they do not duplicate the need for the strict observance of the right of convicts in question, the provisions of these acts indicate the main components of the right of convicts to imprisonment to be humanely treated and respect their human dignity [5].

For example, the UN General Assembly approved in December of 2015 the UN Minimum Rules for the Treatment of Prisoners, known as the Mandela Rules¹. These Rules² are the result of 5 years of intergovernmental consultations and represent a significant harmonisation of the original 1957 version, taking into account international law and best prison management practices [6]. In approving the document, the General Assembly noted that, in adopting them, it was guided by the desire to reaffirm faith in fundamental human rights, in the dignity and worth of the human person without distinction, and took note, in particular, of the general comment on the humane treatment of persons deprived of their liberty, which was adopted by the Human Rights Committee [7]. These Rules³ enshrine the following provisions concerning various aspects of the right of those sentenced to humane treatment and respect for their human dignity (both in the context of actions aimed at ensuring the realisation of this right, and actions that constitute a violation):

“Rule 1: All prisoners shall be treated with the respect due to their inherent dignity and value as human beings [8]. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification”;

“Rule 5: 1. The prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings”;

“Rule 18: 2. In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be able to shave regularly”;

“Rule 43: 1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:

- a) indefinite solitary confinement;
- b) prolonged solitary confinement;
- c) placement of a prisoner in a dark or constantly lit cell;
- d) corporal punishment or the reduction of a prisoner’s diet or drinking water;
- e) collective punishment.”

“Rule 47: 1. The use of chains, irons or other instruments of restraint which are inherently degrading or painful shall be prohibited”;

“Rule 50: Searches shall be conducted in a manner that is respectful of the inherent human dignity and privacy of the individual being searched, as well as the principles of proportionality, legality and necessity”;

“Rule 74: The prison administration shall provide for the careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of prisons depends”;

“Rule 76: Training referred to in paragraph 2 of rule 75 shall include, at a minimum, training on rights and duties of prison staff in the exercise of their functions, including respecting the human dignity of all prisoners and the prohibition of certain conduct, in particular torture and other cruel, inhuman or degrading treatment or punishment”;

“Rule 91: The treatment (of convicted) shall be such as will encourage their self-respect and develop their sense of responsibility”;

“Rule 92: To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his or her social and criminal history, physical and mental capacities and aptitudes, personal temperament, the length of his or her sentence and prospects after release”.

In fact, in the previous edition of the Rules⁴, humanism and respect for human dignity were mentioned only in four points:

“46. 1) Prison authorities should carefully select personnel of all categories, since the good performance of prisons depends on the integrity, humanity, competence and personal qualities of these employees”;

“Procedure 10: within its technical cooperation and development programs, the United Nations: (a) assists Governments, at their request, to establish and strengthen comprehensive and humane correctional systems”;

“41. 3) prisoners should not be denied access to qualified representatives of any denomination. On the other hand, if a prisoner protests against being visited by worshippers, his wishes should be treated with full respect”;

1. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). (2015, December). Retrieved from https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-book.pdf.

2. *Ibidem*, 2015.

3. *Ibidem*, 2015.

4. *Ibidem*, 2015.

“48. All prison staff must behave in such a way and carry out their duties in order to serve as an example to prisoners and win their respect.” All this testifies to an increase in the weight of these categories for the process of execution of punishments associated with isolation from society.

But constant emphasis on these aspects is hardly necessary, because the Rules¹ are not intended to describe in detail an exemplary system of penitentiary institutions, but are intended only to, on the basis of generally recognised achievements of modern thought and taking into account the most important systems of the present, to state what is usually considered correct and principled and practical views on the treatment of prisoners and in the management of institutions. Given the diversity of legal, social, economic and geographic settings, it is clear that not all rules can be applied universally and simultaneously. They must, however, call to life a constant desire to overcome the practical difficulties that stand in the way of their implementation, since they generally reflect those minimum conditions that the UN considers acceptable. On the other hand, they cover a field where public opinion is constantly moving forward [9]. They are not intended to discourage experimentation and the introduction of new practices that are consistent with the principles set forth in them and aimed at achieving the stated goal.

