Національна академія правових наук України
Національний юридичний університет
імені Ярослава Мудрого

ВІСНИК

НАЦІОНАЛЬНОЇ АКАДЕМІЇ ПРАВОВИХ НАУК УКРАЇНИ

Науковий юридичний журнал

Заснований у 1993 році
Періодичність випуску – 4 номери на рік

Том 27, № 3
2020

Харків
«Право»
2020

УДК 34
DOI: 10.37635/jnalsu.27(3).2020

ISSN 1993-0909
E-ISSN 2663-3116

Рекомендовано до друку вченою радою
Національного юридичного університету імені Ярослава Мудрого
(№2 від 18 вересня 2020 р.)

Свідоцтво про державну реєстрацію
Серія КВ № 23993-13833ПР від 11.07.2019 р.

Журнал внесено до Переліку наукових фахових видань України (категорія «Б») у галузі юридичних наук
(наказ МОН України № 6143 від 28.12.2019 р.)

Видання включено до міжнародної наукометричної бази
Index Copernicus International (Варшава, Польща)

Вісник Національної академії правових наук України / редкол.: В. Тацій та ін. – Харків : Право, 2020. – Т. 27, № 3. – 156 с.

Засновники:
Національна академія правових наук України
Національний юридичний університет імені Ярослава Мудрого

Видавець:
Національна академія правових наук України

Відповідальний за випуск
О. В. Петришин

Адреса редакційної колегії: 61024, Харків, вул. Пушкінська, 70, Національна академія правових наук України. Тел. (057) 707-79-89

Офіційний сайт: visnyk.kh.ua
e-mail: visnyk_naprnu@ukr.net

National Academy of Legal Sciences of Ukraine
Yaroslav Mudryi National Law University

JOURNAL

OF THE NATIONAL ACADEMY OF LEGAL SCIENCES OF UKRAINE

Scientific Legal Journal

Founded in 1993
Periodicity – 4 issues per year

Volume 27, Issue 3
2020

Kharkiv
«Pravo»
2020

UDC 34
DOI: 10.37635/jnalsu.27(3).2020

ISSN 1993-0909
E-ISSN 2663-3116

Recommended for publication by the academic Council
Yaroslav Mudryi National Law University
(Protocol № 2 dated 18 September 2020)

The certificate of state registration
КВ № 23993-13833ПР date 11.07.2019

Journal included in the List
of scientific professional publications (category "B") in the field of legal sciences
(the order of MES of Ukraine No. 6143 dated on 28.12.2019)

Journal included in the international scientometric databases
Index Copernicus International (Warsaw, Poland)

Journal of the National Academy of Legal Sciences of Ukraine / editorial board: V. Tatsiy et al. – Kharkiv : Pravo, 2020. – Vol. 27, № 3. – 156 p.

The founders:
National Academy of Legal Sciences of Ukraine
Yaroslav Mudryi National Law University

Publisher:
National Academy of Legal Sciences of Ukraine

Responsible for the release of
O. V. Petryshyn

The Editorial Board address: 61024, Kharkiv, 70 Pushkinska Street, National Academy of Legal Sciences of Ukraine. Ph.: (057) 707-79-89

Official website: visnyk.kh.ua
e-mail: visnyk_naprnu@ukr.net

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УДК 346.44
DOI: 10.37635/jnalsu.27(3).2020.14-27

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Національна академія правових наук України
Харків, Україна

Київський регіональний центр
Національної академії правових наук України
Київ, Україна

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Київський регіональний центр
Національної академії правових наук України

Відділ проблем приватного права
Науково-дослідний інститут приватного права
і підприємництва імені академіка Ф. Г. Бурчака
Національної академії правових наук України
Київ, Україна

ПРОСУБ'ЄКТНА КОНЦЕПЦІЯ ПІДПРИЄМСТВА

Анотація. *Актуальність дослідження зумовлюється необхідністю виявлення оптимальної моделі закріплення поняття «підприємство» та необхідністю взаємного узгодження понять (зокрема, тотожних) в межах економічних відносин у контексті сучасної тенденції оновлення законодавства. Стаття присвячена аналізу поняття «підприємство», об'єктивованого одночасно у Цивільному кодексі України в якості об'єкта цивільних прав та у Господарському кодексі України – в якості суб'єкта господарських правовідносин. З метою виявлення оптимального підходу до розуміння терміну «підприємство» проаналізовано законодавчі положення про підприємство, закріплені у Господарському кодексі України. Констатовано, що кваліфікуючою ознакою підприємства, як організаційної форми господарювання, є його державна реєстрація (створення) за Господарським кодексом України. Втім, на підставі аналізу положень про державну реєстрацію (створення) юридичних осіб, закріплених в Цивільному кодексі України, та положень про державну реєстрацію (створення) суб'єктів господарювання, встановлених Господарським кодексом України, констатовано відсутність таких особливостей державної реєстрації (створення) підприємства, встановлених у Господарському кодексі. З метою виявлення місця підприємства у системі суб'єктів господарських правовідносин, відповідне поняття співставлено з іншими суб'єктами відповідних відносин (суб'єкт господарювання; господарська організація) та з міжгалузевим учасником підприємницьких правовідносин – юридичною особою. На підставі аналізу наведених понять виявлені недоліки законодавчої техніки як у дефініції підприємства за Господарським кодексом України, так і інших його дефінітивних норм, що стосуються визначення природи досліджуваного поняття (визначення суб'єкта господарювання; господарської організації та загальне викладення норм щодо суб'єктів*

(учасників) господарських відносин). Встановлено, що за відсутності чітко структурованої системи суб'єктів господарського права, визначення місця підприємства у відповідній системі вбачається необґрунтованим (особливо у контексті об'єктивації підприємства у Цивільному кодексі України). Викладене зумовлює наявність низки проблем у правозастосовній практиці, пов'язаних не лише з неузгодженістю двох кодифікованих актів, предмет правового регулювання яких принаймі частково співпадає, а і з відсутністю системності у викладенні положень про суб'єктів господарських відносин.

Ключові слова: господарські відносини, учасники цивільного обороту, об'єкти цивільних прав, юридична особа.

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PRO-SUBJECTIVE ENTERPRISE CONCEPT

Abstract. *The article is devoted to the enterprise concept theoretical framework development, which is objectified in both Civil and Economic codes of Ukraine. Thus, named concepts are fundamentally different. In particular, Civil Code of Ukraine recognises enterprise as an object. In the same time Economic code gives a birth to prosubjective enterprise concept. Nevertheless, both legal acts are aimed to regulate economical relationships, which results to doctrinal and practical needs to identify the optimal approach of understanding the nature of enterprise under the current legislation of Ukraine. In order to identify the place of the enterprise in the system of subjects of economic relations, the relevant concept is compared with other subjects of the economic relations (business entity; business organization) and with the intersectoral participant of business relations – a legal entity. Based on the analysis of these concepts, the Authors claimed a non-systematic approach to concept defining under the Economic Code of Ukraine and other shortcomings of legislative techniques in the definition of the enterprise under named act, which resulted in the absence of a clearly constructed system of subjects of economic law. Thus, the establishment of the place of the enterprise in the relevant system seems impractical.*

Keywords: legal entity, Economic code of Ukraine, Civil code of Ukraine, company.

INTRODUCTION

The current legislation implements two opposite concepts of the enterprise. This refers to Article 191 of the Civil Code of Ukraine[1] and Article 62 of the Commercial Code of Ukraine[2]. The Article 191 of the Civil Code of Ukraine[3] establishes that an enterprise is a single property complex used for business activities (Part 1). Part 2 of the cited provision details the composition of the enterprise as a single property complex, and Part 4 stipulates that the enterprise (or its part) may be the object of several transactions. Therewith, Article 62 of the Commercial Code of Ukraine[4] defines an enterprise as an independent business entity established by a competent state authority or local government, or other entities to meet social and personal needs through the systematic implementation of production, research, trade, and other economic activities stipulated by the Commercial Code of Ukraine and other laws.

The above regulatory provisions lead to lively scientific discussions on the legal nature of the enterprise, the feasibility of prescribing such a structure in regulations, as well as the scientific validity of the above approaches, their compliance with established legal traditions and formal logic. Thus, some scholars, perceiving the approach laid down in the above provisions of the Civil Code of Ukraine, define the company as a participant (subject) of economic relations [1-3]. However, civil studies are based on the qualification of the enterprise as an object of civil rights [4-7]. In foreign studies, many scientists have investigated the corporate concept of the enterprise [8-16]. The above confirms the relevance of the doctrinal analysis of the concept of enterprise, its legal nature and the application of legal constructions laid down in the cited articles of the Civil and Commercial Codes of Ukraine.

The scientific discussion on the "pro-object" or "pro-subject" concept of the enterprise, as a system-forming category for the regulation of economic relations, has corresponding statutory origins. Thus, the choice of a concept largely depends on the definition of a legal act, which is considered a proper regulator of the corresponding legal relations. In these circumstances, it can be stated that there is a rather long doctrinal discussion on the correlation between the Civil and Commercial Codes as regulators of business relations [7]. In this context, it is necessary to support O. O. Pervomaisky, according to whom, the idea of the correlation of one code to another implies mutual coherence of their general provisions, which, apparently, is missing from these acts [7].

Apart from the ideal purpose – to prove the absence of a constructive idea in the Civil Code of Ukraine, a comprehensive study of the concept of "enterprise" provides a solution to a purely utilitarian issue – the elimination of a set of important law enforcement issues. Notably, the thesis of the homonymy of the concept of "enterprise" is not seen as a strong argument in support of the pro-subjective concept of enterprise, as both terms are used in a very specific area of legal relations (which will be discussed in more detail below). Thus, it is necessary to study the "viability" of the corresponding provisions of the Civil and Commercial Codes of Ukraine for legal science and practice.

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15
[2] Commercial Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436-15.
[3] Civil Code of Ukraine, op. cit.
[4] Commercial Code of Ukraine, op. cit.

The purpose of the study is to analyse the concept of enterprise (in particular, its pro-subject concept) by comparing it with other types of business entities and determining the place of the enterprise in the system of such entities.

1. MATERIALS AND METHODS

The regulatory framework for this study included codified regulations governing economic relations – the Civil Code of Ukraine and the Commercial Code of Ukraine; regulations that govern the specific features of particular legal forms of legal entities (Laws of Ukraine "On Freedom of Conscience and Religious Organisations"[1] and "On Protection of Economic Competition"[2]).

Philosophical, general scientific, and special scientific methods of cognition were used in the study. The dialectical method was used to analyse doctrinal approaches to the definition of terms such as "enterprise", "business entity", " economic organisation", "legal entity", as well as to cover the basic properties of these concepts. Aristotelian methods (analysis, synthesis, abstraction, generalisation, analogy, induction and deduction) were used to study particular features (signs, characteristics) of the enterprise as a subject of economic relations, as well as other economic and legal pro-subject structures mentioned above. The leading Aristotelian method is the analysis by means of which the enterprise as an economic entity was imaginatively divided into separate signs (features, characteristics) which were investigated separately as a part of the whole (collective) concept. Thus, it is a matter of establishment of such signs of the enterprise as its belonging to subjects of managing; independence; creation by a competent entity, and the purpose of its creation. Similarly, the economic organisation as a business entity, the features (signs, characteristics) of which are determined: the status of a legal entity and the creation in accordance with the Civil Code of Ukraine[3]. The types of business entities and economic organisations were studied in an analogous way.

With the help of abstraction, these features were studied separately (in particular, in terms of their applicability and legitimacy in specific regulations). The method of abstraction allowed to formulate the conclusions of the study, and deduction and induction – to make a corresponding search for the original ideas (regulations and relevant doctrinal provisions). Thus, induction and deduction were used to find the necessary material to generalise and abstract the statutory pro-subjective approach to the concept of enterprise. In particular, it is a matter of establishing the dualistic nature of the term “enterprise” within the Commercial Code of Ukraine.

Formal legal (dogmatic or legal technical) method was used to study and interpret the provisions of the Civil and Commercial Codes of Ukraine, as well as to describe and systematise them. The comparative legal method was used to compare the concepts of "enterprise" in foreign law and " economic organisation", "business entity", "legal entity", "enterprise" in the Civil Code of Ukraine. This method was also used to compare certain rules on a legal entity in the Civil Code of Ukraine and an enterprise (economic

[1] Laws of Ukraine No 987-XII "On Freedom of Conscience and Religious Organizations". (1994, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2210-14#Text

[2] Law of Ukraine No 2210-III "On Protection of Economic Competition". (2001, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2210-14#Text

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

organisation; business entity) in the Commercial Code of Ukraine[1], as well as rules aimed at protecting economic competition in the Commercial Code of Ukraine and the Law of Ukraine "On Protection of Economic Competition". The comparative legal method was also used to compare the procedures for establishing a business entity (legal entity) under the Civil and Commercial Codes of Ukraine in order to identify differences in the corresponding procedures.

The historical method allowed to study the concept of "enterprise" in retrospect and to establish the purpose of its legislative consolidation.

2. RESULTS AND DISCUSSION

2.1 Enterprise as a business entity

The definition of an enterprise as a subject of economic relations is contained in Article 62 of the Commercial Code of Ukraine, according to which an enterprise is an independent business entity established by a competent public authority or local government or other entities to meet public and personal needs through systematic implementation of production, research, trade, other economic activities in accordance with the procedure prescribed by the Commercial Code of Ukraine and other laws. The following features of an enterprise can be distinguished from the above definition: (1) only an economic entity can be considered an enterprise; (2) such entity must be independent; (3) the entity competent to establish the enterprise may be: (a) a public authority; (b) a local self-government body; (c) another entity; (4) the enterprise must be established for the specific purpose of: (a) meeting social needs; (b) meeting personal needs; (5) the purpose of the enterprise must be realized in a specified way, namely by systematic implementation of production, research, trade or other activities in accordance with the procedure prescribed by the Commercial Code of Ukraine and other laws. Each of the above feaures of the enterprise requires specification.

As noted, an enterprise can only be a business entity, the definition of which is contained in Part 1 Article 55 of the Commercial Code of Ukraine. According to the content of the cited provision, economic entities are participants of economic relations who carry out economic activity, exercising economic competence (set of economic rights and obligations), have separate property and are responsible for their obligations within this property, except in cases prescribed by law. Notably, despite the definition of the enterprise through the lens of its belonging to business entities, Part 2 Article 55 of the Commercial Code of Ukraine does not operate the concept of enterprise in terms of defining the types of business entities. Instead, Article 55 of the Commercial Code of Ukraine defines business entities as: (1) economic organisations and (2) citizens of Ukraine, foreigners or stateless persons engaged in economic activity and registered in accordance with the law as entrepreneurs. Note that the purpose and objectives of this study do not provide a full analysis of the concept of business entity. Therewith, belonging to this generic category of the concept of enterprise necessitates partial coverage of related concepts in order to clarify the legal nature of the enterprise (i.e., the scope of generic concepts used to denote the subjects (participants) of economic relations

[1] Commercial Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436-15.

to which the enterprise belongs, and places of the enterprise in the system of subjects (participants) of economic relations).

Based on the statutory definition of "economic organisation" (a legal entity established in accordance with the Civil Code of Ukraine; state, municipal, or other enterprise established in accordance with the Commercial Code of Ukraine, as well as other legal entities engaged in economic activity and registered in accordance with law), it is possible to come to a conclusion about belonging of the enterprise to the economic organisations. Therefore, it can be stated that there are a certain shortcomings of rule-making techniques that lead to artificial complication of the system of economic entities, because in the presence of a narrower concept used to denote business entities, it appears more reasonable to define the category of enterprise with the help of the category of "economic organisation" and not "business entity". In turn, the Commercial Code of Ukraine[1] also divides economic organisations into the following types: (1) a legal entity established in accordance with the Civil Code of Ukraine; (2) a state, municipal, or other enterprise established in accordance with the Commercial Code of Ukraine; (3) other legal entities engaged in economic activity and registered in accordance with the procedure prescribed by law. The above suggests that the entreprise belongs to the second group of economic organisations (state, municipal, or other enterprises established in accordance with the Commercial Code of Ukraine).

It is important to add that the term "enterprise" also has a dualistic nature within the Commercial Code of Ukraine. It refers to the simultaneous extension of this term to (1) state, municipal, and private enterprises as a legal form of an economic entity and (2) the designation of other legal forms of legal entities by this term (first of all, it refers to conditional extension of features inherent in the term *enterprise* or even *company*, known to many foreign legal orders, to an enterprise in Ukrainian legislation).

The above does not contribute to the existence of a clear, scientifically sound and practically appropriate system of subjects (participants) of economic relations and only burdens the national legislation with a significant number of mutually inconsistent concepts. Therefore, it is not possible to definitively determine which enterprises (as a legal form of a legal entity or as an independent business entity, the features of which are enshrined in Article 62 of the Commercial Code of Ukraine) are referred to in Part 2 Article 55 of the Commercial Code of Ukraine. At the same time, considering the absence of other references in the text of the cited article to the concept of "enterprise" and the lack of mandatory rules for classifying an enterprise as a type of economic organisation, the concepts of enterprise presented in Part 2 Article 55 of the Commercial Code of Ukraine and in Article 62 of the Comemrcial Code of Ukraine are presumably identical. Thus, the "enterprise" means the [economic] organisation created (registered) in accordance with the procedure prescribed by the Commercial Code of Ukraine (which should be the criterion for its separation from the list of other economic organisations).

2.2 Enterprise as an economic organisation

Part 2 Article 55 of the Commercial Code of Ukraine gives grounds to conclude that the criterion for distinguishing an enterprise from other economic organisations is the procedure for its creation (such economic organisations must be created in accordance

[1] Commercial Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436-15.

with the procedure prescribed by the Civil Code of Ukraine). This conclusion necessitates the clarification of the specific features of registration (establishment) of the enterprise as a legal entity, which are regulated in the Commercial Code of Ukraine. Therewith, in the above context, the "specific features" mean such legally significant characteristics of the registartion (establishment) of the enterprise, which should be stipulated by the Commercial Code of Ukraine, and not contained in other regulations (or, at least, in the Civil Code of Ukraine, as in the act mentioned in the Commercial Code of Ukraine in contrast to the Commercial Code itself). Therewith, Article 56 of the Commercial Code of Ukraine ("Establishment of a business entity") does not contain the specific features of the establishment of an enterprise as a special form of economic entity. Moreover, the cited article in its content is a reproduction of several legislative provisions related, in particular, to the creation of a legal entity and certain provisions of competition law. Thus, Part 1 of the cited provision prescribes the establishment of a business entity by the decision of the owner(s) of the property or its authorised body in cases established by law. This also makes provision for the possibility of creating a business entity by decision of other bodies, organisations, and individuals by establishing a new economic organisation, merger, accession, separation, transformation of the existing economic organisation(s) in compliance with the requirements of the legislation.

It can be stated that all the above provisions are based on the provisions of the Civil Code of Ukraine on the establishment of a legal entity. This refers to Part 2 Article 81 and Article 87 of the Civil Code of Ukraine. The "specific features" of the establishment of a business entity in the cases stipulated in Part 1 Article 56 of the Commercial Code of Ukraine[1], constitute the decision of the property owner. Admittedly, the phrase "property owner's decision" can be defined as a tribute to the Soviet theory of economic and administrative law and the long prevailing ideology, while in the 2020s, this phrase is nothing short of a bitter misunderstanding.

The establishment of a business entity through mergers, acquisitions, spin-offs, divisions, and transformations also cannot be determined by the feature stipulated in the Commercial Code of Ukraine, considering the detailed regulation of these structures in the Civil Code of Ukraine[2]. Furthermore, the provision of Article 56 of the Commercial Code of Ukraine refers exclusively to the procedure for establishing legal entities. Therewith, as mentioned above, the specified article is entitled "Establishment of a business entity". Given the provisions of Article 55 of the Commercial Code of Ukraine, which also includes individuals as business entities, the very name of Article 56 of the Commercial Code of Ukraine is considered to to be incorrect and failing to meet the requirements of formal logic.

Part 2 Article 56 of the Commercial Code of Ukraine stipulates that the creation of an economic entity is possible by compulsory division (separation) of the existing economic entity by order of the antimonopoly authorities in accordance with the antitrust and competition legislation of Ukraine. This rule reproduces the provisions of Part 4 Article 81 of the Civil Code of Ukraine, which is detailed in Article 53 of the Law of Ukraine "On Protection of Economic Competition". In this case, as noted above, Article 56 of the Commercial Code of Ukraine operates with the generic concept of "business

[1] Commercial Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436-15.
[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15

entity", and therefore, this rule should be applied to individuals-entrepreneurs. Thus, Article 56 of the Commercial Code of Ukraine does not establish any features of the creation of business entities, compared with the Civil Code of Ukraine and acts of special legislation.

Thus, Part 3 Article 56 of the Commercial Code of Ukraine establishes the obligation to comply with the requirements of antitrust and competition law in the establishment of economic entities. At the same time, this requirement is, firstly, presumed; secondly, it is the duty of newly created legal entities in accordance with the Law of Ukraine "On Protection of Economic Competition"[1]; thirdly, it does not contain additional (compared to the provisions of the Law of Ukraine "On Protection of Economic Competition") instruments of protection against violations of the law, as it does not make provision for specific legal consequences of violation of these provisions.

In accordance with Part 4 Article 56 of the Commercial Code of Ukraine[2] an economic entity may be created and operate based on a model statute approved by the Cabinet of Ministers of Ukraine, which after its adoption by the participants becomes a constituent document. Therewith, the above provision of the Commercial Code also cannot be determined as a specific feature of the creation of an economic entity, considering the existence of a corresponding provision in the Civil Code. In this context, it should be noted that in the Commercial Code of Ukraine, the phrase "legal entity" is mechnistically replaced with the phrase "business entity". Furthermore, the above-cited provision of the Commercial Code does not apply to one of the types of business entities – citizens of Ukraine, foreigners, and stateless persons engaged in economic activity and registered in accordance with the law as entrepreneurs. The above gives grounds for a general conclusion that the Commercial Code of Ukraine has both significant defects in rule-making techniques and a lack of formal logic.

Part 5 Article 56 of the Commercial Code of Ukraine, which regulates certain technical issues regarding the information reflected in the decision to establish an economic entity in case of its establishment on the basis of a model charter, is no exception in the contect of determining the "specific features" of the establishment of a business entity. Thus, the above rule reproduces the general requirements for the establishment of a legal entity (in particular, Articles 88-90 of the Civil Code of Ukraine[3]). This suggests that there are no specific features of the establishment of an economic entity, compared to the procedure for creating a "classic" legal entity, prescribed by the Civil Code of Ukraine. Furthermore, the above indicates the inability of the criterion for the division of economic entities into species, laid down in Part 2 Article 55 of the Commercial Code of Ukraine, to justify the feasibility of separating economic organisations from other legal entities.

From the standpoint of formal logic, the concept of economic organisation also causes disapproval, the features of which are determined in the Commercial Code of Ukraine as follows: (1) the status of a legal entity; (2) establishment in accordance with the Civil Code of Ukraine (especially in the context of the lack of features of the

[1] Law of Ukraine “On Protection of Economic Competition”. (2001, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2210-14

[2] Commercial Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436-15.

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

establishment of an economic organisation prescribed in the Commercial Code of Ukraine). Thus, the fact of economic activity cannot be considered a classification feature of an economic organisation, as the same feature is inherent in the generic concept – the business entity. Thus, the only qualifier of an economic organisation is the status of a legal entity. Another business entity is defined as citizens of Ukraine; foreigners and stateless persons who carry out economic activities and are registered in accordance with the law as entrepreneurs. Therewith, Part 3 Article 55 of the Commercial Code of Ukraine does not operate the concept of "economic organisation" (although it is special in relation to the general rules of Part 1-2 of the same article), but uses the concept "legal entity – business entity". The above leads to the conclusion about the artificiality and obvious eclecticism of the concept of economic organisation.

The concept of economic organisation is not used in the definition of enterprise contained in Article 62 of the Commercial Code of Ukraine[1], which uses another generic concept – business entity (despite the list of particular types of enterprises in the definition of economic organisations). Thus, the concept of economic organisation has no real meaning, its use in the Commercial Code of Ukraine is inconsistent and fragmentary. Thus, it is impossible to define the concept of "enterprise" through the lens of its belonging to economic organisations. Notaby, the need to objectify the concept of enterprise in the legislation was largely justified by the actual existence of enterprises as a rudimentary legal form of a legal entity in Soviet law. Therewith, there is no correlation between the statutory definition of an enterprise contained in the Commercial Code and legal entities called “enterprises” in the corresponding state register.

2.3 Other features of the enterprise as a business entity

The first and defining feature of an enterprise prescribed in Article 62 of the Commercial Code is its establishment by a competent public authority or local government body, or other entities. In this case, as noted, the Commercial Code of Ukraine does not contain provisions governing the specific features of the establishment of the enterprise, and the article on the establishment of economic entities is the result of a rather unsuccessful "cloning" of the corresponding provisions of the Civil Code (this refers to mechanistic replacement of the term "legal entity" with the term "business entity"). Considering the belonging of the enterprise to legal entities and the lack of substantive features of this concept, this feature is obviously purely declarative and not burdened with additional qualifying content. The list of entities authorised to establish enterprises is not exhaustive. Therefore, the subjective composition of the persons authorised to establish an enterprise cannot be determined as the feature of an enterprise.

State bodies, local governments, as well as other entities, have the right to establish legal entities in general and enterprises in particular, which eliminates the necessity of additional separation of the right of these entities to establish enterprises. The enterprise has the status of a legal entity enshrined in Part 4 Article 62 of the Commercial Code. Therewith, it is absolutely incomprehensible to duplicate the provisions on a legal entity (which apply to an enterprise *a priori*) in the given article. Duplication of general principles concerning the institution of a legal entity also takes place in Part 3 Article 62

[1] Commercial Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436-15.

of the Commercial Code of Ukraine – the right of an enterprise to act based on a charter or model charter; as well as, apparently, the attempt to paraphrase the provision on equality of the state as a participant in civil relations, which has become the equality of enterprises that can be created by the state.

The legal and technical defects in Article 62 of the Commercial Code are not limited to duplication of concepts and inconsistencies with other articles of this codified act. In particular, the presence of such a rudiment as "form of ownership" in Part 3 Article 62 of the Commercial Code deserves attention.

According to Part 5 Article 62 of the Commercial Code of Ukraine, the entreprise does not include other legal entities. Therewith, according to Article 95 of the Civil Code of Ukraine, legal entities may have separate divisions (branches and representative offices), but the concept of a legal entity does not make provision for the establishment of other legal entities within the legal entity. Thus, the above provision of the Commercial Code does not establish any features of enterprises as legal entities. Another feature of the enterprise, based on the content of Part 1 Article 62 of the Commercial Code, is the purpose of its creation – to meet public or personal needs. However, the declared purpose is quite broad, as social and personal needs are an evaluative concept that can cover any activity.

Returning to the history of the emergence of the category of enterprise in the current legislation, it should be noted that it is a legacy of Soviet law. This term received new life in connection with the adoption of the Law "On Enterprises in Ukraine"[1] in 1991, which introduced the concept of "private enterprise" into the legislation [17]. In Soviet law, the declaration of satisfaction of social needs was fully consistent with the prevailing ideology and features of determining the legal status of economic entities, the owner of which, in a certain form, was was the state. At the same time, the modernisation of "personal needs" greatly expanded the concept of enterprise, which made it impossible to define any specific (identifying) features of the enterprise as an independent legal structure.

The further preservation of the concept of the enterprise in the Commercial Code of Ukraine[2] caused a wave of criticism in legal science. This is refers to the definition of a private enterprise as one that is based on the property of an individual [18]; partial coincidence of unitary and subsidiary enterprises [17]; use of "quasi-verbal" constructions of economic management and operational management [17]; the absence of a clearly defined object of ownership of unitary enterprises [17], etc. Thus, the purpose of the enterprise cannot be considered as its identifying feature. Part 1 Article 62 of the Commercial Code of Ukraine contains another feature of the enterprise as a subject of economic relations – the systematic implementation of production, research, trade, other economic activities in accordance with the procedure prescribed by the Commercial Code of Ukraine and other laws.

In the context of the above, it should be noted that the activities of the enterprise are formulated quite broadly, because the implementation of production, research, trade, and other economic activities in general corresponds to the implementation of

[1] Law of Ukraine No 887-XII “On Enterprises in Ukraine”. (1991, March). Retrieved from https://zakon.rada.gov.ua/laws/show/887-12#Text.

[2] Commercial Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436-15.

entrepreneurial activities for profit (it is a definition of business partnership in Article 84 of the Civil Code of Ukraine[1]). Therewith, the above casuistic list of activities only excessively complicates the definition of the enterprise. Notably, Article 3 of the Commercial Code of Ukraine establishes that economic activity in this code means the activity of an economic entity in the field of social production, aimed at manufacturing and selling products, performing works or rendering services of a cost nature that has a price value. Ignoring the legal technique of the Commercial Code of Ukraine, in which the concept of economic activity is defined with the help of the term "business entity" and, conversely, the qualifying feature of the business entity is the implementation of economic activity, it can be stated that the qualifying feature of economic relations are value nature and price certainty.

Notably, the concept of "social production" only aggravates the concept of economic activity, because by its nature it can be an exclusively doctrinal (as opposed to a statutory) feature of economic relations. This wording does not affect the qualification of each particular limited liability company, state enterprise, or production cooperative as a business entity, and its activities – as a business entity. In such circumstances, the legal form (Article 83 of the Civil Code of Ukraine), the type of legal entity (Article 81 of the Civil Code of Ukraine), the type of company (Articles 84, 85 of the Civil Code of Ukraine), etc. have legal significance. It is seen that the cost nature and price certainty of economic activity can be determined by the real qualifying features of economic activity. At the same time, in the Commercial Code of Ukraine, the relevant definition is burdened by additional features, which, in turn, are used fragmentarily and unsystematically (for example, economic organisation), and some of them have no legal significance (for example, social production as a purpose).

The artificial nature of the framework of concepts of the Commercial Code of Ukraine is also confirmed by the analysis of such concepts as "non-commercial management" (Article 52 of the Commercial Code of Ukraine), which correlates with Part 2 Article 62, according to which an enterprise can be established for non-commercial economic activity as well. The wording "non-commercial economic activity" appears to be a legal oxymoron. Its inclusion in the text of the Commercial Code of Ukraine is explained by the necessity of providing economic entities with the opportunity to carry out both commercial and non-commercial activities. The above correlates with the thesis of a certain symmetry of the concepts "business entity" in the Commercial Code and "person" in the Civil Code, which, at least from a legal and technical stand point, raises fair objections. [7].

Notably, the recognition of non-commercial activity as a part of the subject of regulation of the Commercial Code of Ukraine contradicts the above provisions according to which economic activity is of a value nature. In the context of the above, attention should be paid to such results of the rise of scientific and rule-making thought as "enterprises of religious organisations" (Article 112 of the Commercial Code of Ukraine). The economic and legal status of these organisations is justified, in particular, by the production of products by religious organisations and the presence of the so-called "halo" effect in the economic activities of religious organisations, which lies in

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

subconsciously greater consumer confidence in products produced and sold by religious organisations [19].

First of all, the idea of combining the name of a particular subject of legal relations – a religious organisation – and the concept of enterprise is considered as competing with formal logic and common sense. An example of a similar wording could be considered a "production cooperative legal entity", etc. Furthermore, in the context of the above, the provisions of special legislation should also be considered. This is the Law of Ukraine "On Freedom of Conscience and Religious Organisations"[1], Article 7 of which stipulates that religious organisations in Ukraine are established to meet the religious needs of citizens to profess and spread the religion and act in accordance with their hierarchical and institutional structure, elect, appoint, and replace staff in accordance with their statutes (regulations). Religious organisations in Ukraine are religious communities, administrations and centres, monasteries, religious fraternities, missionary societies (missions), spiritual educational institutions, as well as associations comprising the above-mentioned religious organisations. Religious associations are represented by their centres (departments).

The above suggests the artificiality and illogicality of the extension of the concept of enterprise to religious organisations. In this case, the implementation of such activities (along with their core business, unless otherwise stipulated by law and if this activity meets the purpose for which they were created and contributes to its achievement) does not necessitate artificial substitution of legal form of such non-entrepreneurial legal entities. Moreover, Article 86 of the Civil Code of Ukraine regulates the implementation of business activities by non-profit companies and institutions.

CONCLUSIONS

One of the properties of law as a social regulator is its following the real development of social relations not only in terms of the introduction of new institutions, but also the timely response to the loss of relevance of specific legal models. One of the rudiments that contradicts the formal logic and creates problems for law enforcement practice is the concept of the enterprise as a business entity.

Analysis of the provisions of Articles 62, 55 of the Commercial Code of Ukraine gives grounds to conclude that there are no features of the enterprise as a legal form of the business entity, and the criterion for its separation from other economic organisations, objectified in Part 2 Article 55, is unsuitable due to the lack of such features. The Commercial Code of Ukraine does not have a clearly structured system of subjects (participants) of economic relations. Provisions that determine the specific features of the subjective composition of economic relations have numerous defects in rule-making techniques, are contradictory and partially do not correspond to the formal logic.

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Suggested Citation: Kuznetsova, N.S., & Khomenko, V.O. (2020). Pro-subjective enterprise concept. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(3), 14-27.

Submitted: 02/06/2020
Revised: 23/07/2020
Accepted: 19/08/2020

УДК 347.615
DOI: 10.37635/jnalsu.27(3).2020.28-47

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АЛІМЕНТНІ ЗОБОВ'ЯЗАННЯ ЧЛЕНІВ СІМ'Ї В СІМЕЙНОМУ ПРАВІ УКРАЇНИ: ПРОБЛЕМНІ ПИТАННЯ ТЕОРІЇ ТА ПРАКТИКИ

Анотація. *Актуальність дослідження аліментних зобов'язань членів сім'ї в сімейному праві України обумовлена як новітніми підходами законодавця до регулювання аліментних відносин, так і проблемами правозастосовної практики в цій сфері. Метою дослідження є визначення особливостей аліментних зобов'язань членів сім'ї в сімейному праві України, виявлення проблем правового регулювання та правозастосування цих зобов'язань і розробка рекомендацій щодо їх усунення. Методологічно дослідження аліментних зобов'язань членів сім'ї умовно поділено на окремі структурні частини, в яких розкрито загальну характеристику зазначених зобов'язань в сімейному праві України та особливості окремих їх видів. Методологічна база дослідження аліментних зобов'язань членів сім'ї в сімейному праві України сформована на філософському, загальнонауковому та спеціально-науковому рівнях. В роботі доведено, що аліментні зобов'язання членів сім'ї за своєю сутністю є сімейно-правовими грошовими зобов'язаннями, які виникають на підставах, визначених законом або договором, мають тривалий та особистий характер. Запропоновано одного з подружжя вважати таким, що потребує матеріальної допомоги, якщо його доходи за місяць (заробітна плата, пенсія, доходи від використання його майна, інші доходи) складають суму, що є меншою за розмір мінімальної заробітної плати, встановленої законом. Аналогічні положення запропоновано застосувати і для визначення батьків такими, що потребують матеріальної допомоги, в аліментних зобов'язаннях з утримання повнолітніми дітьми непрацездатних батьків. Аргументовано, що зміна законодавцем мінімального розміру аліментів, які підлягають стягненню з платника аліментів на одну дитину, не є підставою для застосування статті 192 СК України, але є підставою для зміни мінімального розміру аліментів, зазначених у виконавчому листі у процедурі виконання та стягнення аліментів, та враховується під час визначення суми аліментів або заборгованості за аліментами. Запропоновано й інші зміни до СК України щодо удосконалення порядку стягнення аліментів на утримання членів сім'ї. Проведений аналіз теоретичних положень аліментних зобов'язань членів сім'ї та практичних проблем правозастосування в цій сфері і розробка пропозицій з удосконалення сімейного законодавства має значення для подальших наукових досліджень сімейно-правових зобов'язань, сприятиме формуванню ефективного механізму здійснення та захисту прав учасників сімейних правовідносин та становленню єдності судової практики.*

Ключові слова: Сімейний кодекс України, учасники сімейних правовідносин, платник аліментів, соціальне страхування, місячне утримання.

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ALIMONY OBLIGATIONS OF FAMILY MEMBERS IN THE FAMILY LAW OF UKRAINE: PROBLEMATIC ISSUES OF THEORY AND PRACTICE

Abstract. *The relevance of the study of alimony obligations of family members in the family law of Ukraine is conditioned by both the latest approaches of the legislator to the regulation of alimony relations, and the problems of law enforcement practice in this area. The purpose of the study is to determine the features of alimony obligations of family members in the family law of Ukraine, to identify problems of legal regulation and enforcement of these obligations and to develop recommendations for their elimination. Methodologically, the study of alimony obligations of family members is divided into separate structural parts, which cover the general features of these obligations in the family law of Ukraine and the features of their individual types. The methodological basis for the study of alimony obligations of family members in the family law of Ukraine is developed at the philosophical, general scientific and special scientific levels. The study proves that the alimony obligations of family members are in essence family law monetary obligations that arise on the grounds specified by law or contract, are long-term and personal. It is proposed that one of the spouses be considered in need of financial aid if their monthly income (salary, pension, income from the use of their property, other income) is less than the minimum wage established by law. It is proposed to apply similar provisions to identify parents in need of financial aid in alimony obligations for the maintenance of disabled parents by adult children. It is argued that the change of the minimum amount of alimony to be collected from the alimony payer per child is not a basis for applying Article 192 of the Civil Code of Ukraine, but is a basis for changing the minimum amount of alimony specified in the writ of execution and alimony recovery, and is taken into account when determining the amount of alimony or alimony arrears. Other changes to the Family Code of Ukraine have been proposed to improve the procedure for collecting alimony for family members. The analysis of theoretical provisions of alimony obligations of family members and practical problems of law enforcement in this area and the development of proposals to improve family law is important for further research of family law obligations, will contribute to the development of an effective mechanism for exercising and remedy of the rights of parties in family legal relations and the establishment of the unity of judicial practice.*

Keywords: Family Code of Ukraine, participants of family legal relations, alimony payer, social insurance, monthly allowance.

INTRODUCTION

More than fifteen years have passed since the entry into force of the Family Code of Ukraine on January 10, 2002. In this time, the practice of applying the latest family law provisions has established, in particular, in the field of alimony obligations of family members. However, certain provisions of Ukrainian family law still raise questions about law enforcement. In particular, debatable are the provisions on the establishment of one of the spouses in need of financial aid, on the recovery of alimony after divorce for the maintenance of the former spouse who is able to work, on the recovery of alimony from parents for the maintenance of adult children who continue their education by correspondence. Notably, the sphere of alimony obligations constantly attracts the attention of the legislator, as evidenced by repeated changes to the Family Code of Ukraine[1] in order to strengthen the protection of the child's right to adequate maintenance. Therewith, in the current conditions of development of Ukrainian society and the legal system of Ukraine, it is necessary to conduct a "revision" of the current family legislation of Ukraine and determine the main directions of its renewal, including in the field of alimony obligations of family members. One of such areas is the harmonisation of domestic legislation with EU legislation.

An important step towards the approximation of family law of Ukraine with the modern European legal system is the ratification of international regulations and Ukraine's accession to international regulations governing alimony, which also become part of the national family law of Ukraine in accordance with Part 1 Article 13 of the Family Code of Ukraine. Thus, Ukraine acceded to the Convention on the Recovery of Alimony Abroad of June 20, 1956[2], the Convention on the Recognition and Enforcement of Decisions Concerning Maintenance Obligations of October 2, 1973[3], and the Convention on the International Recovery of Child Support and Other Family Detention of November 23, 2007[4]. Therewith, Ukraine still has many unresolved issues in legal regulation of alimony relations with a foreign element, despite the existence of unified legal provisions in this area. Thus, Ukraine has not acceded to the Convention on the Law Applicable to Maintenance Obligations, adopted in Hague on 2 October 1973, Article 8 of which provides that the law applicable to divorce in a Contracting State in which divorce is granted or recognised, regulates alimony obligations between divorced spouses and review of decisions concerning these obligations[5].