1. LITERATURE REVIEW

This issue is defined in a similar way in the European Penitentiary Rules², which also mention the right to humane treatment and respect for human dignity only in certain norms:

“18.1. The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation”;

“72.1. Prisons shall be managed within an ethical context which recognises the obligation to treat all prisoners with humanity and with respect for the inherent dignity of the human person”;

“75. Staff shall at all times conduct themselves and perform their duties in such a manner as to influence the prisoners by a good example and to command their respect”;

“77. When selecting new staff the prison authorities shall place great emphasis on the need for integrity, humanity, professional capacity and personal suitability for the complex work that they will be required to do”.

Thus, the provisions of both rules, by and large, reflect the main boundaries of such treatment of prisoners, which is based on respect for their human dignity and

humanity [10]. They provide guidelines for a humane system of punishment execution, and since humanity in international approaches is inextricably linked with respect for human dignity, the implementation of the rules will serve as a means of ensuring this right as well [11]. And since the rules apply to all aspects of a person’s stay in places of deprivation of liberty, this serves as an additional argument in favour of the conclusion about the creation of a certain model of what behaviour of personnel will be recognised as such that ensures that the right of convicts to imprisonment to a humane attitude and respect for human dignity is observed [12].

It should be noted that, in contrast to national practice, international experts are more concerned about the issues of not securing as such the right of convicts to imprisonment to a humane attitude and respect for their human dignity (because its presence has long been recognised as a well-known axiom in foreign countries), but consider various challenges in implementing it and establishing compliance mechanisms [13].

Quite often, in the foreign scientific literature (by the way, as in national sources), the right of convicts to imprisonment to a humane attitude and respect for their human dignity is interpreted through the prism of decisions of the European Court of Human Rights (ECHR), which ultimately makes it possible to reduce its content to abstinence from certain actions. Indeed, if to analyse these documents, the correctness of this approach can allegedly be confirmed [14].

However, what has been said cannot be taken as an indication of the possibility or expediency of narrowing the content of the right of convicts to imprisonment to a humane attitude and respect for their human dignity purely to restrain the personnel of penal institutions from certain actions. The ECtHR in its decisions ascertains a violation of certain provisions of the Convention³, which occurred due to the actions or inaction of prison officers, as a result of which the necessity or the fact of taking certain actions, or refraining from them, occurs [15]. None of the ECtHR’s decisions indicates that the law under study should be interpreted exclusively to the extent specified in the decisions of this court. Moreover, the ECtHR adheres to the position that states should not only refrain from inhuman and degrading treatment but also ensure that persons who find themselves under their jurisdiction do not fall into situations as a result of their decisions and expose them to an imminent threat of such behaviour [16; 17]. On this basis, the authors can assert that the international community is interested not only and not so much in the normative consolidation of guarantees of protection against cruel treatment, as in the practical situation in the sphere of the treatment of convicts.

Moreover, the ECtHR considers cases in accordance

1. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). (2015, December). Retrieved from https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.

2. European Prison Rules. (2006, January). Retrieved from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d8d25.

3. Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://www.echr.coe.int/documents/convention_eng.pdf.

with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms¹, which does not directly enshrine the right to humane treatment and respect for human dignity [18]. The Convention² guarantees only individual human rights, and since the named right is fundamental, such that it determines all other rights, it does not make sense to additionally secure it. Therefore, in Art. 3 of the Convention³ deals exclusively with the prohibition of a certain type of behaviour – torture: “no one may be subjected to torture or inhuman or degrading treatment or punishment”. That is, all cases considered by the ECtHR and recognised as examples of violation of the right to humane treatment and respect for human dignity are studied through the prism of the prohibition of torture or a certain type of behaviour provided for in Art. 3, and therefore cannot serve as an illustration of the violation of the named right as such. The ECtHR states only certain types of violations of this right, but does not indicate mechanisms for ensuring its implementation in general.

To control the real situation, mechanisms of international control over the practice of detention of suspects and accused, provided for by international acts, can be used [19]. In particular, the UN Committee against Torture, established in accordance with the Convention⁴ against Torture, plays a certain role in identifying the relevant negative facts, which, among other things, carries out expert functions and possesses information that, in its opinion, contains reasonable data on the systematic use of torture in the territory of those or other states, as well as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, established in accordance with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁵ of November 26, 1987.