There are also some approaches to the legal regulation of alimony in the scientific literature, but most of the studies of alimony obligations of family members were

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text
[2] Law of Ukraine No 15-V "On Accession to the Convention on the Recovery of Alimony Abroad". (2006, July). Retrieved from https://zakon.rada.gov.ua/laws/show/15-16#Text
[3] Law of Ukraine No 135-V "On Ukraine's Accession to the Convention on the Recognition and Enforcement of Decisions Concerning Maintenance Obligations". (2006, September). Retrieved from https://zakon.rada.gov.ua/laws/show/135-16#Text
[4] Law of Ukraine No 26-VII "On Ratification of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance". (2013, January). Retrieved from https://zakon.rada.gov.ua/laws/show/26-18#Text
[5] Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations. Retrieved from https://www.hcch.net/en/instruments/conventions/full-text/?cid=86.

conducted in relation to the maintenance of the child by mother or father until it reaches the age of majority. Thus, alimony obligations of family members have been studied in the Ukrainian legal literature in the scientific articles of V. K. Antoshkina [1], L. V. Afanasieva [2], I. V. Zhylinkova [3], T. P. Krasvitna [4], Ya. V. Novokhatska [5], Z. V. Romovska [6], L. V. Sapeiko [7], V. I. Truba [8] and other legal scholars. In foreign literature, the following scholars studied alimony obligations of family members: J. Nevado Montero [9], N. Letova [10], I. Artemyeva [11], E. Ivanova [12], J. E. Crowley [13], P. Chiappori [14], N. D. Katz [15], A. G. Valverde [16], O. A. Yavor [17], L. S. Rzhanitsyna [18], T. A. Gurko [19]. However, the development of family law in Ukraine, problematic issues of law enforcement practice in alimony obligations of family members necessitate further study of theoretical provisions on the legal nature and essence of these obligations, identification of problems of their legal regulation and development of proposals for improving the family law regulation of alimony relations of family members.

The purpose of this study is to determine the features of alimony obligations of family members in the family law of Ukraine, to identify problems of legal regulation and enforcement of these obligations and to develop recommendations for their elimination.

1. MATERIALS AND METHODS

Determination of the specific features of alimony obligations of family members in the family law of Ukraine is impossible without the use of basic tools of the methodology of the doctrine of private law. The methodology of legal science means the system of methodological principles, techniques, means, tools, and methods of scientific cognition, which is used to obtain data in the study of state and legal reality in the context of the problems of legal practice. Describing the family law methodology, O. Yu. Ilyina notes that it is based on three basic preconditions: first, the "agreement" of most family ties; secondly, the special state interest in ensuring the normal functioning of the family as the most important social unit, a "cell" of the social organism, and most importantly – in the most effective protection of the rights and interests of children; thirdly, the impossibility of legal technologies to penetrate deeply into the fabric of family relations – the inner essence of which is more regulated through morality, custom, tradition, and other forms of social influence. Therefore, the family law methodology is quite difficult to combine private and public principles, dispositive and imperative provisions [20]. Undoubtedly, it is difficult to accept O. Yu. Ilyina's approach to the preconditions of the family law methodology, although it can be agreed that alimony obligations of family members may arise based on an agreement between participants in family legal relations, in particular, the spouses have the right to enter into a maintenance agreement with respect to one of them, in which to determine the conditions, amount, and terms of payment of alimony (Part 1 Article 78 of the Family Code of Ukraine[1], etc.

Regarding the difficulties in combining private law and public principles in the family law methodology, the following should be noted. The maintenance obligations of the mother and father in relation to the child are aimed at the most effective protection of

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text

the rights and interests of children. Therewith, these responsibilities have long been regulated from the standpoint of public law regulation, in particular, the conclusion of alimony agreements, termination of the right to child support in connection with the acquisition of ownership of real estate, etc. However, in modern conditions, the private law framework for the regulation of alimony obligations is becoming widespread. Thus, the Family Code of Ukraine contains provisions that indicate the dispositive legal regulation of these obligations: alimony is paid monthly, and by mutual consent they can be paid in advance (Part 3 Article 77); the parties may agree to provide maintenance to one of the spouses, regardless of disability and the need for financial aid under the conditions specified in the marriage contract (Part 1 Article 99). Notably, in the legal literature attention is paid to the specifics of family ties between the parties to the alimony relations. In terms of subjects, object, and purpose, alimony obligations are inherent only in family law, but in their structure and method of protection they are remarkably similar to civil law obligations [21]. Thus, according to V. I. Truba, the analysis of the provisions of Chapter 15 of the Family Code of Ukraine allows to classify alimony as obligatory [8].

The methodological framework for the study of alimony obligations of family members in family law of Ukraine is developed at the philosophical, general scientific, and special scientific levels. The dialectical method, anthropological, axiological, and institutional approaches were predominantly used. The dialectical method allowed to consider the alimony obligations of family members in their development and to identify the characteristics of their individual types depending on their subject composition. However, the specific features of alimony obligations of family members cannot be considered separately from philosophical anthropology. The German philosopher of law Gustav Radbruch notes that only family law, also in the era of individualism, comes from a different image of a person, derived not only from reason and self-interest. Family law makes provision for the husband's right to trust in his wife, the right of parents to trust in children, with the hope that they will fulfil their duty back. In the person of husband and parents, it considers the presence of love and responsibility [22]. Admittedly, providing maintenance to family members is a sign of love and responsibility between them. D. A. Hudyma fairly points out that only the unity of the conclusions of the philosophical doctrine of law and person with the "current" theoretical developments of legal science can create a solid methodological framework for the development of legal science and practice, deprive the science of dogmatism and commentary on legislation, and law enforcement – of some shortcomings of its operation [23]. Axiological and institutional approaches provide an opportunity to consider in combination and unity of such basic categories of family law as family, marriage, parenthood, kinship, and legal values, which constitute the basis for building family relationships to provide maintenance to family members.

General scientific methods of analysis and synthesis, induction, and deduction contributed to the formulation of the concept of alimony obligations of family members, provided an opportunity to identify gaps in their legal regulation, to formulate proposals to improve family law in Ukraine. The basis of the special scientific level of study of alimony obligations of family members was historical legal and comparative legal methods. D. A. Kerimov rightly argues that outside the historical context that connects

the phenomena and processes of modernity with those phenomena and processes that preceded them, as well as with those that will arise on their basis and in a more or less distant perspective, it is impossible to know this very modernity. And this is quite natural, because in society there are always remnants of the past, the foundations of the present and the beginnings of the future [24]. The comparative legal method of studying the alimony obligations of family members is of particular importance in the current conditions of development of the legal system of Ukraine and the recodification (update) of civil and family legislation of Ukraine. The legal doctrine of Ukraine correctly notes that the scientific recognition of the comparative approach, which has recently been actively developed and applied in almost all social and humanitarian sciences, as well as its methodological potential, suggest that it should soon take a place in the structure of the methodology of science on a par with the structural, functional, systemic, synergistic, and other general scientific methodological approaches [25]. The comparative legal method of studying the alimony obligations of family members allows to conclude that the family law of Ukraine can preserve the national traditions and features of legal regulation of these obligations, although, admittedly, a progressive phenomenon nowadays is the unification of international law provision in the field of recovery of alimony for family members.

The empirical material of the study used the materials of judicial practice on the recovery of alimony for family members, which provided an opportunity to identify problems of law enforcement in this area and suggest ways to solve them.

2. RESULTS AND DISCUSSION

2.1 The concept and typical characteristics of alimony obligations of family members in family law of Ukraine

The Family Code of Ukraine does not contain a legal definition of the term "maintenance obligations". Instead, it uses such concepts as "the rights and responsibilities of the spouses for maintenance", "the obligation of the mother or father to maintain the child and its performance", etc. Meanwhile, alimony obligations as a legal category are well-established in the science of family law. It is the relations of family members about the provision of maintenance that is called alimony. In the Family Code of Ukraine[1] the term "alimony" is used both as a synonym for maintenance and as allowance. Thus, the right to maintenance (alimony) has the spouse who is incapacitated, needs financial aid, provided that the other spouse can provide such material aid (Part 2 Article 75); maintenance of one of the spouses is provided to the other spouse in kind or in cash with their consent. According to the court decision, alimony is awarded to one of the spouses, usually in cash (Parts 1, 2 Article 77); the ways in which parents perform their obligation to maintain the child are determined by agreement between them. By agreement between the child's parents, one of them who lives separately from the child may take part in its maintenance in cash and (or) in kind. By court decision, child support (alimony) is awarded in proportion to the income of its mother or father or in a fixed amount of choice of the parent or other legal representatives of the child with whom the child lives (Parts

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text

1-3 Article 181); the share of earnings (income) of the mother or father, which will be collected as child support, is determined by the court (Part 1 Article 183).

In the science of family law, there are different views on the concepts of maintenance and alimony. Thus, O. O. Deriy defines alimony, on the one hand, as allowance, which is provided voluntarily by one family member to another and which can be in food, clothing, care, etc., in kind and in money, and on the other hand, alimony is money or property provided by a person liable for alimony for the maintenance of another person [26]. V. I. Truba believes that "maintenance" is a broader concept, as it includes a mutual obligation to care for, provide family members with means of subsistence, which is performed both voluntarily and compulsorily, or forced in case of a right to support one of the participants in the family relationship, who is unable to support themselves due to violation or lack of personal abilities. Alimony obligations ("alimony") are related to the concept of "allowance" as a part of the whole, as they reflect the forced or involuntary performance of the maintenance obligation [8].

If alimony is collected in cash based on a court decision or an agreement between alimony payers, then there is a transformation of maintenance obligations into alimony obligations. Alimony obligations are legal relations where one party, the debtor – the payer of alimony – is obliged to take in favour of the other party (creditor – the recipient of alimony) a certain action, which is to pay alimony in cash, and the creditor has the right to demand from the debtor the performance of its duty. Such understanding of the alimony obligation suggests its essence as a monetary obligation, albeit conditioned by the specific features of family legal relations [27].

T.P. Krasvitna notes that in the case when the maintenance of one of the spouses is provided to the other spouse in cash, the obligation of the spouses to maintain can be defined as monetary, because it mediates the movement of funds as a legal tender [4]. Therewith, the author believes that the maintenance obligation of the spouses is a special type of civil obligations, to which the provisions of the law of obligations of the Civil Code of Ukraine[1] may be applied in the alternative, insofar as it does not contradict the essence of the maintenance obligation [4].

Indeed, based on the analysis of the provisions of Article 8 of the Family Code of Ukraine[2], the provisions of the Civil Code of Ukraine[3]. can be applied to certain personal non-property and property relations of participants of family legal relations. However, considering that the maintenance obligations of family members are conditioned by the personal family relations of their parties, it can be argued that they are not civil in nature, although they are monetary in nature. Thus, V. A. Belov understands monetary obligations as civil relations, the content of which is the right of the creditor and the corresponding legal obligation of the debtor to make a settlement or payment, i.e. action(s) to transfer a certain (significant) amount of money (currency) [21]. The definition of a monetary obligation is contained in legislation of various industries. Thus, Article 1 of the Bankruptcy Procedure Code of Ukraine of October 18, 2018 No. 2597-VIII (hereinafter referred to as the Code) defines a monetary obligation as an obligation

[1] Civil Code of Ukraine. (2020, August). URL: https://zakon.rada.gov.ua/laws/show/435-15#Text
[2] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text
[3] Civil Code of Ukraine, op. cit.

of the debtor to pay the creditor a certain amount of money in accordance with a civil transaction (agreement) and other grounds stipulated by the legislation of Ukraine. Monetary liabilities also include liabilities for the payment of taxes, fees (mandatory payments), insurance premiums for compulsory state pension and other social insurance; liabilities arising from the inability to perform obligations under contracts of storage, work and labour, lease (rent), etc. and which must be expressed in monetary units[1]. Thus, the Code provides a definition of a monetary obligation in a broad meaning. In cases where the performance of the obligation involves the debtor's obligation to pay the creditor a sum of money, it is a monetary obligation. Alimony obligation to pay money for the maintenance of family members is a monetary obligation.

An analysis of the current Family Code of Ukraine[2] indicates that the family law of Ukraine is already in some way "interspersed" with rules on liability for breach of a monetary obligation, although it is not a maintenance obligation as a monetary obligation. Thus, according to para. 1 Part 4 Article 196 of the Family Code of Ukraine in case of overdue payment of additional expenses for a child due to the payer's fault, such payer is obliged to pay the amount of arrears of additional expenses with consideration of the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount. It is considered expedient for the legislator to extend the provisions of Article 625 of the Civil Code of Ukraine[3] on liability for breach of monetary obligation, despite the fact that parts 1-3 of Article 196 of the Family Code of Ukraine established a penalty for late payment of alimony [27]. In this meaning, a maintenance obligation is a monetary obligation. It is proposed to extend the provisions of Article 625 of the Civil Code of Ukraine on liability for breach of monetary obligation in terms of the possibility of recovery of the amount of debt, taking into account the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount.

One of the hallmarks of a family member's alimony obligation is its long-term nature. The legal literature states that this is performed by providing a family member who is in need of maintenance with periodic (monthly) maintenance, but for a long period. The duration of the maintenance of a family member depends on the conditions that served as the basis for the emergence of alimony legal relations. The alimony obligation will continue until the conditions under which the family member needs maintenance disappear. It should be added that the duration of the maintenance obligation of family members, in particular, the maintenance obligation between the child and its mother or father may be conditioned by the age of the child, as parents are obliged to perform their obligation to provide maintenance until child is of legal age, and in the presence of certain conditions specified by law or contract, the maintenance obligation may arise for parents in relation to the maintenance of adult children.

The alimony obligation of family members cannot be considered a legal relationship with a plurality of persons on the debtor's side, for example, the alimony obligation of the mother or father and child, because there is an independent alimony

[1] Bankruptcy Procedure Code of Ukraine. (2018, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2597-19#Text
[2] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text
[3] Civil Code of Ukraine. (2020, August). URL: https://zakon.rada.gov.ua/laws/show/435-15#Text

relationship between the authorised person and the alimony debtor, in particular between father and child and between mother and child, which indicates the personal nature of the alimony legal relations.

Thus, alimony obligations of family members to provide maintenance in cash are family legal monetary obligations that arise on the grounds specified by law or contract, they have a long-term and personal nature.

2.2 Problematic issues of recovery of alimony for spousal support

It is generally accepted in the legal literature that the basis for the maintenance obligation of the spouses is the legal structure, which includes the following legal facts: 1) the fact that the wife and husband are in a registered marriage; 2) incapacity of one of the spouses; 3) the need of one of the spouses; 4) the solvency of the other spouse. The right to maintenance of the spouses in case of child living with one of them depends on the age and health of the child [4]. Admittedly, the contract of matrimony on the provision of maintenance may determine other conditions for the provision of maintenance to one of the spouses by the other spouse.

An analysis of law enforcement practices regarding the recovery of alimony for the maintenance of one of the spouses indicates that changes in the socio-economic development of the state and increasing social guarantees of Ukrainian citizens that occurred in Ukraine after the entry into force of the Family Code of Ukraine[1], have led to the fact that today only in rare cases it is possible to recover alimony for the maintenance of one of the spouses by a court decision due to the fact that there are practically no categories of disabled persons who can be recognised as needing financial assistance from another spouse. Thus, according to Part 3 Article 75 of the Family Code of Ukraine, a spouse who has reached the retirement age established by law or is a person with a disability of I, II or III category is considered incapable of work. In accordance with Part 4 Article 75 of the Family Code of Ukraine, one of the spouses is in need of material aid if the salary, pension, income from the use of their property, other income do not provide them with a living wage established by law.

Analysing the conditions of alimony for the maintenance of one of the incapacitated spouses in need of financial aid, it should be recalled that in 2004 the subsistence level for persons who lost their ability to work was 284.69 UAH[2], and the resolution of the Cabinet of Ministers of Ukraine No. 544 of April 15, 2003 established that the minimum old-age pension from 01.07.2003 is 50 UAH[3]. On January 1, 2004, the Law of No. 1058-IV "On Compulsory State Pension Insurance" of July 9, 2003 came into force, Article 28 of which stipulated that the minimum old-age pension was set at 20 percent of the average wage of workers employed in the sectors of the Ukrainian economy, if men had 25 years, and women had 20 years of qualifying period. According to the provisions of Article 28 of the Law of Ukraine "On Compulsory State Pension Insurance" (as amended on 12.01.2005), if men have 25, and women have 20 years of

[1]Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text

[2] Law of Ukraine No 1704-IV "On Approval of the Subsistence Minimum for 2004". (2004, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1704-IV#Text

[3] Resolution of the Cabinet of Ministers of Ukraine No 544 "On increasing the size of labor pensions". (2003, April). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP030544.html.

qualifying period, the minimum size of the old-age pension is established in the amount of the subsistence minimum for persons who have lost the ability to work and is as follows: from 12.01.2005 – 332 UAH; from 01.01.2006 – 350 UAH; from 01.04.2006 – 359 UAH; from 01.10.2006 – 366 UAH; from 01.01.2007 – 380 UAH[1].

Thus, since January 2005, persons who were considered disabled due to reaching the retirement age established by law have already been provided with a pension at the subsistence level. Only for persons with disabilities and persons who did not acquire the right to a labour pension for valid reasons, the minimum pension was set at the level of a social pension in an amount less than the subsistence level. Thus, according to paragraphs a), b) Article 94 of the Law of Ukraine No. 1788-XII "On Pension Provision" of November 5, 1991, social pensions are assigned in the following amounts: the right to a labour pension without a valid reason; b) 50 percent of the minimum old-age pension: to persons who have reached the age of: men – 60 years old, women – 55 years old and have not acquired the right to a labour pension for valid reasons; disabled persons of III category[2].

Furthermore, according to Article 6 of the Law of Ukraine No. 1727-IV "On state social aid to persons who are not entitled to a pension and persons with disabilities" of May 18, 2004, the amount of state social aid to persons who are not entitled to a pension and persons with disabilities for conditions stipulated in Part 1 Article 4 of this Law, is established based on the subsistence level for persons who have lost their ability to work: persons with disabilities of I category, women who have been awarded the title of "Mother-heroine", per one child of the deceased breadwinner – 100 percent, per two children – 120 percent, per three or more children – 150 percent; persons with disabilities of II category – 80 percent; persons with disabilities of III category – 60 percent; clergymen, ecclesiastic dignitaries, and persons who, for at least ten years before the Law of Ukraine "On Freedom of Conscience and Religious Organisations" came into force, held elective or appointed positions in religious organisations officially recognised in Ukraine and legalised in accordance with the legislation of Ukraine, the presence of archival documents of the relevant state bodies and religious organisations or testimony of witnesses confirming the fact of such work, – 50 percent; persons who have reached the age established by Article 1 of this Law – 30 percent[3].

The above provisions indicate that the recognition of one of the spouses as in need of financial aid, depending on the provision of the subsistence level for the recovery of alimony from the other spouse, no longer meets the needs of today. It is considered that in the current conditions of economic development and legal system of Ukraine it would be appropriate to use other state social standards to determine the state of one spouse in need of financial aid, or the state of the other spouse who can provide such material aid. Thus, the basic state social guarantees include the minimum wage, providing a person with income in this amount could be used to determine one of the spouses in need of

[1] Law of Ukraine No 1058-IV "On Compulsory State Pension Insurance". (2003, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1058-15#Text.

[2] Law of Ukraine No 1788-XII "On Pension Provision". (1991, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1788-12#Text

[3] Law of Ukraine No 1727-IV “On State Social Assistance to Persons Not Entitled to a Pension and Persons with Disabilities”. (2004, May).

material aid. In this regard, Part 4 Article 75 of the Family Code of Ukraine[1] should be amended as follows: "4. One of the spouses is in need of financial aid if their monthly income (salary, pension, income from the use of property, other income) is less than the minimum wage established by law".

Obligations to maintain the former spouse are stipulated by the legislation of Ukraine and the legislation of other states. Thus, according to § 1584 of the German Civil Code, after a divorce, one of the spouses who is obliged to pay alimony is liable to the relatives of the eligible person. If the obligated person is insolvent, their relatives are liable instead. § 1585 of the German Civil Code stipulates that current alimony is paid in the form of cash rent. Rent must be paid before the beginning of the calendar month. The obligor must pay the full amount of the monthly rent even if the right to alimony is terminated due to remarriage or death of the authorised person. Instead of an annuity, the eligible person may demand payment of the capitalised amount of payments, if there is a serious reason for this and if the obligated person will not be unfairly burdened as a result. Therewith, European countries have recently registered a decrease in the number of disputes over the payment of alimony by a husband for the maintenance of his ex-wife after divorce. As noted in the scientific literature, the reduction in the number of such disputes was the result of a deliberate reorientation of alimony legislation, which, by limiting the payment of alimony, sought to promote divorce and ensure greater economic equality of the former spouses [28].

With the entry into force of the Family Code of Ukraine, the provisions of Part 4 Article 76 of the Family Code of Ukraine became an innovation in alimony obligations: if in connection with the upbringing of a child, housekeeping, care for family members, illness or other significant circumstances, one of the spouses was incapable of getting an education, work, occupy a corresponding job, they have the right to maintenance in connection with the divorce and when they are able to work, provided that they need financial aid and that the ex-husband (wife) can provide financial aid. However, in law enforcement the provisions of this article raised questions: How to prove in court that one of the spouses did not have the opportunity to occupy the corresponding job, get an education, etc. precisely because of raising a child, housekeeping or other significant circumstances, and not because of lack of sufficient knowledge, life and professional experience, professional skills, insufficient qualifications? Therefore, when assessing specific life circumstances in cases of recovery of alimony for the maintenance of one of the former spouses, courts usually do not see a causal link between the inability of one spouse to find employment with their responsibilities for housekeeping, caring for family members, etc. Thus, the Desnianskyi District Court of Chernihiv in its decision of May 27, 2015 in the case No. 750/3717/15-ц noted: "Considering that the plaintiff has a higher education and is an able-bodied person, the plaintiff owns a three-room apartment and a land plot, which does not indicate the plaintiff as a person in need of financial aid, in the absence of evidence confirming the fact that the plaintiff cannot be employed in connection with the household and caring for family members or with other circumstances of significant importance, the court concludes that the plaintiff is not a person entitled to maintenance in accordance with the requirements of Part 4 Article 76

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text

of the Family Code of Ukraine, in connection with which the claim is unfounded and cannot be satisfied" [29]. It appears that Part 4 Article 76 of the Family Code of Ukraine should be excluded from the Family Code of Ukraine, which will contribute to the clarity of legal provisions and unification of judicial practice.

Consequently, the definition of such conditions for the alimony of one of the spouses, such as their need for material aid, and the solvency of the other spouse or their ability to provide material aid, currently requires changes. This study proposes to consider one of the spouses in need of material aid if their monthly income (salary, pension, income from the use of property, other income) is less than the minimum wage established by law. Accordingly, the second of the spouses is the one who can provide financial aid if their monthly income (salary, pension, income from the use of his property, other income) exceeds the amount of the minimum wage established by law.

2.3 Problematic issues of collecting alimony for child support

Alimony obligations of a mother or father to support a child until they reach the age of majority are one of the most common obligations to support family members. Looking at the history of this issue, in the pre-Soviet period only individual legal regulations stipulated the obligation of parents to support children. Thus, clause 118, part 1 of chap. IV of the Civil Code of Eastern Galicia in 1797 prescribed that the father maintains the children until they can feed themselves [30]. More detailed legal regulation of such obligations was acquired in Soviet family law. The Family Code of Ukraine made provision for many innovations in the legal regulation of alimony obligations for mothers, fathers and children, for example, it significantly expanded the possibilities of contractual regulation of maintenance relations, established responsibility for late payment of alimony, payment of additional costs for a child, etc. Alimony obligations of the mother or father to support the child are based on the principles of equality of responsibilities between mother and father in relation to the child and equal responsibility of parents to the child, in some foreign countries, in particular in Italy – within the framework of the general legal guardianship of the mother and father over the child [31].

Given that the problem of alimony obligations for the maintenance of the child's parents until they reach adulthood constantly attracts attention [6; 7], this study will focus only on those problematic issues of recovering alimony for child support, which have recently become widely discussed among lawyers.

1. Thus, the legislator has repeatedly changed the minimum amount of child support, in connection with which the question arises: Is there a need to appeal to court with a separate claim to change the amount of alimony in case when the court decision indicated the minimum amount of alimony that was established at the time of the court decision?

The Grand Chamber of the Supreme Court in its ruling of March 4, 2020 in case No. 682/3112/18 stated that the legislator's change of the minimum amount of alimony to be recovered from the alimony payer per child is not grounds for changing the amount of alimony in accordance with Article 192 of the Family Code of Ukraine[1], but is the basis for changing the minimum amount of alimony specified in the writ of execution in the

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text

procedure of execution and recovery of alimony, and is taken into account when determining the amount of alimony or debt. Law of Ukraine No. 2475-VIII of July 3, 2018 amended Part 1 Article 71 of the Law of Ukraine "On Enforcement Proceedings" with the second paragraph, which stipulates that the executor collects alimony from the debtor in the amount specified in the enforcement document, but not less than the minimum guaranteed amount stipulated by the Family Code of Ukraine. That is, the legislation prescribes a mechanism that makes provision for the payment of alimony in the amount not less than the minimum guaranteed amount stipulated by the Family Code of Ukraine, even in the presence of previous court decisions on recovery of alimony in the amount lower than the minimum guaranteed amount of alimony established by law. Thus, the courts of first and appellate instances came to a reasonable conclusion that the state executor, calculating the alimony arrears, correctly proceeded from the minimum alimony limit at the level of 50% of the subsistence minimum for a child of the appropriate age [32].

2. Recovery of alimony from the mother or father for child support must be distinguished from the collection of additional costs for the child from parents, which in essence are not alimony. In particular, the Resolution of the Civil Court of Cassation of the Supreme Court of 10 May 2018 in case 2-1161/2011 states that when deciding on the amount of funds to be recovered for additional costs, the courts must take into account the extent to which each parent is obliged to take part in these costs, considering the financial and family situation of the parties and other interests and circumstances that are significant. In case the financial situation of the parents does not allow to ensure full payment of additional costs, they can be reimbursed only in part. Considering these circumstances, the court determines the amount of additional costs for the child conditioned by special circumstances for one of the parents in a fixed amount. The existence of such additional costs must be proved by the claimant for recovery. These funds are additional, in contrast to the funds received by one parent for child support. In these cases, the costs are actually incurred or estimated, therefore they must be determined in a fixed amount. Additional costs are not an additional collection of child support. Alimony is necessary to ensure normal material conditions for the child's life. In some cases, in exceptional circumstances, apart from the usual costs for the child, additional ones are required. The amount of additional costs should be determined depending on the estimated or actual costs incurred by the child. The law refers to the jurisdiction of the court to determine the circumstances that may be considered significant. In any case, such important circumstances include the state of health, financial situation of the defendant, the presence of other minor children, disabled wife, husband, parents, adult children, etc. Additional costs per child may be financed in advance or covered once incurred, periodically or permanently. The amount of additional costs for the child must be justified by relevant documents (for example, the cost of special medical care – a certificate of medical institution on the cost of medical services; treatment costs, spa treatment – extracts from the child's medical history, doctor's prescriptions, certificates, checks, travel documents, etc.). When collecting funds for additional costs that must be incurred in the future, the court must provide a calculation or justification of the need for future costs [33].

Thus, the change of the minimum amount of child support by the legislator does not require an appeal to the court with a separate claim for a change in the amount of child support. Additional costs for the child caused by special circumstances (development of the child's abilities, illness, disability, etc.) are not alimony, but are aimed at providing the child with the appropriate standard of living necessary for its physical, mental, spiritual, moral, and social development.

2.4. Problematic issues of recovery of alimony for the maintenance of an adult child

Alimony obligations for the maintenance of an adult child are divided into two types: 1) for the maintenance of adult disabled children; 2) regarding the maintenance of adult children who continue their education. Alimony obligations of parents for the maintenance of adult incapacitated children arise in the presence of a set of the following legal facts: 1) adult children are incapable of work; 2) adult children are in need, i.e. those in need of financial aid; 3) parents can provide financial aid. Alimony obligations of parents for the maintenance of adult children who continue their education arise from the obligatory combination of the following legal facts: 1) the daughter, son coming of age of over 18, but less than 23 years old; 2) their continuing education; 3) the need in material aid in connection with education; 4) parents have the opportunity to provide such aid.

In law enforcement practice, many questions arise regarding the recovery of child support for an adult child who is continuing its education and therefore needs financial aid. In particular, the question arises about the possibility of recovery of alimony from parents for the maintenance of adult children who continue their studies by correspondence. Notably, the form of education of an adult child to collect child support from the mother or father does not matter. Thus, the Civil Court of Cassation of the Supreme Court in its decision of April 17, 2019 in the case No. 644/3610/16-ц critically assessed the conclusions of the courts of first and appellate instances and did not agree that studying in correspondence department, an adult plaintiff has the opportunity work and earn a living, which relieves parents of the obligation to maintain it [34]. Furthermore, parents are not released from the obligation to maintain an adult daughter or son, who continue their education, during the holidays. At present, the judicial practice has developed an approach where a person who has been deprived of parental rights over a child is not released from the obligation to maintain an adult child who continues its education. Although some scholars, in particular A. A. Lesko, believe that the obligation of parents to maintain an adult daughter or son, who continue their studies, is defined by Article 199 of the Family Code of Ukraine, which makes provision for the maintenance of an adult daughter or son until the age of twenty-three, does not arise for parents deprived of parental rights [35].

Admittedly, deprivation of parental rights is a sanction in family law applicable to the mother or father for non-performance or improper performance of their parental responsibilities in relation to the child on the grounds specified in Article 164 of the Family Code of Ukraine, and is carried out only in court. However, deprivation of parental rights does not relieve the parents of the obligation to maintain the child. It is considered that such an obligation cannot be terminated even after the child reaches the age of majority, if there are grounds prescribed by law for the maintenance of the parents

of the adult daughter and son. In this regard, it is proposed to introduce in the Family Code of Ukraine a provision on the obligation of parents deprived of parental rights to maintain both adult disabled children in need of financial aid, if parents can provide such financial aid, and adult children who continue their education and therefore need financial aid until they reach the age of 23, provided that the parents can provide financial aid.

2.5 Problematic issues of recovery of alimony from adult children for parental support

In accordance with Part 1 Article 202 of the Family Code of Ukraine[1] an adult daughter and son are obliged to support parents who are unable to work and need financial aid. The obligation of children to support their parents in need of financial aid is also known to other legal systems in the world. Thus, K. S. Pearson notes that the Virginia Parental Support Act is a typical law, the existence of which can be traced back to the history of the adoption of social security laws in colonial times. The law, codified in the Annotated Code of Laws of the State of Virginia, section 20-88, begins with a statement of general obligation, stating that "it should be...an obligation of all able-bodied persons over 18 years of age, once that person has sufficiently provided for their family, to help and support their mother/father if she/he finds himself in a difficult situation". This law gives courts the power to determine and oblige to make payments to parents, including the distribution of costs among several children [36].

Alimony obligations of adult children for the maintenance of their parents under the laws of Ukraine arise in the presence of legal composition, which includes the following legal facts: 1) determination of the origin of an adult child from specific mothers, fathers, 2) incapacity of the mother, father; 3) the need of the mother or father for financial aid.

The most problematic issue of modern law enforcement practice is the definition of mother or father in need of financial aid. The approach reflected in the decision of the Civil Court of Cassation of the Supreme Court of December 5, 2018 in case No. 570/3274/15-ц has been established for a long time: the need for financial aid is determined in each case depending on the financial situation of parents. The court considers the parents' receipt of pensions, state benefits, subsidies, the presence of parents' property that can bring income, etc. The mere fact of the incapacity of the parents does not presuppose that the children have the obligation to provide them with maintenance – the state of incapacity for work must be accompanied by the need to receive third-party financial aid. Evidence of this need is the receipt by the mother or father of income below the subsistence level. According to the current legislation, the state provides the necessary maintenance for disabled people – old-age pension, disability pension, state aid, etc. Therefore, when issuing a court decision, the amount of such state maintenance should be considered and made dependent on the subsistence level [37].

However, at present the judicial practice departs from this approach, as evidenced by the decision of the Supreme Court of the Joint Chamber of the Civil Court of Cassation of September 5, 2019 in case No. 212/1055/18-ц, which states that in the case,

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text

the court of first instance, having correctly established the circumstances of the case and applied the rules of substantive law, came to the reasonable conclusion that the plaintiff is a pensioner, incapable of work, has a serious illness, needs treatment, and therefore needs financial aid, which the defendant, her son, does not provide, although he is able to work, is officially employed and has the opportunity to pay child support. The appellate court's reference to the fact that the plaintiff, although incapable of work, nevertheless receives a pension in the amount significantly exceeding the subsistence level established by law for persons who have lost their ability to work and therefore does not require third-party financial aid is unfounded, since Articles 202, 203 of the Family Code of Ukraine, which regulate the disputed legal relations, do not make provision for consideration only of the subsistence level established by law, as an absolute condition for recovery or refusal to collect alimony [38].

It is considered that such an interpretation of family law on the maintenance obligations of adult children to support their parents will lead to a lack of unity of judicial practice in this category of family disputes. It would be expedient for the legislator to determine more specifically which of the parents can be considered in need of financial aid. In this category of family law disputes, similar provisions could be applied to the recognition of a person in need of financial aid as to one of the spouses, as discussed above in this study.

2.6 Problems of alimony obligations of other family members and relatives

The Family Code of Ukraine in the provisions of Chapter 22 also regulates the alimony obligations of other family members and relatives, making provision for a fairly wide scope of alimony payers, which allowed some lawyers, in particular L. V. Afanasieva, to classify them as alimony obliged subjects of the second group. Thus, spouses (ex-spouses), parents and children are obliged to support each other in cases established by law, regardless of the obligations of other persons to provide maintenance. The law imposes maintenance obligations on other family members and relatives only in the absence of first-degree alimony payers [2].

Notably, the changes to the family legislation of Ukraine in terms of strengthening the protection of the child's right to maintenance did not affect the second group of alimony obligations of persons. In particular, the legislator did not amend Article 272 of the Family Code of Ukraine[1], which prescribes that the amount of alimony collected from other family members and relatives for children and disabled adults in need of financial aid is determined as a share of earnings (income) or in a fixed amount. In determining the amount of alimony, the court takes into account the material and family status of the payer and recipient of alimony. If the claim is not filed against all liable persons, but only against some of them, the amount of alimony is determined with consideration of the obligation of all liable persons to provide maintenance. In this case, the total amount of alimony to be collected may not be less than 30 percent of the subsistence level for a child of the appropriate age. The court may determine the period during which alimony will be collected.

Thus, the minimum amount of alimony collected from other family members and

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text

relatives per child is 30 percent of the subsistence level for a child of the appropriate age. Therewith, Part 2 Article 182 of the Family Code of Ukraine already refers to the minimum guaranteed amount of alimony for one child, which cannot be less than 50 percent of the subsistence level for a child of the appropriate age. These legal provisions indicate unequal opportunities for the child to exercise its right to maintenance. In this regard, it is proposed to amend Part 2 Article 272 of the Family Code of Ukraine and to prescribe that the total amount of alimony to be collected from other family members and relatives may not be less than 50 percent of the subsistence level for a child of the appropriate age.

CONCLUSIONS

Thus, the alimony obligation of family members is a legal relationship in which one party (the debtor – the payer of alimony) is obliged to perform in favour of the other party (creditor – the recipient of alimony) a certain action – to pay alimony in cash, and the creditor has the right to demand from the debtor to perform their duty. In this meaning, the alimony obligation is by its nature a monetary obligation, and by its essence – a family law obligation. It is proposed to extend the provisions of Article 625 of the Civil Code of Ukraine on liability for breach of monetary obligation in terms of the possibility of recovery of the amount of debt, taking into account the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount. It is proved that the recognition of one of the spouses as in need of financial aid, depending on its provision at the subsistence level for the recovery of alimony from the other spouse, no longer meets the needs of today. It is proposed that one of the spouses be considered in need of financial aid if their monthly income (salary, pension, income from the use of property, other income) is less than the minimum wage established by law. It is proposed to apply similar provisions to identify parents in need of financial aid in alimony obligations for adult children to support their disabled parents in need of financial aid.

It is established that the legislator's change of the minimum amount of alimony to be collected from the alimony payer per child is not a basis for changing the amount of alimony in accordance with Article 192 of the Family Code of Ukraine, but is the basis for changing the minimum amount of alimony specified in the writ of execution in the procedure for executing and collecting alimony, and is taken into account when determining the amount of alimony or debt. It is argued that the form of education of an adult child who continues its studies and therefore needs financial aid does not matter for collecting alimony from a mother or father, and also that parents are not exempt from the obligation to support an adult daughter/son continuing education, including during the holidays.

It was proposed to amend the Family Code of Ukraine and stipulate the obligation of parents deprived of parental rights to support both adult disabled children in need of material aid, if parents can provide such material aid, and adult children who continue their education and, in this regard, need material aid, until they reach the age of 23, provided that parents can provide such material aid.

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Suggested Citation: Borisova, V.I. & Krasytska, L.V. (2020). Alimony obligations of family members in the family law of Ukraine: problematic issues of theory and practice. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(3), 28-47.

Submitted: 29/05/2020
Revised: 03/08/2020
Accepted: 28/08/2020

УДК 349.41
DOI: 10.37635/jnalsu.27(3).2020.48-62

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ПОНОВЛЕННЯ ДОГОВОРУ ОРЕНДИ ЗЕМЛІ: ПРОБЛЕМИ ТЕОРІЇ ТА СУДОВОЇ ПРАКТИКИ

Анотація. *Землі виступають найважливішим об'єктом навколишнього природного середовища, є незамінним засобом виробництва в сільському господарстві, територіальним базисом для розміщення різноманітних об'єктів. Стверджується, що належне функціонування відносин щодо оренди земель є запорукою сталого господарського обігу, гарантією реалізації прав та виконання обов'язків як орендодавцем, так і орендарем відповідної земельної ділянки. Дискусійним є питання поновлення договору оренди землі по закінченню строку його дії. Метою дослідження є окреслення існуючих теоретичних та правозастосовчих проблем щодо поновлення договору оренди землі, внесення пропозицій з усунення останніх. Для досягнення цієї мети використано системно-структурний метод наукового пізнання, за допомогою якого проаналізовано приписи законодавства щодо поновлення договору оренди землі, висвітлено їх співвідношення та взаємодію. Доведено, що переважне право орендаря існує щодо поновлення договору оренди землі лише на той самий строк і на тих самих умовах і за відсутності заперечень щодо такого поновлення з боку орендодавця. При намаганні орендаря змінити істотні умови договору оренди землі й за відсутності згоди орендодавця на такі зміни переважне право орендаря на укладення договору оренди землі на новий строк припиняється. Наголошено, що в кожному спорі слід встановлювати добросовісність дій орендодавця щодо відмови в поновленні договору оренди землі з однією особою (орендарем) й наступного укладення договору з новим орендарем. Видається дискусійним застосування в земельних орендних правовідносинах категорії «менш захищена» сторона, оскільки залежно від суб'єктного складу сторін цих правовідносин такою стороною може виступати як орендар, так і орендодавець. Підсумовано, що Верховий Суд має уніфікувати практику застосування приписів законодавства щодо поновлення договору оренди землі (лише у комплексі з іншими нормативними приписами або автономно, з використанням принципу «мовчазної згоди»). На можливість автономного застосування таких приписів вказують норми Закону України «Про внесення змін до деяких законодавчих актів України щодо протидії рейдерству». Виявлені недоліки правового регулювання поновлення договору оренди землі після спливу його строку вказують на напрями вдосконалення законодавства у сфері оренди земель, що має практичну значимість.*

Ключові слова: земельна ділянка, законодавство, правові відносини, особливий вид нерухомості, речові права.