The European Committee on Human Rights (ECHR), which is charged with monitoring the implementation of the provisions of the ICCPR by the contracting parties, approaches this issue in a similar way. The ECHR may also consider complaints (or communications) from individuals alleging a violation of their rights under this Covenant. Analysis of a number of decisions of the ECHR suggests that the provisions of Art. 10 ICCPR should be interpreted broadly and in conjunction with the Standard Minimum Rules for the Treatment of Prisoners⁶.

2. MATERIALS AND METHODS

“Cabal and Bertran v Australia”⁷ (2003) found violations of Art. 10 of the ICCPR, with regard to humane treatment and respect for the dignity of the human person, was that they were kept in a cage that looked like a prison cell, given that the applicants were forced to take turns in it. In “Brough v Australia”⁸ (2006), the ECHR found the following acts to be a violation: prolonged confinement in an isolation cell without any opportunity for communication, combined with exposure to artificial light for an extended period of time, absence of clothes and blankets.

An analysis of other decisions of the ECHR allows stating that the committee usually establishes a violation of the right of prisoners to humane treatment and respect for their human dignity when the persons:

- are kept in solitary confinement;
- are subjected to physical, psychological and verbal attacks by prison staff or inmates;
- face a refusal to provide the necessary medical (including mental health) care and dental care;
- are in unsanitary conditions, without water, food, proper living conditions;
- are exposed to long periods of isolation or overcrowding;
- are undernourished, hold on without sufficient natural light;
- are not provided with a bed, the possibility of physical exercise;
- cannot realise opportunities for obtaining education, do not have access to information and documents.

That is, the violation of the named right is determined through a very wide and heterogeneous range of actions or inaction, which indicates the volume of the content of the law itself. In addition, its definition depends on the industry in which this right is interpreted. For example, commenting on the norms of the International Covenant on Economic, Social and Cultural Rights⁹, the Committee on Economic, Social and Cultural Rights (CESCR) notes: “respect for a person and his dignity is expressed in the freedom of a person to choose the type of work, and also indicates the importance of work for personal development and for his social and economic integration.” The Norwegian court, considering the appeal of the convicted Anders Breivik, concluded that the violation of his right to humane treatment

1. Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://www.echr.coe.int/documents/convention_eng.pdf.

2. *Ibidem*, 1950.

3. *Ibidem*, 1950.

4. *Ibidem*, 1950.

5. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. (1987, November). Retrieved from <https://rm.coe.int/16806dbaa3>.

6. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). (2015, December). Retrieved from https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.

7. Communication of the Human Rights Committee No. 1020/2001 “Carlos Cabal and Marco Pasini Bertran v. Australia. (2003, August). Retrieved from http://www.worldcourts.com/hrc/eng/decisions/2003.08.07_Cabal_v_Australia.htm.

8. Communication of the Human Rights Committee No. 1184/2003 “Corey Brough v. Australia”. (2006, March). Retrieved from <https://archive.crin.org/en/library/legal-database/corey-brough-v-australia.html>.

9. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

and respect for human dignity was expressed in keeping him in isolation and banning the publication of books. In China, an example of a humanistic approach and respect for human rights is the granting of permission to say goodbye to relatives of those sentenced to death before the execution of this punishment.

As a result, all this becomes the basis for the assertion that international experts usually interpret in broader terms the content of the right of convicts to imprisonment to be humanely treated and respect their human dignity, while humanism and respect are perceived as integral and paired categories. In connection with the latter circumstance, foreign literature does not always talk about humanism and respect in isolation: referring to the necessity to ensure the observance of the prisoners' right to respect for human dignity, at the same time it means that such behaviour is humane. That is, while ensuring respect for human dignity, the right of the convicted person to a humane attitude is also implemented.

Experts note that prison procedures that depersonalise or humiliate can also infringe on the human dignity of prisoners, such as inconvenient prison uniforms. For example, in Texas and Rwanda, male prisoners were forced to wear pink prison uniforms, deliberately humiliating them. Mandating female prisoners to wear jumpsuit as prison uniforms can have the same effect as it forces them to undress when using the toilet. Some countries use dubious procedures that are not justified for security reasons, such as forcing prisoners to march and singing patriotic songs or requiring them to walk in a certain way. The right to dignity also includes the application of fair and equitable non-discriminatory rules and procedures and the promotion of respectful relations between staff and prisoners. Attitude towards a person, behaviour with this person, disclosure of information about him to society or abusive treatment of him – all this can infringe on human dignity, given the fact what exactly this particular person perceives as humiliating or shameful.