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RENEWAL OF THE LAND LEASE AGREEMENT: PROBLEMS OF THEORY AND JUDICIAL PRACTICE

Abstract. *Land is the most important object of the environment. It is an indispensable means of production in agriculture, the territorial basis for the location of various objects. It is argued that the proper functioning of land lease relations is a guarantee of sustainable economic circulation, a guarantee of the exercise of rights and performance of duties by both the lessor and the lessee of the land. The issue of renewal of the land lease agreement after its expiration is debatable. The purpose of the study is to outline the existing theoretical and law enforcement problems regarding the renewal of the land lease agreement, to make proposals to eliminate the latter. To achieve this purpose, a system-structural method of scientific knowledge was used, which helped analyse the prescriptions of the legislation on renewal of the land lease agreement, their relations and interaction were highlighted. The study proves that the lessee's pre-emptive right exists to renew the land lease agreement only for the same period and on the same terms and in the absence of objections to such renewal by the lessor. If the lessee tries to change the essential terms of the land lease agreement and in the absence of the lessor's consent to such changes, the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated. It is emphasised that in each dispute it is necessary to establish the good faith of the lessor's actions to refuse to renew the land lease agreement with one person (lessee) and the subsequent conclusion of the agreement with the new lessee. The use of the category of "less protected" party in land lease legal relations appears debatable, because depending on the subject composition of the parties to these legal relations, such a party can be both a lessee and a lessor. It is concluded that the Supreme Court should unify the practice of applying the provisions of the law on the renewal of the land lease agreement (only in combination with other regulations or autonomously, with the use of the principle of "tacit consent"). The possibility of autonomous application of such instructions is indicated by the provisions of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Counteraction to Raiding". The revealed shortcomings of the legal regulation of the renewal of the land lease agreement after its expiration indicate the directions of improvement of the legislation in land lease, which has practical significance.*

Keywords: land plot, legislation, legal relations, special type of real estate, property rights.

INTRODUCTION

Land is the most important object of the environment, is an indispensable means of production in agriculture, the territorial basis for the placement of various objects. The use of land can take place on various legal titles, a prominent place among which is the right to lease land (land plot). This right is based on the agreement term paid possession and use of land necessary for the lessee to conduct business and other activities (Part 1 Article 93 of the Land Code of Ukraine of October 25, 2001 No. 2768-III[1], Article 1 of

[1] Land Code of Ukraine. (2001, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2768-14#Text

the Law of Ukraine of 6 October 1998 No. 161-XIV "On Land Lease"[1] (hereinafter referred to as "the Law No. 161-XIV"). The lessee is obliged to use the land in accordance with the terms and conditions of the agreement and the requirements of land legislation. The lease agreement is described by, among other things, maturity, as the date and term of the lease agreement is one of its essential conditions. Due functioning of relations regarding the land lease is a guarantee of fulfilment of the rights and performance of duties both by the lessor and the lessee of the corresponding land plot.

Legal issues of leased contractual land relations were the subject of scientific research by scientists V. M. Yermolenko, I. I. Karakash, P. F. Kulinich [1], V. V. Nosik, V. I. Semchyk, V. D. Sydor [2], M. V. Shulga, Y. Mirwati [3], J. Lee, D. Rodriguez [4], A. Popov, O. Knyaz [5], N. Akram [6], M. R. Taylor [7], G. Lyakhovich [8], M. Matveeva [9], V. A. Mayboroda [10], F. Lazar [11], etc. However, there are still unresolved issues, and a number of issues have not yet been properly regulated, resulting in difficulties in law enforcement. One of the debatable issues is the renewal of the land lease agreement after its expiration. Thus, some researchers generally deny the need for regulations on such renewal of the land lease agreement, while others outline the shortcomings of regulations and abuse that occur in the practical implementation of the lease, both on the part of the lessor and the lessee.

The issue of renewal of the land lease agreement after its expiration has gained new relevance due to the adoption of the Law of Ukraine of December 5, 2019 No. 340-IX "On Amendments to Certain Legislative Acts of Ukraine on Combating Raiding"[2] (hereinafter referred to as "the Law No. 340-IX") by the Verkhovna Rada, which introduced regulations on the renewal of the land lease agreement. This statutory act re-regulated the issue of renewal of the land lease agreement, introduced the conditions for the application of such a procedure, regulated the specific features of entering information on the renewal of the agreement into the State Register of Real Property Rights, and prevented such renewal of state and communal land plots.

The purpose of the study is to outline the existing theoretical and law enforcement problems regarding the renewal of the land lease agreement, to make proposals to eliminate the latter. The objectives of the study are to investigate the views of scholars on the essence of renewal of the land lease agreement, their critical analysis, and study the existing case law of the Supreme Court (Grand Chamber and individual courts of cassation, functioning in its composition) on the application of the legislation on renewal of the land lease agreement after its expiration.

1. MATERIALS AND METHODS

The study of lease contractual relations and the issue of renewal of the land lease agreement required the application of a system-structural method of scientific knowledge. This method analyses the provisions of the legislation on the renewal of the land lease agreement, highlights their correlation, the corresponding internal relations. In

1 Law of Ukraine No. 161-XIV “On Land Rent” . (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161-14#Text.

2Law of Ukraine No. 340-IX “On the introduction of amendments to acts of legislation of Ukraine for anti-raiding”. (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/340-IX#Text.

particular, this refers to the provisions of the Land and Civil Codes of Ukraine[1], the laws of Ukraine No. 161-XIV[2] and No. 340-IX[3] in their interaction.

The method of analysis and synthesis was used to establish the content of the law on the renewal of the land lease agreement, the implementation of their interpretation. The use of the method of analysis contributed to the acquisition of knowledge about the individual elements of the object of knowledge, and the method of synthesis contributed to the development of an idea of its structure and system features. Thus, the requirements of Art. 33 of Law No. 161-XIV[4] with a distinction of the relevant grounds for termination of the lessee's pre-emptive right to enter into a land lease agreement for a new term. The content of the new Article 126-1 "Renewal of land lease agreement, land easement agreement, agreements on granting land use rights for agricultural purposes or for development" of the Land Code of Ukraine has been clarified, which allowed to formulate certain rules for renewal of land lease agreement.

The empirical basis of the study included the judgements of the court of cassation on lease agreements and renewal of the land lease agreement, in particular, the Grand Chamber of the Supreme Court, its Commercial Court of Cassation, and the Civil Court of Cassation. An analysis and synthesis of the composition of court decisions in Ukrainian judicial institutions was conducted. It is found that the imperfection of the legislative regulation of relations for the renewal of the land lease agreement after its expiration causes a significant number of problems in law enforcement.

The basis for studying the subject of renewal of land lease agreements was the combination of basic methods of scientific knowledge. A set of methods allowed to consider the main provisions and legislation on the renewal of the land lease agreement in Ukraine. An analysis of legal provisions, which are the main source of regulation of relations between the parties to renew the land lease agreement, was carried out. The main legal document regulating legal relations regarding land lease in Ukraine is the Land Code of Ukraine and the Law of Ukraine "On Land Lease".

General scientific methods of cognition were used in studying the basic issues of legal regulation of land lease. These methods include dialectical method, Aristotelian method, systematic data analysis, methods of information analysis and synthesis. The formal legal method, the method of legal modelling and the comparative legal method were also used.

The dialectical method of scientific knowledge was used to specifically and objectively consider legal phenomena on land lease in Ukraine, as well as on the renewal of land lease agreements. Dialectical method helped identify the main provisions, as well legal regulation of land lease in terms of qualitatively and quantitatively. The basic methods of cognition of information by the dialectical method are the principle of

[1] Land Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2768-14#Text; Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/page20#Text.

[2] Law of Ukraine No. 161-XIV "On Land Rent" . (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161-14#Text.

[3] Law of Ukraine No. 340-IX "On the introduction of amendments to acts of legislation of Ukraine for anti-raiding". (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/340-IX#Text.

[4] Law of Ukraine No. 161-XIV "On Land Rent", op. cit.

ascension from abstract concepts to concrete, as well as the synthesis and analysis of information. The Aristotelian method was used to study the legal regulation of land lease more accurately and specifically. This method is based on a set of laws and techniques of correct thinking. Synthesis of information is another method of scientific cognition used in this study. It involves the material or imaginary integration of the features and parameters of a particular object, such as combining the properties and characteristics that have been determined by data analysis into one system. Systematic data analysis or a systematic method of scientific knowledge is used in the study for a more detailed acquaintance with the system of land legal regulation. With the help of a systematic analysis, the legal aspect of land lease in Ukraine, the components that describe this process, the land lease agreement and the legal aspects of renewal of the land lease agreement are considered. The system method is one of the basic methods of studying state and legal phenomena, regulations and laws. The analysis of relevant legal facts and regulations on land lease agreements in force in Ukraine was performed by applying the formal legal method. This method is based on a consistent and logical study of legal provisions and laws. A common method for studying legal provisions is the method of legal modelling. This method allowed to construct models of theoretical legal situations, and the search for ways to solve them in the future is performed. This method involves solving hypothetical legal situations. The final method of scientific knowledge in this work was comparative law. This method involves comparing and studying different legal documents and court decisions.

Thus, the conclusions on the application of the rules of law of the Grand Chamber of the Supreme Court on the binding nature of the additional agreement on land lease for a new term (renewal of the land lease agreement), the Commercial Court of Cassation within the Supreme Court on the content of the lessee's letter , the good faith of the lessor in resolving the issue of renewal of the land lease agreement, the use of "tacit consent" in the renewal of such an agreement, the procedure for objection in the renewal of the agreement on the part of the lessor. The legal positions of the Civil Court of Cassation in the Supreme Court on the legal facts required for the renewal of the land lease agreement also eased the investigation of the subject under study.

2. RESULTS AND DISCUSSION

The special legal literature indicates that the lease of land is described by the following important components: the allocation of land as an object of lease; contractual terms of the lease; restriction of land lease for a certain period; paid rent; the existence of only the right to own and use land; provision of land for certain activities, etc. [2]. It is the land lease agreement that serves as the basis for acquiring the right to lease a land plot in case of mutual expression of will by both parties. Such an agreement is a document certifying the right to lease land and the basis for state registration of the right to lease land [12].

Article 13 of the Law No. 161-XIV[1] stipulates that a land lease agreement is an agreement under which the lessor is obliged to transfer the land plot to the lessee for possession and use for a certain period, and the lessee is obliged to use the land plot in

[1] Law of Ukraine No. 161-XIV “On Land Rent”. (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161-14#Text.

accordance with the terms and conditions of the agreement and requirements of land legislation. The statutorily essential conditions of the land lease agreement define: (a) the leased object (cadastral number, location and size of the land plot); (b) the date of conclusion and term of the lease agreement; (c) rent indicating its amount, indexation, method and conditions of calculations, terms, procedure for its payment and revision and liability for non-payment (Part 1 of Article 15 of the Law No. 161-XIV).

Considering the subject matter, the study will highlight the legal aspects of the renewal of the land lease agreement (extension of the lease agreement of land after the expiration of the relevant lease agreement). General provisions on the lease (rent) of property are contained in Paragraph 1 Chapter 58 "Rent (lease)" of the Civil Code of Ukraine of January 16, 2003 No. 435-IV[1], which refers, inter alia, to the pre-emptive rights of the lessee of the corresponding thing. Thus, Part 1 of Art. 777 of the Civil Code of Ukraine contains the following provisions: (a) the lessee, who duly performs their duties under the lease agreement, after the expiration of the agreement has a pre-emptive right over other persons to enter into a lease agreement for a new term; (b) the lessee, who intends to exercise the pre-emptive right to enter into a lease agreement for a new term, is obliged to notify the lessor prior to the expiration of the lease agreement within the period specified in the agreement, and if it is not established therein – within a reasonable time; (c) the terms and conditions of the new lease agreement shall be established by agreement of the parties. In case of failure to reach an agreement on payment and other terms and conditions of the agreement, the lessee's pre-emptive right to enter into the agreement is terminated. Notable, these general approaches to the lessee's pre-emptive right over other persons to enter into a lease for a new term are applied in case of renting both movable and immovable property.

Considering that land plots are a special type of real estate, described by a specific legal regime, the issue of the lessee's pre-emptive right to enter into a land lease agreement for a new term (renewal of such an agreement) is regulated by special legislative provisions on land lease. Thus, Law No. 161-XIV[2] holds a separate Article 33 on the renewal of the land lease agreement.

At one time P.F. Kulinich expressed a well-founded opinion about the inappropriateness of this article, which should regulate the issue of renewal of the right (and not the agreement) of land lease [1]. This idea was supported by other researchers, noting that the exclusion of Article 33 "Renewal of the land lease agreement" from the Law No. 161-XIV[3] is justified. This would lead to the fact that the procedure for renewal of the agreement would be applied to Article 764 of the Civil Code of Ukraine[4][13].

Despite this, Article 33 "Renewal of the land lease agreement" of the Law No. 161-XIV[5] (before its amendment by the Law No. 340-IX[6]) regulated the considered public

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/page20#Text.

[2] Law of Ukraine No. 161-XIV "On Land Rent". (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161-14#Text.

[3] *Ibidem*, 1998.

[4] Civil Code of Ukraine, op. cit.

[5] Law of Ukraine No. 161-XIV "On Land Rent", op. cit.

[6] Law of Ukraine No. 340-IX "On the introduction of amendments to acts of legislation of Ukraine for anti-raiding". (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/340-IX#Text.

relations as follows.

Thus, according to Part 1 Article 33 of the No. 161-XIV[1], the lessee has a pre-emptive right to extend the contractual lease of land (to conclude a land lease agreement for a new term, renewal of the land lease agreement – as this right is called by the legislator). The precondition for the emergence of such a pre-emptive right of this person is the proper performance of obligations by the lessee under the land lease agreement. Such proper performance of obligations by the lessee is named by some researchers to be the main requirement of the law, which gives the lessee the right to renew (extend) the land lease agreement [14]. The lessee may exercise this pre-emptive right only after the expiration of the land lease agreement.

In turn, Parts 2-5 Article 33 of No. 161-XIV[2] hold the conditions for the exercise of the outlined pre-emptive right of the lessee, which include:

a) lessee's notice to the lessor about the intention to exercise the pre-emptive right before the expiration of the term of the land lease agreement. The term of such notice must be established in the land lease agreement, but in any case, it must be made not later than one month before the expiration of the land lease agreement;

b) such notice must be made in writing by the lessee sending a letter to the lessor. The obligatory appendix to such letter-notice on renewal of the land lease agreement is the draft of the additional agreement to the land lease agreement;

c) after receiving a notice with a draft additional agreement, the lessor must consider them within a month, verify for compliance with the law, agree with the lessee (if necessary) the essential terms of the agreement and, in the absence of objections, decide to renew the land lease (in relation to state and communal lands), to conclude an additional agreement with the lessee on renewal of the land lease agreement.

Therewith, it is statutorily stipulated that an additional agreement to the land lease agreement on its renewal must be concluded by the parties within one month. Both refusal and delay in concluding an additional agreement to the land lease agreement may be appealed in court (parts 8, 11 Article 33 of Law No. 161-XIV). Notably, the need for an additional agreement on the conclusion of a land lease agreement for a new term (renewal of the land lease agreement) has been confirmed by judicial practice. Thus, the Grand Chamber of the Supreme Court, deciding the dispute on the renewal of the land lease agreement, in paragraph 61 of the decision of May 26, 2020 in the case No. 908/299/18 (proceedings No. 12-136гс19) indicated that Article 33 of the Law of Ukraine "On Land Lease"[3] defines both the conditions and grounds for renewal of the land lease agreement, and the obligation of the parties to enter into an additional agreement to the land lease agreement on its renewal[4].

It should be emphasised that the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated on the following grounds:

a) the lessor's objection to the renewal of the lease agreement. In this case, the

[1] Law of Ukraine No. 161-XIV “On Land Rent”. (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161-14#Text.
[2] *Ibidem*, 1998.
[3] *Ibidem*, 1998.
[4] Judgment of the Grand Chamber of the Supreme Court in case No 908/299/18 (proceedings No 12-136gs19). (2020, May). Retrieved from http://www.reyestr.court.gov.ua/Review/89825064

lessor must send the lessee a letter of notice of objection to the extension of the land lease agreement;

b) failure to reach an agreement between the lessee and the lessor on the rent and other essential terms of the land lease agreement (Part 4 of Article 33 of the Law No. 161-XIV).

In other words, the lessee's pre-emptive right exists to renew the land lease agreement only for the same period and on the same terms and conditions and in the absence of objections to such renewal by the lessor. Therefore, if the lessee attempts to change the essential terms and conditions of the land lease agreement and in the absence of the lessor's consent to such changes, the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated.

Notably, the application of the above legislative provisions on the renewal of the land lease agreement raises several issues that are not regulated. In such circumstances, the answers to them are developed in the process of law enforcement. Thus, the Commercial Court of Cassation within the Supreme Court in paragraph 5.3 of the decision in the case No. 908/2314/18 dated September 16, 2019 indicated that the lessor's objections regarding the inconsistency of the letter-notice of the lessee with the draft supplementary agreement to the law cannot be submitted without giving reasons, but must be substantiated and contain specific references to violations of the law, specified in the letter of notice or draft supplementary agreement, or contain specific essential terms and conditions of the agreement, in respect of which the lessor proposes changes[1]. Sometimes there are situations when the lessor first objected to the renewal of the land lease agreement with a particular lessee (indicating the relevant reasons), and then after some time entered into a new lease agreement with another person. Again, the current legislation does not regulate this situation.

Instead, the Commercial Court of Cassation within the Supreme Court in paragraph 5.7. of the resolution in the case No. 920/739/17 dated September 10, 2018 indicated that in accordance with Article 3 of the Civil Code of Ukraine[2], the principles of justice, good faith, and reasonableness constitute the fundamental principles of civil law, aimed, inter alia, at establishing the rule of law in the legal system of Ukraine. In this case, good faith means the desire of a person to honestly use civil rights and ensure the performance of civil duties, which is confirmed in particular by the content of Part 3 Article 509 of this Code. Thus, citing this principle in the text of the Civil Code of Ukraine, the legislator established a certain limit of behaviour of participants in civil relations, so that each of them is obliged to honestly exercise their civil rights and perform civil obligations, including the possibility of their actions (inaction) harming the rights and interests of others. This principle is not purely formal, as its non-compliance leads to a violation of the rights and interests of participants in civil turnover. That is why in specific legal relations, in particular regarding the renewal of the land lease agreement based on Article 33 of the Law of Ukraine "On Land Lease", the good faith of the landlord in essence constitutes a guarantee of compliance with the rights of the less protected party, which in

[1] Resolution of the Commercial Court of Cassation of the Supreme Court in case No 908/2314/18. (2019, September). Retrieved from http://www.reyestr.court.gov.ua/Review/84944522

[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/page20#Text.

the disputed legal relations is the lessee[1].

The above should be generally supported and, notably, in each dispute it is necessary to establish the good faith of the lessor's actions to refuse to renew the land lease agreement with one person (lessee) and the subsequent conclusion of an agreement with a new lessee. Unfairness of the lessor's actions may serves as grounds for recognition and protection of the lessee's pre-emptive right to continue the contractual lease of land in court as violated and, accordingly, to conclude that the new land lease agreement is invalid.

Notably, in the above court decision, the court of cassation applied the category of "less protected" party, which in the disputed land lease is determined by the lessee. Such an approach requires additional consideration, is debatable, and may be justified in the presence of the following contractual structure: the lessor – a public authority or local government, the lessee – a legal entity under private law, an individual – an entrepreneur, an individual. However, when considering a lease where the lessor is an individual as the owner of the land, and the lessee is a legal entity (farm, agricultural holding, other business entity), it is possible to draw the opposite conclusion about the "less protected" party in such contractual relations, which is likely to be the lessor.

A considerable number of questions arise in connection with the implementation of the provisions of Article 33 of the Law No. 161-XIV[2] (until amendment by Law No. 340-IX), according to Part 6 of which if the lessee continues to use the land after the expiration of the lease and in the absence of a lessor's letter-notice one month after the expiration of the agreement on the objection to the renewal of the land lease agreement, such an agreement is considered renewed for the same period and on the same terms and conditions as provided by the agreement. Some researchers consider this provision discriminatory against the landlord of the land [15], while others point out that it contradicts Article 31 of the Law No. 161-XIV, which determines the expiration of the term for which the agreement was concluded, as one of the grounds for its termination [16]. Furthermore, in this case the law makes provision for the conclusion of an additional agreement on the renewal of the lease of state-owned land, which is performed by the authorised head of the executive body, determined by the decision of this body, without the decision of the executive body to renew the land lease. N.V. Ilkiv thinks that there is an increase in the term of the lease of state-owned land due to improper performance of obligations by the lessor to dispose of state property and avoid the procedure of land auction [17].

There are various approaches to the application of Part 6 of Article 33 of Law No. 161-XIV[3]. Thus, according to one of them, it should be applied only together with other provisions of Article 33 of the Law of Ukraine "On Land Lease". That is, the lessee may not continue to use the land after the lease agreement if they, intending to exercise the pre-emptive right to enter into a land lease agreement for a new term, failed to timely notify the lessee in writing (letter-notice with a draft supplementary agreement). In other

[1] Resolution of the Commercial Court of Cassation of the Supreme Court in case No 920/739/17. (2018 September). Retrieved from http://www.reyestr.court.gov.ua/Review/77748947

[2] Law of Ukraine No. 161-XIV "On Land Rent" . (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161-14#Text.

[3] *Ibidem*, 1998.

words, according to this approach, Part 6 of Article 33 of Law No. 161-XIV may be applied only in combination with other provisions thereof, in particular, with parts 2-5. Confirmation of this position can be found in case law. Thus, for example, the Civil Court of Cassation of the Supreme Court in the decision of June 27, 2019 in the case No. 312/275/17 noted that to renew the land lease agreement on the grounds stipulated by Part 6 of Article 33 of the Law of Ukraine "On Land Lease" requires the following legal facts: the lessee duly performs its duties under the lease agreement; before the expiration of the agreement, they timely notify the lessor of their intentions to exercise the pre-emptive right to enter into an agreement for a new term; the lessee added a draft additional agreement to the letter-notice; the lessee continues to use the allocated land plot; the lessor failed to notify the lessee in writing of the refusal to renew the lease agreement[1].

According to another approach, the provisions of Part 6 Article 33 of Law No. 161-XIV can be applied autonomously, they enshrine the principle of "tacit consent". According to this opinion, the lessee's notice to the lessor about the intention to exercise the right to renew the land lease agreement on the grounds stipulated by Part 6 Article 33 of the Law of Ukraine "On Land Lease" is not required. The essence of the renewal of the lease agreement under this part of the article is that the lessee continues to use the land after the lease, and the lessor, accordingly, does not object to the renewal of the agreement, in particular in connection with the proper performance of the land lease. The absence of such an objection may manifest itself in "tacit consent". These legal conclusions are formulated by the Commercial Court of Cassation of the Supreme Court in paragraph 5.2. of the resolution in the case No. 920/739/17 dated September 10, 2018[2].

In another case, the Supreme Court further emphasised that the construction of Part 6 Article 33 of the Law of Ukraine "On Land Lease" stipulates the absence of a written notice of the lessor to object to the renewal of the lease agreement, i.e. crucial for the renewal of the agreement for the same period and on the same terms and conditions is only the fact of the lessor's objection to renewal, without any substantiation (paragraph 27 of the decision of the Commercial Court of Cassation of the Supreme Court in the case No. 912/1712/17 dated November 29, 2018[3]).

Discussing the content of Part 6 Article 33 of Law No. 161-XIV[4], some researchers note that it launched a mechanism of continuous renewal of the agreement through prolongation without the actual possibility of terminating the agreement. According to O.I. Baran, the rules of procedural law cannot limit the rules of substantive law, which is the right of ownership of land. Therewith, the refusal to extend solves the main problem of the lessor – eliminates the complex mechanism of returning the land in its use [18]. However, it is hardly possible to agree with the above considerations.

Thus, Part 6 Article 33 of the Law No. 161-XIV makes provision for the possibility

[1] Resolution of the Civil Court of Cassation of the Supreme Court in the case No 312/275/17. (2019, June). Retrieved from http://www.reyestr.court.gov.ua/Review/82798011

[2] Resolution of the Commercial Court of Cassation of the Supreme Court in case No 920/739/17. (2018, September). Retrieved from http://www.reyestr.court.gov.ua/Review/77748947

[3] *Ibidem*, 2018.

[4] Law of Ukraine No. 161-XIV “On Land Rent” . (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161-14#Text.

of preventing the "automatic" renewal of the land lease agreement by the lessor – they only need to object (without any justification for such objection) in the renewal of the agreement. Moreover, it is hardly correct to assume that Part 6 Article 33 of Law No. 161-XIV contains the rules of procedural law. After all, the provision of procedural law is considered to be the rule of law that regulates social (procedural) relations between the court, on the one hand, and the participants in the trial, on the other hand, and aims to address procedural and organisational issues of substantive law to protect rights and legitimate interests of the subjects of material legal relations [19]. Part 6 Article 33 of Law No. 161-XIV does not comply with such attributes.

Instead, O.V. Kot is correct in pointing out that it cannot be considered that the continuation of the lease is possible against the will of the lessor, as it would violate the basic principles of civil procedure, including the principle of freedom of agrrement and free will. Currently, the will of the lessor is manifested in the form of silence [20].

The possibility of autonomous application of the regulations on the renewal of the land lease agreement is indicated by the latest amendments introduced by Law No. 340-IX. Thus, this regulation, which will enter into force on July 16, 2020, changed the name of Article 33 of the Law No. 161-XIV to "The pre-emptive right of the lessee to enter into a land lease agreement for a new term", as well as introduced a new wording of its text, excluding the provision on the renewal of the land lease agreement. In other words, Part 6 was excluded from Article 33 of the Law No. 161-XIV while leaving other regulations in force.

Furthermore, a new Article 32-2 "Renewal of land lease agreements" was added to the Law of Ukraine "On Land Lease", according to which the renewal of land lease agreements is performed in accordance with the procedure prescribed by Article 126-1 of the Land Code of Ukraine. That is, these changes differentiate the categories of "pre-emptive right to continue the contractual lease of land" and "renewal of the land lease", which should be assessed positively. Therewith, the Law No. 340-IX[1] supplemented the Land Code of Ukraine with a new Article 126-1 "Renewal of land lease agreement, land easement agreement, agreements on granting the right to use land for agricultural purposes or for construction", which contains, in particular, the following rules for renewal of land lease agreement:

a) the condition for renewal of the land lease agreement may be established in such an agreement. That is, the lessor and lessee must agree on the possibility of renewing the land lease agreement and enshrine it directly in the text of the agreement;

b) such a condition may be contained only in the lease agreement of private land. Conversely, such a condition cannot be established in the lease agreement of land plots of state and communal property. However, there are exceptions, such as placement of buildings or structures owned by the user or acquirer of the right to use the land on state or communal lands;

c) the land lease agreement may be renewed only for the same term and under the same conditions.

The following mechanism was introduced to renew the land lease agreement after its expiration: renewal of the agreement is considered as such without the parties to the

[1]Land Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2768-14#Text.

same performing a written transaction on its renewal in the absence of a statement of one of the parties to exclude information from the State Register of Real Rights to Immovable Property. Thus, performance of other actions for its renewal by the parties to the agreement is not required. It is obvious that the basis for renewal of the land lease agreement is the proper performance of the terms of such agreement by the lessee during its term.

The right of the parties to the lease agreement to refuse to continue further contractual relations is also statutorily regulated. Thus, Parts 3 and 4 of Article 126-1 of the Land Code of Ukraine[1] stipulate that a party to the agreement who wishes to exercise the right to refuse to renew the agreement no later than one month before the expiration of such agreement, submits to the State Register of Real Rights to Immovable Property an application for exclusion of agreement renewal information from this register. In the absence of such a statement prior to the expiration date of such agreement after the relevant expiration date of the agreement, the state registration of property rights is extended for the same period.

Relevant changes to this procedure for renewal of the land lease agreement and possible waiver of this have been introduced to the legislation on state registration of real rights to immovable property. Thus, in the current wording of Part 1 Article 26 of the Law of Ukraine No. 1952-IV of July 1, 2004 "On state registration of real rights to immovable property and their encumbrances"[2] stipulates that in case the party submits an application for exclusion of information on renewal of the agreement from the State Register of Real Rights to Immovable Property, the state registrar excludes such information from the State Register and, after the expiration of the agreement, the state registration of the property right derived from the right of ownership shall be terminated by software for register accounting. In the absence of such a statement, subject to renewal of the agreement after its expiration, the state registration of real rights is extended for the same period by software of the above State Register.

In the legal literature, some critical remarks have been made about these new regulations. Thus, L.V. Leiba points out that the innovations provided in Law No. 340-IX are not indisputable. For example, the provisions of Article 126-1 of the Land Code of Ukraine to some extent contradict the provisions of Article 33 of the Law "On Land Lease", which in turn further reduces the guarantees of enjoyment of the pre-emptive right of the lessee. These provisions are entirely aimed at protecting the interests of lessors. For example, in a situation where the lessee intends to exercise their pre-emptive right, they apply to the lessor with a letter notifying on the extension of the lease, meanwhile, the lessor, based on the provisions of Article 126-1 of the Land Code of Ukraine[3], applies to the State Register of Real Rights to Immovable Property to exclude information about the renewal of the lease agreement. Thus, the unprotected party is the lessee, who cannot be sure of the effectiveness of guarantees of enjoyment of the pre-emptive right to enter into a lease of land for a new term [21].

Additionally, attention should be paid to the inconsistency of the provisions of

[1] Land Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2768-14#Text.
[2] Law of Ukraine No 1952-IV “On state registration of real rights to immovable property and their encumbrances”. (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1952-15#Text.
[3] Land Code of Ukraine, op. cit.

Article 126-1 of the Land Code of Ukraine that the renewal of the agreement is considered as such without the parties to the same performing a written transaction on its renewal in the absence of a statement of one of the parties to exclude information from the State Register of Real Rights to Immovable Property and Part 1 of Article 26 of the Law of Ukraine "On state registration of real rights to immovable property and their encumbrances"[1] to extend the state registration of real rights for the same period with the use of software tools of the State Register of Rights in the absence of such application and only if the agreement is renewed after its expiration. After all, in itself, the absence of a statement from the lessee or lessor to exclude information about the renewal of the agreement from the State Register of Real Rights to Immovable Property will indicate the renewal of the land lease agreement, and hence there is no need for additional confirmation of renewal.

CONCLUSIONS

The imperfection of the legislative regulation of relations on the renewal of the land lease agreement after its expiration raises numerous issues in law enforcement. When renewing the land lease agreement, the conclusion of an additional agreement between the lessor and the lessee is mandatory. The lessee's pre-emptive right to renew the land lease agreement exists only for the same period and on the same terms and conditions and in the absence of objections to such renewal on the part of the lessor. If the lessee attempts to change the essential terms and conditions of the land lease agreement and in the absence of the lessor's consent to such changes, the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated. The actions of the lessor to refuse to renew the land lease agreement must be bona fide. Unfairness of the lessor may serve as grounds for recognising and protecting the violated lessee's pre-emptive right to continue the contractual lease of land and, accordingly, to conclude that the new land lease agreement is invalid.

The use of the category "less protected" party in land lease legal relations appears to be disputable, as depending on the subjective composition of the parties to these legal relations, such party may be both the lessee and the lessor. The Supreme Court must unify the practice of applying Part 6 Article 33 of the Law No. 161-XIV (only in combination with other regulations or autonomously, with the use of the principle of "tacit consent"). The latest procedure for renewing the land lease agreement is also not without flaws. In particular, the rights of the land lessee are in fact unprotected in case the lessor applies to the State Register of Real Rights to Immovable Property to exclude information on the renewal of the lease agreement when agreeing on an additional agreement to such an agreement between these parties.

Elimination of the identified shortcomings of the legal regulation of renewal of the land lease agreement after its expiration will contribute to the proper functioning of relevant public relations, and these shortcomings themselves indicate areas for improvement of legislation in land lease, which has practical significance.

The study of the experience of legal regulation of renewal (prolongation) of a land

[1] Law of Ukraine No 1952-IV “On state registration of real rights to immovable property and their encumbrances”. (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1952-15#Text.

lease agreement after its expiration in other countries should be considered as promising.

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Suggested Citation: Urkevych, V.Y. (2020). Renewal of the land lease agreement: problems of theory and judicial practice. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(3), 48-62.

Submitted: 20/06/2020
Revised: 22/07/2020
Accepted: 27/08/2020

УДК 341.171: 341.217(4)
DOI: 10.37635/jnalsu.27(3).2020.63-79

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МЕХАНІЗМИ ВИРІШЕННЯ СПОРІВ, ПЕРЕДБАЧЕНІ УГОДАМИ ПРО АСОЦІАЦІЮ, УКЛАДЕНІ ЄВРОПЕЙСЬКИМ СОЮЗОМ З ТРЕТІМИ КРАЇНАМИ

Анотація. *Міжнародне врегулювання суперечок має таку ж довгу історію, як і міжнародні відносини. Усі угоди ЄС про асоціацію мають відповідні механізми з урегулювання суперечок, які певною мірою різняться між собою. Основним завданням даного дослідження виступає визначення міжнародно-правових механізмів вирішення спорів, включені в Угоду про асоціацію між ЄС та Україною. Крім того, особливої актуальності набуває мета дослідження у контексті процесу розв'язання першого в практиці України торгівельного спору Україна-ЄС щодо національних обмежень на експорт деревини. Порівняння різних договірних засад співпраці Євросоюзу із третіми країнами дає змогу констатувати, що найвищим рівнем захисту осіб через функціонування механізму вирішення суперечок характеризуються угоди про асоціацію, причому деякі з них навіть нагадують «арбітражне застереження». Встановлено, що критеріями порівняльного аналізу стали самі типи механізмів вирішення спорів, процедури консультацій та арбітражна процедура, процедура посередництва та правила процедури. Відповідно до даних критеріїв було встановлено, що угоди про асоціацію містять майже однакові положення про процедури консультацій та арбітражну процедуру, за виключенням деяких угод, де арбітраж представлений у звуженому масштабі. Положення про процедури посередництва в представлених угодах майже ідентичні, як й Кодекси поведінки арбітрів та Правил процедури, які слугують шаблонними документами, дубльованими в різних угодах. Детально проаналізовані угоди про асоціацію між ЄС та Україною, Грузією та Молдовою, охарактеризовані спільні й відмінні риси. Відмінність у деталях механізмів урегулювання спорів може свідчити про побоювання у сторін щодо імовірності й інтенсивності виникнення спорів. Угода про асоціацію між Україною та ЄС для врегулювання суперечок передбачає використання різних способів: проведення консультацій, арбітраж, створення третейської групи. Особливу увагу приділено аналізу першого випадку торговельного спору, який вирішується із застосуванням арбітражної процедури в рамках Угоди про асоціацію з Україною щодо експорту необробленої деревини.*

Ключові слова: арбітраж, переговори, Україна, соціально-економічні реформи, інтеграційно-орієнтована угода.

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DISPUTE SETTLEMENT MECHANISMS PROVIDED BY THE ASSOCIATION AGREEMENTS CONCLUDED BY THE EUROPEAN UNION WITH THIRD COUNTRIES

Abstract. *International dispute settlement and international relations both have a long history. All EU association agreements have appropriate dispute settlement mechanisms, which differ to some extent. The main task of this study is to determine the international legal mechanisms for resolving disputes included in the Association Agreement between the EU and Ukraine. Furthermore, the purpose of the study becomes especially relevant in the context of the process of resolving the Ukraine-EU trade dispute on national restrictions on timber exports, which is the first dispute in Ukrainian practice. A comparison of the various treaty principles of EU cooperation with third countries suggests that the highest level of protection of individuals through the functioning of the dispute settlement mechanism is described by association agreements, and some of them even resemble an "arbitration clause". It was found that the criteria of comparative analysis were the types of dispute resolution mechanisms, consultation procedures and arbitration procedure, mediation procedure and rules of procedure. According to these criteria, it was found that the association agreements contain almost identical provisions on consultation procedures and arbitration, with the exception of some agreements where arbitration is presented on a narrower scale. The provisions on mediation procedures in the submitted agreements are almost identical to the Code of Conduct for Arbitrators and the Rules of Procedure, which serve as template documents duplicated in the various agreements. The association agreements between the EU and Ukraine, Georgia, and Moldova are analysed in detail, and common and distinctive features are described. Differences in the details of dispute settlement mechanisms may indicate that the parties have concerns about the likelihood and intensity of disputes. The Association Agreement between Ukraine and the EU for the settlement of disputes makes provision for the use of various methods: consultations, arbitration, the establishment of an arbitration panel. Particular attention is paid to the analysis of the first case of a trade dispute, which is resolved with the use of the arbitration procedure under the Association Agreement with Ukraine on the export of raw wood.*

Keywords: *arbitration, negotiations, Ukraine, socio-economic reforms, integration-oriented agreement.*

INTRODUCTION

The Association Agreement between Ukraine and the EU is the largest international legal instrument in the history of Ukraine and one of the largest international agreements with a third country ever concluded by the European Union in terms of its scope and subject matter. It defines a qualitatively new format of relations between Ukraine and the EU on the principles of "political association and economic integration" and constitutes a strategic guideline for systemic socio-economic reforms in Ukraine. The Association

Agreement with Ukraine, as an integration-oriented agreement, is not intended to prepare Ukraine for EU accession, but seeks to "gradually bring the parties closer together, based on common values and close privileged ties". Dispute settlement mechanisms stipulated by the Association Agreements concluded by the European Union (hereinafter referred to as the EU) with third countries play the role of a stabilising factor in the further development of relations between the parties.

Notably, these provisions vary in different agreements, considering the factors of in-depth trade cooperation. This subject is of particular importance to the EU, especially in the context of the current global crisis in World Trade Organisation (WTO) dispute settlement mechanisms (due to the blocking of the election of members of the WTO Dispute Settlement Body in 2019). At the political level, some progress is already being made, and in March 2020 the EU proposed a Provisional Arbitration Agreement on Appeals, which largely reflects the usual WTO dispute settlement rules and can be used between any WTO members wishing to join. until the WTO Appellate Body is fully operational. Instead, the provisions of the Association Agreements already concluded by the European Union indicate the active practice of including provisions on the settlement of disputes that differ from each other.

International dispute settlement has as long a history as international relations. The application of international trade rules has been identified as a top priority in the European Commission's 2015 Trade for All strategy, and the Court of Justice has recently approved the use of dispute settlement mechanisms in trade agreements in its recent Opinion 1/17 [1]. In this Opinion on the validity of the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), the Court of Justice recognises that in modern trade agreements the EU may establish a permanent court composed of judges, appointed by the states that have signed the relevant international agreement to resolve disputes between the investor and the state. This is a big step forward in approving the creation of a single, independent and open judicial protection system for the legitimate interests of EU investors. However, so far there is no practice of using these mechanisms.

The matter of dispute resolution mechanisms was raised in the studies of M. Cremona and R. Wessel [2]. Researchers are analysing the current debate and the specific angles of the confused link between dispute resolution at EU level and the resolution of international disputes. Particular attention is paid to the issues of dispute settlement mechanisms within free trade areas (hereinafter referred to as FTAs), concluded between the EU and other countries, in a study by I. Barcero [3]. The emergence of disputes and their resolution in accordance with the Association Agreement between Ukraine and the EU has been studied by such scholars as Ya.M. Kostyuchenko [4], Ya.P. Lyubchenko [5], N.A. Mazaraki [6], V.I. Muravyov [7], W. Shin [8], C. Davis [9], D.J. Kuenzel [10], J. Kucik [11], C. Capucio [12], S.L. Robertson [13], R.K. Idrees [14], A. Altamimi [15], etc. The doctrine states that to a considerable extent the architecture of the dispute settlement mechanism determines whether it is effective or not. Both the costs and potential benefits of taking part in a dispute resolution process constitute important elements in determining its effectiveness. Too long a procedure may deter the complainant from taking the case out of the consultation phase. The scope of the dispute settlement is also important: if a trade agreement excludes certain trade provisions or

trade-related provisions from the application of the dispute settlement mechanism, credibility in those provisions is undermined. If the matter is referred to arbitration, it is crucial that all parties recognise the final decision of the arbitrators and that legal remedies are available to enforce it. On the other hand, recourse to dispute settlement mechanisms, especially in EU practice in association relations with other countries, is an unusual practice and may indicate an ineffective negotiation process between the parties.

The main task of this study is to determine the international legal mechanisms for resolving disputes included in the Association Agreement between the EU and Ukraine with the use of a comparative legal method of analysis. Furthermore, the purpose of the study becomes especially relevant in the context of resolving the Ukraine-EU trade dispute on national restrictions on timber exports.

1. MATERIALS AND METHODS

The study in this paper is based on the laws and principles of dialectics, which contribute to the study of the interdependence of international and social processes, which are constantly interconnected and implemented through legal mechanisms within the EU association with third countries. The general laws of dialectics have also found their application in the study. For example, the method of systematic analysis was used to clarify the internal links between legal provisions that develop the international legal aspect of the EU association's relations with other countries.