3. RESULTS AND DISCUSSION

The responsibility of the state goes beyond preventing active harassment of prisoners: it includes refraining from humiliating procedures that infringe on human dignity and do not serve security or any other purpose, and ensuring that the suffering of prisoners in places of detention does not exceed the level inherent in deprivation of liberty. Human dignity and security in prisons are interdependent. Prisons and human dignity are not just compatible, they must be compatible.

Security and control are best ensured in an environment where there is respect for the inherent human

dignity of prisoners. As the International Centre for Prison Research has pointed out, it is completely wrong to assume that humane and fair treatment of prisoners will lead to reduced security or control. In fact, fairness and legality are not only decisive factors for well-being in prisons, but also have an obvious impact on the observance of the rule of law in the process of executing criminal sentences. If prisoners' rights are respected, they are more likely to recognise the legitimacy of the authority of prison staff, which in turn reduces the risk of tensions and unrest. Research from UK prisons shows that prisoners consider order and safety, along with fairness, respect and humanity, to be the most important aspects of prison life. At the same time, some types of practices and security measures can be intrusive and prohibitive in nature, limiting the rights of prisoners. Security concerns can be overestimated to the detriment of the human dignity of prisoners; the measures taken to ensure safety may be inappropriate or even excessive; the way they are implemented can be harsh and overwhelming / or applied systematically, regardless of whether a person is a real danger or not. The challenge facing the prison administration is to simultaneously ensure the safety and protection of the human rights and dignity of persons deprived of their liberty. There should be a methodology, for example in the format of a code of conduct, to authoritatively guide prison administration and staff in implementing security measures. In addition, planning should be undertaken to establish appropriate procedures and staff behaviour in different situations, and appropriate training should be provided.

American researchers also agree that all human rights are based on the inherent dignity of human beings, which was confirmed in 1948 by the adoption of the Universal Declaration of Human Rights¹. Recognising the temptation to disregard the human dignity of prisoners, Article 10 of the ICCPR², to which the United States acceded as a party, requires prison officials to, among other things, create conditions for providing mental health treatment for prisoners with mental health problems, as well as humane conditions. content. The inability to provide adequate mental health services in prison cannot be attributed to a lack of funds to staff these institutions with an adequate supply of qualified personnel or to meet mental health needs. The Human Rights Committee has confirmed that article 10 of the ICCPR³, which provides for the right to humane treatment, cannot be dependent on material resources. At the same time, respect for the human dignity of prisoners requires that the prison be managed in a manner that will increase the likelihood of their successful return to society upon release.

Article 10 of the ICCPR⁴ attaches correction and social rehabilitation to the essential goal of respect for

1. Universal Declaration of Human Rights. (1948, December). Retrieved from <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

2. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

3. *Ibidem*, 1966.

4. *Ibidem*, 1966.

dignity and humane treatment. Thus, the aforementioned norm creates a positive target for correction so that the punishment is something more than an ordinary punishment. As stated in the UN-approved Standard Minimum Rules for the Treatment of Prisoners¹ (SMR), the purpose and justification of a sentence of imprisonment or deprivation of liberty in general is ultimately to protect society and prevent crimes that threaten it. This goal can be achieved only when, after serving a sentence and returning to normal life in society, the offender is not only ready, but also able to obey the law and ensure his existence. Thus, rehabilitation is the ultimate goal of deprivation of liberty, which is simultaneously included in the content and rights of convicts to a humane attitude and respect for human dignity.

Psychiatric treatment also plays an important role in the rehabilitation of prisoners who have or are at risk of developing mental disorders. As stated in the named Rules², the institution's medical services should aim to identify and treat any physical or mental illness or defect that may interfere with the prisoner's rehabilitation. All necessary medical, surgical and mental health services must be provided for this purpose. The HES also establishes different regimens suitable for each person, depending on the severity of the mental illness.

A human rights-based approach to mental health treatment for prisoners further recognises the importance of continuity of care to ensure that individuals have access to treatment upon release. Standard Minimum Rules for the Treatment of Prisoners³ stipulate that medical institutions must identify all physical and mental illnesses or defects that could interfere with the re-education of a prisoner, and take care of their cure. To do this, institutions must be able to provide the necessary medical, surgical and mental health services.