Due to the method of system analysis, the provisions of international agreements on the establishment of dispute settlement mechanisms were studied. The method of induction and deduction provided the definition of the components of Association Agreement, systemic and structural-functional analysis was used to comprehensively describe the features of the deep and comprehensive FTA between the EU and Ukraine, including in the context of establishing dispute resolution mechanisms. The forecasting method was also used to determine the prospects of applying the practice of resolving trade disputes in the EU practice, which is becoming important. The use of a comparative legal method, a comparative analysis of individual provisions of the association agreements was conducted. The application of this method is also relevant in the study of EU contractual practice with countries such as Moldova and Georgia, as the content of the provisions of the Association Agreements between the EU and these countries is virtually identical to the text of the Association Agreement between Ukraine and the EU. This method allows to identify commonalities and differences in the provisions of the agreements.

The EU-Ukraine dispute settlement mechanism in the Association Agreement makes provision for a modern and “quasi-judicial” dispute settlement model, which has been included in all EU FTAs since 2000 and is largely based on the WTO Dispute Settlement Understanding. The use of the historical method of legal analysis helped to establish that a new model of dispute settlement mechanisms was first included in 2000 (in the EU-Mexico Association Agreement). Notably, the European Commission's approach to resolving disputes in trade agreements is being developed, starting with the traditional diplomatic approach observed in the Association Agreements and other EU agreements until 2000. The dynamics of the development of these legal relations, the matter of the application of mechanisms continues to be relevant for further studies.

Furthermore, the initiation of an arbitration procedure for resolving a dispute between the EU and Ukraine has not yet been covered in the doctrine at all. To examine the main legal aspects of dispute settlement, this study uses a method of comparing similar provisions in agreements between the EU and some selected countries, including Israel, Albania, as well as a detailed analysis of EU-Georgia association agreements, Moldova, and Ukraine.

2. RESULTS AND DISCUSSION

2.1 Dispute settlement mechanisms in early selected EU Association Agreements

All EU association agreements have proper dispute settlement mechanisms, which vary to some extent. In this regard, V. Muravyov notes: "There is no single model of dispute settlement mechanism for all Union agreements on association. The mechanisms set out in such agreements differ, first of all, in terms of structure, decision-making procedures and their legal force, etc. In some of them, preference is given to political means of settlement, in others – to judicial and quasi-judicial. However, this may suggest the basic models for agreements concluded with the countries of a particular region. Each of these models may have minor differences that do not affect its essence" [7].

According to Kostyuchenko, dispute resolution in these agreements has two main aspects [16]: (i) settlement of trade or trade-related disputes (in fact, disputes related to the FTA); and (ii) resolving disputes concerning the interpretation and application of other provisions of the agreement. The first aspect is described by the fact that the WTO had a certain influence on the design of mechanisms for settling this category of disputes, as the FTAs in these agreements were created according to the "WTO approaches". However, dispute settlement in association agreements is still different from that in the WTO.

The Association Agreements make provision for arbitration for the settlement of disputes (except for the Association Agreement with Israel). The EU's Association Agreements with Ukraine, Moldova, and Georgia contain another additional mechanism – mediation, which is not in the agreements, for example, with Bosnia and Herzegovina, and Israel. Some of these agreements also make provision for a consultation mechanism as a preliminary stage ("pre-stage") before arbitration. Notably, the provisions on mediation procedures in the submitted agreements are almost identical to the Code of Conduct for Arbitrators and the Rules of Procedure, which serve as template documents duplicated in the various agreements.

The most developed basis of the association for relations between the EU and neighbouring non-EU countries is the European Economic Area (hereinafter referred to as the EEA), which entered into force on January 1, 1994 [9]. Within the EEA, the members of the European Free Trade Association, except for Switzerland, have legal relations with the EU closer than any other third country. Under the EEA Agreement, disputes concerning the interpretation and application of its provisions, which are essentially identical to the relevant provisions of the EU's founding treaties, in particular the Treaty on the Functioning of the EU (TFEU) and acts adopted by its institutions, are referred to the Joint Committee. It is attended by representatives of the parties to the agreement. If the issue cannot be resolved, the dispute is considered by the Court of

Justice by mutual agreement of the parties (Article 113). In some cases (application of protection measures) an arbitration procedure may be used (Article 111.4).

Comparing the agreements concluded by the EU with the countries of Central and Eastern Europe (the so-called "European agreements") before their accession to the EU, the dispute was decided by the Association Committee (Article 105.2 of the European Agreement with Poland). It included representatives of the parties to the agreements. As decisions in the committee were made by consensus, this allowed one of the parties to block the resolution of the dispute. It also made provision for recourse to arbitration (Article 105.4). However, this method of settlement was ineffective. Defendant had the possibility of blocking the election of arbitrators by delaying or even refusing to appoint a second arbitrator. On the other hand, the defendant had the opportunity to disagree with the appointment of a third arbitrator, taking advantage of the need for the parties to agree on its candidacy. Moreover, the decisions of the arbitrators were not binding on the parties (Article 104). There was also no procedure for approval and no measures that could be applied to the offender (Article 115.2).

All the provisions of the Stabilisation and Association Agreements on dispute settlement are virtually identical. The only body for their settlement is the Association Council (Article 113 of the Stabilisation and Association Agreement with Croatia). Its decisions are binding (Article 112). The agreements do not make provision for recourse to arbitration. However, the parties could use coercive measures if the other party fails to perform its obligations under the agreement (Article 120.2).

2.2 Dispute settlement mechanisms stipulated by the Association Agreements with Israel and Albania

In both agreements, only two articles cover dispute resolution – Article 75 of the main text and Article 33 of Protocol 4 to the Agreement with Israel[1]; and Article 119 of the main text and Article 33 of Protocol 4 to the Agreement with Albania[2]. Below, the study considers them in more detail. The agreement with Israel[3] (Article 75) stipulates that all disputes concerning the application and interpretation of the agreement are referred to the Association Council. The dispute is resolved by a decision of the council, which is subject to execution by the parties. If the dispute cannot be resolved in this way, either party may initiate arbitration proceedings. According to this procedure, each party appoints one arbitrator, the Association Council appoints a third arbitrator. The decision shall be taken by the arbitrators by a majority of votes and the parties shall take all measures to implement it [17-19].

Protocol 4 to the Agreement with Israel, which regulates the concept of "origin of goods" and methods of administrative cooperation, contains another article that regulates the settlement of disputes, but only those disputes that arise between the customs services of the parties to verify proof of origin and interpretation of the protocol. Notably, such

[1]EU-Israel Association Agreement. (2020). Retrieved from http://www.eeas.europa.eu/archives/delegations/israel/eu_israel/political_relations/agreements/index_en.htm

[2] EU-Albania Stabilization and Association Agreement. (2006). Retrieved from https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX%3A22009A0428%2802%29

[3] EU-Israel Association Agreement, op. cit.

disputes are referred to the Customs Cooperation Committee. It is worth paying attention to the specific features of the Association Agreement with Israel. The agreement with Israel is the least similar to all other agreements. Thus, like the agreements with Ukraine, Moldova, and Georgia, it is also concluded within the framework of the European Neighbourhood Policy, but this is another regional direction of this policy. Unlike these agreements, the Association Agreement with Israel does not make provision for a detailed dispute settlement mechanism.

Thus, the Agreement with Israel contains only two articles dealing with this issue:

– Article 33 of Protocol 4 on trade (if there is a dispute between the customs authorities of the states concerning the confirmation of the origin of goods, and this dispute cannot be resolved at the level of these authorities, it shall be referred to the Customs Cooperation Committee);

– Article 75 – concerns the settlement of disputes by the Association Council regarding the interpretation and application of the provisions of the agreement. Therewith, the settlement of disputes by the Association Council in the Association Agreement with Israel has its specifics compared to a similar mechanism of other agreements: if the council failed to resolve the dispute, the parties may apply to arbitration (which, incidentally, is not specified in the agreement). Each of the parties appoints the arbitrator, and the third arbitrator is elected by the council itself. Other agreements do not make provision for arbitration in this context.

There are no other provisions in the Association Agreement with Israel for resolving disputes. This exhausts the dispute settlement mechanisms. The agreement with Albania cannot boast of more detailed regulation. Article 119 of the main text of the agreement stipulates that disputes concerning its application and interpretation shall be referred to the Stabilisation and Association Council, which shall make a decision binding on the parties with a view to resolving the dispute. Like the agreement with Israel, this agreement holds additional regulations for resolving disputes arising between the customs services of the parties regarding the verification of evidence of origin and interpretation of the protocol. Such disputes are also referred to the Stabilisation and Association Council (i.e. even to a special customs committee). Such regulation is poor. Many issues have not been resolved, such as deadlines, appeals, lack of intention of the parties to resolve the dispute. There are also no additional stages of dispute resolution, such as consultations, mediation, etc.

2.3 Dispute settlement mechanisms stipulated by the Association Agreements with Georgia, Moldova, and Ukraine: a comparative aspect

The latest generation of association agreements are those concluded within the framework of the Eastern Partnership policy – with Moldova[1], Georgia[2], and Ukraine[1].

[1] 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). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.260.01.0004.01.ENG

[2] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A0830%2802%29

The provisions of these agreements are aimed at opening markets through the introduction of "deep and comprehensive free trade areas", which differ from the classic FTAs. All three association agreements make provision for three types of dispute settlement mechanisms:

– settlement of disputes concerning the interpretation and application of the trade section of agreements (Chapter IV in the agreement with Ukraine and in the agreement with Georgia[2], Chapter V in the agreement with Moldova[3]) – the mechanism for resolving such disputes is set out in a separate chapter entitled "Dispute Resolution" (Ch. 14 in the agreement with Ukraine and Chapter 14 in the agreements with Georgia and Moldova);

– mediation – this mechanism may be used to settle disputes concerning any measures affecting the trade interests of the parties (agreement with Georgia), trade or investment (agreement with Moldova) or concerning any measures falling within the scope of the provisions regarding the national regime and access of goods to the market (agreement with Ukraine);

– general mechanism – applies to disputes concerning the interpretation, performance or fair application of the agreement in so far as it does not relate to the trade section.

The greatest attention in all three agreements is paid to the mechanism of settlement of disputes on trade issues, because the association agreements primarily constitute trade agreements on the establishment of a free trade area. In general, the procedure for resolving this category of disputes is similar in all three agreements and is two-stage. At the first stage, consultations are envisaged to reach a mutually agreed solution (Article 305 of the Agreement with Ukraine, Article 246 of the Agreement with Georgia, and Article 382 of the Agreement with Moldova). The consultation phase begins with one contracting party submitting a written request to the other party and the Trade Committee on the disputed measure with reference to the particular provisions of the agreement. After that, generally, 30 days are provided for consultations on the territory of the respondent party. At the same time, consultations on urgent matters, in particular on perishable or seasonal goods, take 15 days, and urgent consultations on energy – up to 3 days. If the consultations were not held within the specified period or the parties did not reach an agreement, the complaining party has the right to proceed to the second stage – the creation of an arbitration panel.

The Association Agreements with Ukraine, Moldova, and Georgia similarly regulate the establishment and operation of arbitration groups. As stipulated by the provisions of these agreements, the establishment of an arbitration panel is initiated by the complainant party submitting a request to the respondent party and the Trade Committee. It should be emphasised that, unlike the agreements with Georgia and

[1] Law of Ukraine No 1678-VII "On Ratification of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand". (2014, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1678-18#Text

[2]Agreement between the Government of Ukraine and the Government of the Republic of Georgia on free trade. (2019). Retrieved from https://zakon.rada.gov.ua/laws/show/268_078#Text

[3] Free Trade Agreement between the Cabinet of Ministers of Ukraine and the Government of the Republic of Moldova. (2005). Retrieved from https://zakon.rada.gov.ua/laws/show/498_073#Text

Moldova, the Association Agreement (AA) with Ukraine distinguishes the concept of the mandate of the arbitration panel. Thus, the standard mandate makes provision for the authority of the arbitration panel to examine the issue raised in the request, to decide on the compatibility of the disputed measure with the provisions of the AA and to make a decision in accordance with the requirements of the agreement. Therewith, part 2 of Article 306 of the agreement with Ukraine allows for the possibility of creating an arbitration group with a special mandate. In this case, the written request of the complaining party, apart from the disputed measure and a brief description of the legal grounds of the complaint, must also contain the proposed text of the special mandate.

Following the provisions of these association agreements, the arbitration panel includes three arbitrators, whose nominations are agreed by the parties within 10 days. If the parties fail to agree on the composition of the group, the relevant appeal shall be submitted to the chairman of the committee, which shall select arbitrators by lot from a list of 15 independent experts in the field of international trade and international law. After the selection of the arbitrators, the arbitral tribunal shall submit a preliminary report within 90 days and issue a ruling on the merits of the dispute within 120 days. Notably, all the above deadlines are halved if the dispute concerns seasonal and perishable goods or energy. Furthermore, if the subject of the dispute is the issue of energy and there is a complete or partial cessation of transit of oil, gas, or electricity, the party may request the chairman of the arbitration panel to act as a mediator for the immediate settlement of the dispute. Perhaps the only difference between the association agreements with Ukraine, Georgia, and Moldova in terms of the establishment and operation of arbitration groups is the possibility provided in the agreements with Georgia and Moldova to suspend the arbitration group at the request of both parties for up to 12 months.

The Association Agreements with Ukraine, Georgia, and Moldova hold identical provisions on the mandatory implementation of the arbitration panel's rulings. Moreover, all three agreements will address remedies in case of urgent energy disputes, interim remedies in the event of non-compliance, and the right of the parties to agree on a mutually agreed solution at any stage of the dispute. Notably, the Rules of Procedure and the Code of Conduct for Arbitrators, set out in appendices XXV and XXIV to the agreement with Ukraine, appendices XX and XXI to the agreement with Georgia and appendices XXXIII and XXXIV to the agreement with Moldova, make provision for almost identical procedure for consideration of issues by the arbitration panel and similar standards of proper conduct of arbitrators. All three agreements require arbitrators to use the provisions of the Vienna Convention on the Law of Treaties of 1969 and the practice of the Dispute Settlement Body within the WTO when interpreting agreements, and to seek interpretation from the Court of Justice.

As a rule, in case of failure of consultations, a party may request a violation of the arbitration procedure for dispute settlement. The tribunal includes three arbitrators. Under the agreements with Moldova and Georgia, the parties must agree on the procedure for appointing arbitrators. If such a procedure is not agreed, each of the parties shall appoint one arbitrator, and the third shall be appointed by the Chairman of the Association Committee in the trade configuration. Under the agreement with Ukraine, after no agreement on the appointment procedure between the parties, all three arbitrators are appointed by the Chairman of the Trade Committee. It is important that the

agreements with Georgia and Moldova make provision for the need to replace arbitrators, as well as a separate article on the suspension and closure of arbitration proceedings. There are no comparable articles in the agreement with Ukraine.

An alternative mechanism for settling trade disputes is the institution of mediation. This mechanism is stipulated in Ch. 15 of the Association Agreement with Ukraine for the settlement of disputes concerning any measures falling within the scope of the provisions on national treatment and market access, as well as in separate Appendices XIX and XXXII to the EU agreements with Georgia and Moldova. The mediation procedure in all three agreements is similar. The complaining party first submits a request for a contentious issue, to which the other party must provide an answer. The complaining party may then request that the mediation procedure be initiated by sending a written request to the other party. The contracting parties have 15 days to approve the candidacy of the mediator, and in case of failure to agree on the identity of the mediator within the specified period, the parties apply to the chairman of the Trade Committee. After determining the mediator, the parties are given 60 days to reach a mutually agreed decision, which can be further confirmed by the decision of the committee. During negotiations, the mediator has the right to propose their solution to the dispute, which the parties have the right to accept or reject.

The third dispute settlement mechanism is the so-called general dispute settlement procedure, which applies to the interpretation, execution, and application of agreements in so far as it does not concern trade sections. The general mechanism is also similar in all three agreements (Articles 476-478 of the Agreement with Ukraine, Articles 421-422 of the Agreement with Georgia, and Articles 454-455 with Moldova[1]). To start the procedure, one of the parties sends a formal request to the other party and the Council of the Association on the disputed issue. The parties should then make every effort to resolve the dispute through consultations within the Association Council or other body of the agreement (for example, the Association Committee or even the relevant subcommittee). Until the dispute is resolved, the relevant issue should be considered at each meeting of the Association Council. If the parties reach a compromise solution, the Council of the Association may, by agreement of the parties, make a binding decision based on the results of the dispute. Therewith, if the parties have not been able to reach an agreement in the Council of the Association within three months, it is allowed to take appropriate measures on the part of the complainant party. All three association agreements contain a so-called "essential elements" clause, according to which in case of violation of the basic political and legal principles of the agreement (democracy, human rights, respect for sovereignty, territorial integrity, inviolability of borders, non-proliferation of weapons of mass destruction, etc.) the complaining party reserves the right to immediately suspend the agreement.

Attention should also be paid to certain dispute settlement provisions in other sections of the agreements. Inter alia, the Association Agreements with Moldova and Georgia state that disputes concerning the provisions on global special measures (Articles

[1] Agreement between the Government of Ukraine and the Government of the Republic of Georgia on free trade. (2019). Retrieved from https://zakon.rada.gov.ua/laws/show/268_078#Text. Free Trade Agreement between the Cabinet of Ministers of Ukraine and the Government of the Republic of Moldova. (2005). Retrieved from https://zakon.rada.gov.ua/laws/show/498_073#Text

158-160 and Articles 37-39, respectively) and the provisions of the Anti-Dumping and Countervailing Agreement (Articles 161-164 and Articles 40-43, respectively) are not affected by the chapter on dispute resolution. Furthermore, the provisions of the chapter on the settlement of disputes also do not apply to the rules of the anticompetitive agreement and merger. Similar provisions on global extraordinary measures, anti-dumping, and anti-competitive actions are stipulated in the Association Agreement between Ukraine and the EU[1]. However, the agreement with Bosnia and Herzegovina and the agreement with Israel do not address these issues at all, and therefore do not contain reservations about the non-application of the dispute settlement procedure stipulated in the agreement. Notably, the association agreements with Ukraine, Georgia, and Moldova contain a similar article on the settlement of disputes between service providers (Articles 123, 112, and 239, respectively). In accordance with this provision, the parties shall ensure that in case of disputes between service providers rendering electronic communications networks or services, the relevant regulatory authority is obliged, at the request of either party, to take a binding decision as soon as possible. Therewith, it should be noted that the older agreements with Israel and Bosnia and Herzegovina do not have a corresponding provision.

Thus, the dispute settlement mechanism in the EU Association Agreements with Ukraine, Georgia, and Moldova is almost identical. This is due to the small time difference between their initialling (agreements with Georgia and Moldova were generally initialled on the same day), as well as their conceptual and structural similarity as agreements on a deep and comprehensive free trade area.

2.4 The practice of applying the dispute settlement provisions in the EU Association Agreement with Ukraine

The Association Agreement between Ukraine and the EU for the settlement of disputes makes provision for the use of various methods: consultations, arbitration, the establishment of an arbitration panel (Chapter 14). Notably, these provisions and, in general, dispute resolution mechanisms do not apply to decisions or any possible cases of inaction of the bodies established by the agreement. The Association Agreement stipulates general observance of the principle of a fair trial and the principle of legal certainty (Article 24). Either party may request consultations on specific issues related to the application of trade defence instruments (Article 50 bis). In this case, the consultations are given a period in which they must be held, which is 21 days.

There is a two-stage dispute settlement mechanism, which includes consultations prior to the violation of the arbitration stage of dispute settlement. Consultations are held through diplomatic channels within 30 days or within 15 days on urgent issues. In case of failure to complete the settlement of the dispute within the specified time, the party may request the establishment of an arbitration panel (paragraph 6 of Article 305). The procedure for creating such an arbitration group is stipulated by Article 306 of the Association Agreement and contains a standard clause for granting a mandate to the arbitration panel. Association Agreement holds a detailed description of the creation of the arbitration group and its timing. Article 308 details the procedure for consideration of

[1] Association Agreement between Ukraine and the EU. Retrieved from https://www.kmu.gov.ua/diyalnist/yevropejska-integraciya/ugoda-pro-asociacyu

a dispute by an arbitration panel, its authority to draw up a report, etc. According to Article 310, the arbitration panel shall take its decision within a largest period of no more than 150 days after its establishment. In addition, Article 321 makes provision for a decision-making procedure by an arbitration panel, which becomes binding on the parties to the agreement and does not impose specific rights and obligations on individuals and legal entities. In other words, the state party to the agreement is obliged by its national mechanisms to implement the decision made by the arbitration group. A separate procedure is prescribed for the category of energy relations related to energy carriers (paragraph 3 of Article 310, Article 314).