In the foreign literature of a number of countries, opposite opinions are expressed, according to which humanism refers to the negative phenomena of mass culture. For example, they point to the extreme harmfulness of humanism precisely in the legal plane on the grounds that in this way a law-abiding citizen is at a disadvantage in relation to a criminal, whom he must treat humanely and with respect for his human dignity. In the opinion of the named representative of religious circles, humanism is a technology of weakening a people for its most unspent destruction or comfortable parasitism on it. The author points out: "Humanists cry for leniency to rapists, murderers, maniacs, believing that they need to be treated, weaving Biblical dogmas, interpreting them in their own way, call for mercy and compassion, as well as forgiveness of criminals and enemies."

However, it seems that such a position only underlines the prevailing considerations in certain societies regarding the relatively low value of each individual, and indicates the correctness of progressive, humane European approaches to this problem. This is especially emphasised by the general situation with human rights in countries that are inclined towards the totalitarian path of their development. In addition, the above approach has not been reflected in any regulatory or strategic document.

Thus, international documents establish that humane treatment and respect for human dignity is one of the fundamental rights of convicts and plays a decisive role in working with them and ensuring their rehabilitation. That is why it is quite natural that this approach is typical for many European countries. For example, German practice shows that the establishment of the right to human dignity as a legal concept can lead to the right to rehabilitation. This country vigorously proclaims the importance of dignity, reinforcing this approach at the level of Art. 1 of the Basic Law⁴: human dignity is inviolable. To respect and protect it is the duty of all government authorities. The German people, therefore, recognise the inviolable and inalienable human rights as the basis of any community, peace and justice in the world. The fact that it is in the first articles of the German Constitution⁵ that the emphasis is placed on dignity, according to scientists, is evidence of its fundamental place, at least in theory, in modern German law. The Constitution is also important for the rights of convicts, although it does not directly distinguish them.

The German judiciary has emphasised in its practice the importance of preserving the dignity of convicts. In its well-known decision on life imprisonment, the Federal Constitutional Court noted that if a person is convicted to this punishment, he will seek to escape, because otherwise her human dignity will suffer. Having reached this conclusion, the Court has noted the historical development of punishments that have become more human and individual. The decision also noted that correctional institutions are obliged, even in the case of a sentence of life imprisonment, to assist convicts in maintaining all abilities and readiness to perform their usual functions inherent in human beings, to compensate for the destructive consequences caused by the loss of freedom, and to eliminate all changes that deform a person. It is this approach that serves as the basis for creating conditions for rehabilitation while working with a convict, ensuring the prevention of degradation and respect for the dignity of convicts.

To further substantiate the idea of the necessity to ensure respect for the dignity of convicts by creating

1. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). (2015, December). Retrieved from https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-book.pdf.

2. *Ibidem*, 2015.

3. *Ibidem*, 2015.

4. Basic Law for the Federal Republic of Germany. (1949, May). Retrieved from <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

5. *Ibidem*, 1949.

conditions for their rehabilitation, the Lebach case is usually cited in Germany, the essence of which was that a television station tried to use the external image of a convict in combination with a film about a robbery, and against this background, present a report on the clash of the rights of convicts to respect for dignity and rehabilitation with the rights of free citizens. Here, the Constitutional Court noted that prisoners really have the right to rehabilitation, which is based on the constitutional right to human dignity, personality development and certainty. Indeed, the Constitution¹ proclaims that every person has such a right, and it is limited only by the requirement not to violate the rights of other citizens, constitutional or moral laws. Moreover, the Court stated that as bearers of the fundamental right to human dignity convicted persons should be able to re-establish themselves in society after serving their sentence. This case is an illustration of the penitentiary theory of “socialisation” existing in Germany, according to which society should have the goal of re-socialisation of all convicts in accordance with the norms of the Constitution, and the state and the community should help such persons in their self-development and rehabilitation, because exactly on this the right to respect for human dignity is based.

In general, the interpretation of constitutional provisions on human dignity takes place in more than 50 decisions of the Federal Constitutional Court of Germany (FCC), which cover a wide range of issues: from a general understanding of the philosophical and legal nature of this phenomenon to specific situations related to the issue of dignity (for example, the collection of statistical information, job loss, deprivation or restriction of property). However, most often the need to interpret the first paragraph of Article 1 of the Basic Law of the Federal Republic of Germany² is associated with ensuring the human right to dignity in the process of carrying out criminal proceedings. The FCC considers the dignity of an individual as the objective value of a person who cannot be lost: a criminal cannot be turned into a simple object of combating crime with violation of his socialised his right to dignity and respect, which is protected by the Constitution³. In the development of this legal position, the FCC’s view on coercion of a person to self-incrimination is more specific: compulsion to self-incrimination affects the dignity of a person, whose confessions are used against him. Coercion to create, on account of one’s own testimony, the prerequisites for a criminal judicial assessment or the establishment of retaliatory sanctions would also be unacceptable and violating human dignity.

The basis for the interpretation of this phenomenon is the philosophical and legal views of I. Kant regarding the nature of the human as a transcendental subject. Considering natural freedom as the only original right belonging to every person, taking into account his human nature, and arguing

that natural law comes from the mind and is limited by the mind, he returned to understanding this concept as “value-in-itself.” Such views of the German philosopher were embodied not only in the constitutional proceedings of the FCC, they became the deep basis for international legal acts in the field of human rights protection and the recognition of human dignity as one of the fundamental human values. It can be argued that this understanding of human dignity is universal, since similar views are contained in the decisions of the courts of states belonging to the Anglo-Saxon system of law.

Along with the experience of advanced European countries, the situation in other developed countries such as Canada is interesting. When deciding disputes over human dignity, the Supreme Court of Canada interprets the provisions of the 1982 Canadian Charter of Rights and Freedoms⁴. In the case law of this institution, two competing approaches to understanding the nature of dignity have developed: as freedom and as coercion. The first approach is very close to the modern view of the nature of human rights and corresponds to the Kantian concept of human dignity, in particular, as a value and moral duty. In accordance with this approach, dignity is a fundamental, inalienable value and is perceived as an objective norm. It finds its expression in almost every right and freedom guaranteed by the said charter. In addition, it is often viewed in a systemic connection with such categories as freedom and equality, defining dignity as a certain personal autonomy of a person. According to the second approach (dignity as coercion), this phenomenon is associated with the rules of civilised human life, that is, those behavioural norms that are established and perceived in society. In the same context, dignity is understood as a reputation (the Ukrainian analogue is “honour”), which is defined as an intrinsic inalienable value that has external manifestations. According to the second approach, an infringement on human dignity can take place, regardless of his wishes, in such areas as trafficking in human organs, prostitution, commercial surrogacy, and so on. Using the first point of view at this phenomenon, the Supreme Court of Canada is guided by the understanding of dignity as an inalienable value of a person, a moral manifestation of human autonomy, a fundamental right, which is fundamental to natural human rights. According to another, competing with the first view, the phenomenon of human dignity is already understood in a narrower sense – everything is considered unworthy that does not correspond to certain rules or denigrates the dignity of a particular person.

The judicial law-making of the Constitutional Court of the Republic of South Africa in this area is more unambiguous. It recognises human dignity as the basic, fundamental value of the constitutional order, thanks to

1. Basic Law for the Federal Republic of Germany. (1949, May). Retrieved from <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

2. *Ibidem*, 1949.

3. *Ibidem*, 1949.

4. The Canadian Charter of Rights and Freedoms. (1982, April). Retrieved from <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/>.

which the rule of law and constitutionalism in South Africa develop. According to the legal position of the Constitutional Court of South Africa, recognition of human dignity is a confirmation of the intrinsic value of a human being, which has the right to be treated with dignity, based on respect and importance. The essence of this concept is also revealed through the linkage to the categories of freedom and equality, more precisely – equal access to certain social benefits. In general, the South African Constitutional Court analyses the observance (preservation) of human dignity by disclosing the legal content of such naturalistic needs’ as the right to food, drinking water, clothing, housing, medical care and the like. Thus, by its nature, this concept is recognised as the natural significance of a person and at the same time as a requirement for the state to ensure a decent standard of living.

The recognition of respect for the dignity (or simply – for the dignity) of a prisoner and the humanity in the treatment is also approached in a similar way in other countries, in particular Norway. So, the activity of the penal service in this country is based on five basic principles:

- 1) the purpose of punishment is “in the word of the law”, in changing a convicted person;
- 2) humanity;
- 3) legality;
- 4) equality before the law;
- 5) has served a sentence – paid off with society.

The principle of normalising stay in prison is also respected, that is, bringing conditions of stay closer to normal life. At the same time, the government promotes and implements the principle of guaranteeing a return to normal life in every possible way and recognises the existence of a close connection between the views on the causes of a crime and the attitude towards a prisoner. The prison administration strives to ensure that security measures do not restrict social work and humane treatment of prisoners.

In Switzerland, the procedure for the execution of sentences is based on two basic constitutional principles: respect for human dignity and ensuring the rights of offenders, since these can be significantly limited due to the need to stay in prison. In these basic principles, criminal legislation provides general principles for the execution of sentences: prevention of the commission of reoffending after release; organising, if possible, normal conditions for prisoners; support of persons who are released from places of deprivation of liberty in overcoming the consequences of imprisonment; ensuring adequate conditions of imprisonment; taking the necessary measures to prevent the commission of crimes during their stay in places of deprivation of liberty. The unwritten, but commonly used principle in working with convicts is the principle: “It is not our friends who are condemned, but not our enemies either.” It is with this that both the education of the personnel and the first days of work in prisons and other institutions for the execution of sentences begin. The main thing is to treat convicts with respect for their human dignity. That is why people who have a negative attitude towards criminals, want to rule over others, are prone to manifestations of anger and

the like are not accepted for work in places of deprivation of liberty (this is determined with the help of relevant specialists and various surveys). Choleric people, aggressive, conflicted personalities, imitators of various dogmas, convinced exclusively of their own righteousness, and the like are not hired in any way. From the same motives, people who already have a certain life experience (at the age of 28-30) are recruited. Moreover, preference is given to those who have a family and children.

That is, despite the somewhat distinctive approaches in the definitions, the activities of the systems for the execution of criminal sentences in foreign countries are aimed at maximizing the observance of the right of convicts to a humane attitude and respect for their human dignity. As for the definitions in relation to them, there are constant discussions in scientific circles. At the same time, one of the main problems is the dispute about the possibility of classifying humanism and respect for human dignity as the category of prisoners’ rights.

For example, it is mentioned that the idea of dignity is undoubtedly closely related to rights, but no specific “right to dignity” is specified in either international or national (United Kingdom) documents. Therefore, it is proposed to consider dignity as a fundamental category, as a “source of rights”, noting at the same time that dignity is not a substantive right in itself, because it is much more fundamental than all other rights based on it. Without entering into a discussion, the authors note that in international instruments, indeed, the right to dignity, as such, does not exist. Standards indicate respect for human dignity, that is, they imply certain actions from the state and other persons. And it is the respect for dignity that should act as the fundamental right of a convicted person, for it is characterised by material characteristics. At the same time, in order to ensure an appropriate mechanism for its implementation, it is advisable to carry out work to determine the content of the right to respect for dignity, at least in general terms.

CONCLUSIONS

As a result, completing the analysis of international approaches to the problem of the exercise of rights by convicts, it can be asserted that:

1. International standards recognise the right of convicts to imprisonment to humane treatment and respect for their human dignity as a fundamental right, which creates the basis for the implementation of all other rights, primarily the right to rehabilitation (social adaptation) after serving a sentence.

2. Humanism and respect for human dignity, despite certain scientific discussions, are understood in international standards and practice as inalienable categories that condition each other.

3. International standards do not provide a clear list of the content of the right of convicts to imprisonment to a humane attitude and respect for their human dignity, which allows constantly expanding its interpretation in the creation of judicial practice and the execution and serving of a sentence of imprisonment.

4. Likewise, the practice of international judicial and convention bodies does not establish clear limits for the implementation of this right, limiting itself solely to indicating actions that may violate it, and from which states should introduce certain guarantees. At the same time, the main components of the right of convicts to a humane attitude and respect for human dignity include: conditions of detention, communication, behaviour, means of ensuring the regime, mechanisms for the implementation of other rights, medical assistance, the creation of opportunities for rehabilitation after release and other circumstances arising when serving a sentence in form of imprisonment.

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