An essential element in the dispute resolution is the issue of compliance with the decision of the arbitration panel, as well as non-performance of obligations by either party. Article 315 of the Association Agreement makes provision for the possibility of imposing temporary measures in case of non-compliance in the form of temporary compensation. Moreover, temporary measures may take the form of raising tariff rates to the level applicable to other WTO members.

There are several other components of the dispute settlement mechanism under the agreement. First of all, in cases of disputes over access of goods to markets, the mediation mechanism is applied (Article 327). Articles 330 and 331 indicate the procedure for electing a mediator, the procedure for conducting mediation. If the dispute between the parties concerns the interpretation of acts of the EU institutions in the field of regulatory convergence, the agreement makes provision for a separate procedure, which is that the arbitration group applies to the Court of Justice to obtain its decision on this matter. In this case, the arbitral award is not rendered until the Court of Justice has given its ruling. The decision of the Court of Justice is binding on the arbitral tribunal (Article 322). Apart from certain procedures for resolving disputes between the parties, such a mechanism also involves joint institutions and bodies established by the Association Agreement.

For the EU, recourse to dispute settlement procedures set out in association agreements is an unusual practice. However, in accordance with the Association Agreement with Ukraine, the European Union, for the first time in its practice, applied this mechanism and initiated the establishment of arbitration. According to the EU, there have been attempts to resolve the dispute over the export of raw timber through negotiations, but this has not yielded any results. Notably, the consultations did not find a solution to the problem, and therefore the EU moved to the next stage of the process, requiring the establishment of an arbitration commission comprising three arbitrators (Articles 306-307 of the Association Agreement).

Membership of arbitration panels is often a stumbling block in resolving disputes, and the AA between Ukraine and the EU seeks to ensure the establishment of a commission through a set of complex balancing rules for the appointment of arbitrators. This dispute is the first commercial dispute to be resolved through an arbitration procedure under the Association Agreement. The parties to the dispute are, respectively, the parties to the Agreement, namely Ukraine and the EU.

In January 2019, the EU Delegation to Ukraine sent a verbal note No. 005/2019 to the Ministry of Foreign Affairs with a request to initiate consultations to resolve the dispute that arose in connection with the ban on exports of raw wood from Ukraine. On

June 20, 2019, in accordance with Article 306 of the Association Agreement with Ukraine, the European Union initiated an arbitration procedure regarding restrictions applicable to Ukraine in respect of exports of certain types of wood products. Pursuant to the provisions of this article, the EU, as the complaining Party, must submit to the respondent Party, Ukraine, as well as to the Association Committee in trade configuration, both a request for an arbitration panel and a summary of the legal grounds to the considered factual and legal questions.

At present, when examining the procedural aspects of the dispute between Ukraine and the EU within the AA, it should be generalised that the Parties resolve the dispute solely based on the provisions of Chapter 14 "Dispute Resolution" of the AA:

– EU request of January 15, 2019 for consultations with Ukraine in accordance with Article 305 of the AA;

– holding consultations on February 7, 2019 in order to achieve a mutually agreed result, which was not achieved by the Parties;

– EU request of June 20, 2019 for the establishment of an arbitration panel in accordance with Article 306 of the Association Agreement and in accordance with the procedure for establishing the arbitration panel in accordance with Article 307 of the AA, as well as the relevant provisions of the dispute settlement rules contained in Appendix XXIV to Chapter 14;

– approval of the composition of the arbitration group on January 29, 2020 and, accordingly, approval of the working procedure of the arbitration group, as well as the schedule of meetings of the arbitration group.

In support of its position, the EU refers to the fact that the permanent ban on exports of timber and lumber, which was introduced in accordance with the Law of Ukraine No. 2860-IV "On specific features of state regulation of business entities related to the sale and export of timber"[1] dated 08.09.2005 (Article 2) and a temporary ban on the export of all other unprocessed timber for a period of 10 years in accordance with the Law of Ukraine "On Amendments to the Law of Ukraine "On the specific features of state regulation of business entities related to sale and export of timber" regarding the temporary ban on exports of timber in its raw form"[2] dated 09.04.2015 (Article 2-1) are "bans" on exports from Ukraine to the European Union in the content of both the first sentence of Article 35 of the AA and Article XI:1 of GATT 1994 and as such are incompatible with Article 35 of the AA. In its written claim, the European Union states that these measures have "explicit protectionist objectives" and "are not applied in conjunction with an effective restriction on domestic consumption" [20]. It is worth recalling that Article 35 of the AA prohibits the restriction of imports and exports of any goods assigned for the territory of the other Party, excluding the exceptions specified in the UA or in accordance with Article XI of GATT 1994.

However, Ukraine argues that such a ban was imposed by the fact that the export ban introduced by the state in 2005 did not make provision for any commercial purposes,

[1] Law of Ukraine No 2860-IV “On the peculiarities of state regulation of business entities related to the sale and export of timber”. Retrieved from https://zakon.rada.gov.ua/laws/show/2860-15#Text

[2] Law of Ukraine “On Amendments to the Law of Ukraine" On Peculiarities of State Regulation of Business Entities Related to the Sale and Export of Timber” on the temporary ban on the export of raw timber”. (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/325-19#Text

but was introduced for environmental reasons: in 2005 valuable and rare wood species were considered as endangered and therefore at a high risk of extinction. This, in turn, can lead to deforestation and other environmental problems. Furthermore, the Ukrainian side emphasises that the 2005 export ban applies only to the export of lumber of valuable and rare species of wood. Ukraine handles the conservation of these unique species, which make a major contribution to the country's ecosystem.

As for the export ban, as regulated by the Law of Ukraine "On Amendments to the Law of Ukraine "On specific features of state Regulation of business entities related to the sale and export of timber" on the temporary ban on the export of raw timber"[1] dated 09.04.2015, Ukraine motivates its position by the fact that this measure is temporary, as it was introduced only for 10 years. Furthermore, a temporary ban on exports in 2015 was introduced in combination with restrictions on domestic production or consumption in accordance with the requirements of paragraph "g" of Article XX of GATT 1994, concerning the conservation of depleted natural resources.

Thus, from the comparative analysis of existing dispute resolution mechanisms for Ukraine in the process of European economic integration of Ukraine, it can be concluded that the AA not only creates new opportunities for trade for Ukraine, but also makes provision for a special process of involvement in the dispute settlement mechanism. In essence, such a mechanism stipulated in the agreement is closely interlinked with the mechanisms stipulated in the WTO and is not mutually exclusive. Apart from certain procedures for settling disputes between the parties, such a mechanism also involves joint institutions and bodies established by the agreement. By mutual consent, the Association Council adopts decisions that are binding and recommendatory in nature. The Council of the Association may amend the appendices to the AA, considering the evolution of EU law and the current standards set in international instruments (Article 463). The parties to the Association Agreement may refer any dispute concerning the interpretation, implementation, or good faith performance of the AA to the Council. The Council may resolve the dispute by making binding decisions.

The AA makes provision for general observance of the principle of a fair trial and the principle of legal certainty. The Association Agreement between Ukraine and the EU for the settlement of disputes stipulates the use of various methods: consultations, arbitration, the establishment of an arbitration panel (Chapter 14). These provisions and, in general, dispute settlement mechanisms do not apply to decisions or any possible cases of inaction of the bodies established by the agreement.

CONCLUSIONS

The rapid development of regional trade liberalisation leads to the emergence of new institutional mechanisms for interstate cooperation and cooperation with international integration associations. A comparison of the various treaty principles of EU cooperation with third countries suggests that the highest level of protection of individuals through the functioning of the dispute settlement mechanism is described by association

[1] Law of Ukraine "On Amendments to the Law of Ukraine" On Peculiarities of State Regulation of Business Entities Related to the Sale and Export of Timber" on the temporary ban on the export of raw timber". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/325-19#Text

agreements, some of which even resemble an "arbitration clause" (in particular, the EU-Chile agreement). Therewith, the Free Trade Agreement with the EFTA countries is also similar to the dispute settlement mechanism within the EU agreements but has a narrower nature of action.

Thus, each of the analysed agreements holds provisions for resolving disputes regarding its interpretation and application. The dispute settlement mechanisms in the EU Association Agreements with Ukraine, Georgia and Moldova are almost identical due to the slight difference in time between their initialling and the conceptual similarity of their provisions as FTA+ agreements with European WTO members. The approach of these agreements to delineate the general dispute settlement procedure through the Association Council and the special procedure for the commercial division of agreements through consultations, arbitration groups and mediation is justified and appropriate.

An analysis of the recent agreements signed with Ukraine, Georgia, and Moldova suggests that the approach to regulating dispute settlement mechanisms is largely uniform. Differences in the details of dispute settlement mechanisms may indicate that the parties are concerned about the likelihood and intensity of disputes.

It is safe to say that there is no universal model for resolving disputes in association (and stabilisation) agreements. However, among the agreements submitted for consideration, the greatest similarity of dispute settlement mechanisms can be traced in the agreements concluded within one policy area and region.

The process of resolving the first Ukraine-EU trade dispute in Ukraine regarding national restrictions on timber exports has been studied. Notably, the European Union, for the first time in its practice, applied the mechanism for resolving trade disputes and initiated the establishment of arbitration in accordance with the provisions of the Association Agreement. According to the EU, there have been attempts to resolve the dispute over the export of raw timber through negotiations, but this has not yielded any results. This dispute is the first commercial dispute to be resolved through an arbitration procedure under the Association Agreement. Currently, this dispute is procedurally at the stage of studying the positions of the parties.

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Suggested Citation: Smyrnova, K.V. (2020). Dispute settlement mechanisms provided by the association agreements concluded by the European Union with third countries. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(3), 63-79.

Submitted: 11/05/2020
Revised: 15/07/2020
Accepted: 17/08/2020

УДК 347.124:332.025.28
DOI: 10.37635/jnalsu.27(3).2020.80-94

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АКТУАЛЬНІ ПИТАННЯ ЗАСТОСУВАННЯ ЦИВІЛЬНО-ПРАВОВИХ СПОСОБІВ ЗАХИСТУ ПРАВА ДЕРЖАВНОЇ ВЛАСНОСТІ В УМОВАХ КРИЗИ МІЖНАРОДНОГО ПУБЛІЧНОГО ПРАВА

Анотація. *Окупація півострову Крим та ведення військових дій на Сході України привели до глобальних порушень прав усіх категорій власників. Державна власність постраждала чи не найбільше, оскільки незаконно націоналізованими виявились цілісні майнові комплекси, підприємства, установи та організації. Вирішувати існуючий конфлікт між державами Україна та Російською Федерацією потрібно, звісно, публічно-правовим інструментарієм, проте фактична криза міжнародного публічного права, яку ми на сьогодні спостерігаємо, не дає можливості цього зробити. Основна мета – дослідити особливості застосування цивільно-правових способів захисту права державної власності в умовах кризи міжнародного публічного права, визначити проблеми, що супроводжують таке застосування, та намітити шляхи їх вирішення. При підготовці дослідження було використано загальнонаукові і спеціальні методи наукового пізнання, зокрема діалектичний, формально-логічний, порівняльно-правовий, системного аналізу тощо. В дослідженні вказується, що в процесі захисту державної власності наявне велике кола суб'єктів, які можуть бути до нього залучені. У питанні представлення прокурором інтересів держави у цій категорії справ встановлена неоднозначність судової практики. Також вказується на особливість представництва в суді інтересів держави в особі Кабінету Міністрів України та Національного банку України. Автор відзначає також актуальність питання підсудності спорів щодо майна, яке перебуває на території АР Крим. Дослідивши Закон України «Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України» від 15.04.2014 р. та Конституцію Російської Федерації вказується на дуалістичність дії різних законів на одній території, що фактично унеможливлює виконати рішення суду, навіть якщо воно буде прийнято національним судом. Узагальненим автор робить висновок, що єдиною позицією всіх органів державної влади, що є суб'єктами управління державною власністю, має бути непогодження на компенсацію за націоналізоване майно від держави-агресора, адже повернути тоді його буде неможливо. Згода має бути дана лише на компенсацію за той дохід, який країна втратила в результаті неможливості використовувати свою власність. Уся національна та міжнародна судова практика має демонструвати таку волю українського народу.*

Ключові слова: *державна власність, захист прав, анексія території, націоналізація, цивільно-правові способи захисту прав.*

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CURRENT FEATURES OF THE APPLICATION OF CIVIL LAW METHODS FOR PROTECTION OF STATE PROPERTY RIGHTS UNDER THE CRISIS OF INTERNATIONAL PUBLIC LAW

Abstract. *The occupation of the Crimean peninsula and hostilities in eastern Ukraine have led to global violations of the rights of all categories of owners. State property has suffered the most, as entire property complexes, enterprises, institutions and organizations have been illegally nationalized. The main goal is to investigate the peculiarities of the application of civil law methods of state property rights protection in the crisis of public international law, to identify the problems that accompany such application, and to identify ways to solve them. While preparing the study general scientific and special methods of scientific cognition were used, in particular dialectical, formal-logical, comparative-legal ones, system analysis, etc. The research indicates that in the process of protecting state property, there is a wide range of entities that can be involved in it. The ambiguity of judicial practice has been established in the issue of representation of the state's interests by the prosecutor in this category of cases. It also points out the peculiarity of the representation in court of the interests of the state represented by the Cabinet of Ministers of Ukraine and the National Bank of Ukraine. The authors also note the urgency of the issue of jurisdiction over property disputes located in the territory of the Autonomous Republic of Crimea. Examining the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine" of 15.04.2014 and the Constitution of the Russian Federation indicates the dual nature of different laws in one territory, which virtually makes it impossible to be adopted by a national court. In general, the authors conclude that the only position of all public authorities that are subjects of state property management should be non-approval of compensation for nationalized property from the aggressor state, because then it will be impossible to return it. The consent should be given only for compensation of the income that the country has lost as a result of the inability to use its property.*

Keywords: state property, protection of rights, annexation of territory, nationalization, civil law methods of rights protection.

INTRODUCTION

The issue of state property rights protection has recently become rather important. Since 2014 not only private and collective owners have violated their property rights, but also the state as the owner. We consider the occupation of part of the territory of Ukraine and the conduct of hostilities in eastern Ukraine. The aggression of the Russian Federation against Ukraine is the basis for the violation of the rights of all owner categories [1]. In addition to the negative social effects, these events caused disproportionate damage to national economic interests. Thus, the Cabinet of Ministers of Ukraine in June 2014

determined that the amount of damage caused to the state of Ukraine only by the annexation of Crimea is about 1 trillion 80 billion UAH, without taking into account the cost of minerals and lost profits [2]. This amount has sufficiently increased till present.

Military action in eastern Ukraine is also causing great damage. At the presentation of their study at the Ukrainian Crisis Media Center, Atlantic Council analysts reported that infrastructure losses due to hostilities in eastern Ukraine were estimated at about $ 9.5 billion [3]. All damages must be compensated. Such conflicts should be resolved by public law tools at the political level. However, as we can see, no negotiations and Norman formats have yielded a positive result, so the owners are forced to use private law tools to obtain at least some solution to the issue of property rights violations. Fortunately, under national law public law entities have this opportunity. This is noted in their research and such scientists as V. Borisova [4], V. Dolgopolova [5], V. Yarotsky and D. Spesivtsev [6]. The practice of applying the rules of civil law allows to establish the causes of problems with the tools used, as well as to identify ways to solve them. The analysis of judicial practice also shows that there is no single concept among the judiciary for resolving disputes related to violations of state property rights. This determines the relevance of the chosen research topic.

Issues of protection of state property rights have been studied by such national and foreign researchers as E. Bernarda [7], O. Bignyak [8], V. Borisova [4], V. Butnev [9], A. Vershinin [10], O. Gulida [11], L. Dolgopolova [5], S. Domuschi [12], R.O. Stefanchuk [13], O. Karmaza [14], V. Krivenko [15], O. Pervomaisky [16], R. Stefanchuk [13], D. Spesivtsev [6], Ye. Sukhanov [17], Ye. Kharitonov [18], A. Yarema [15], V. Yarotsky [6] and others.

Despite the large number of scientific publications on the property rights protection in general, the protection of state property rights cannot be considered sufficiently studied. With Ukraine's independence and the construction of a market economy, scholars focused on private property and its protection, while state property actually remained in the shadows. We associate the problem of lack of attention primarily with a certain negative attitude towards it by the population, which perceives it as forcibly taken from private owners in Soviet times. Now the attitude to state property is gradually changing, as it has become one of the forms of property rights, far from dominant in the economy of our state. Its purpose has also changed radically, today it is the foundation of economic security of our state, as well as the implementation of its social functions. The importance of the role it plays creates the need to protect it in all possible forms and ways. Judicial protection of violated rights is perhaps of paramount importance, O. Karmaza points out in her study, noting: "In the arsenal of state remedies designed to guarantee human rights and freedoms, the legitimate interests of society and the state, the courts play a leading role" [14].

The purpose of the study is to investigate the peculiarities of the application of civil law methods of state property rights protection in the crisis of public international law, to identify problems that accompany such application, and to identify ways to solve them.

1. MATERIALS AND METHODS

General scientific and special methods of scientific cognition were used in the study, in particular dialectical, formal-logical, comparative-legal, system analysis, etc. The

dialectical method is aimed at creating an unambiguous, static picture of the world. It is described by the fact that it considers things and phenomena in isolation from each other, reduces the variety of forms of movement to one form, such as mechanical, and denies the contradictions of movement and development. The dialectical method of cognition of legal phenomena provides a scientific analysis of the concepts of property protection, forms and methods of protection, the grounds for seeking protection. The formal logical method is used in the formulation of the concepts of violation of the law, the subjects of the application for protection, etc. The main formal logical research methods include: the method of classification, generalisation, and typology, inductive and deductive research methods, construction of concepts, argumentation, logic and some others. Logical methods are based on the requirements and principles of formal logic. Formal logic studies the following forms of thinking: concepts, judgments, proofs, arguments, justifications, etc., given their logical structure, despite their specific content. Logic examines forms of thinking in terms of their structure and describes the most correct methods of thinking.

The comparative legal method was used in the study of the statute of limitations in cases of violation of state property rights, as well as to consider the legislation on the prosecutor's participation in this category of cases. The comparative legal method involves comparing single-line legal concepts, phenomena, and processes, as well as clarifying the similarities and differences between them. In this method, conclusions by analogy are widely used, based primarily on similar features of the facts under study. This allows to transfer features from one phenomenon under study to another, eliminates the eclectic combination of elements of different legal systems without delving into the features of their genesis, the dynamics of functioning and prospects for evolution. The use of the method of systematic analysis allowed to determine the most acceptable civil law methods of protection of state property rights in the crisis of public international law. The application of a systematic approach in legal science is a fundamental methodological orientation of the study of legal phenomena, their interpretation, and construction of a theoretical model of the studied complex of phenomena, according to which society itself is considered as objectively existing, natural, complex, polystructural, and adaptive object. This method adapts dynamic system objects, which constitute a form of human life as a biological species. There are five basic principles of a systems approach. The first is integrity, which allows to consider both the system as a whole and at the same time as a subsystem for higher levels. The second is the hierarchy of the structure, i.e. the presence of many elements located on the basis of the subordination of the elements of the lower level to the elements of the higher level. The implementation of this principle can be considered on the example of any particular organisation, system, or phenomenon. Any organisation is an interaction of two subsystems: control and managed. The third principle is the principle of structuring, which allows to analyse the elements of the system and their interrelation within a particular structure. As a rule, the process of functioning of the system is determined not only by the properties of its individual elements, but also by the properties of the structure itself. The fourth principle is the principle of multiplicity, which allows to use many cybernetic, economic, and mathematical models to describe individual elements, and the system as a whole.

2. RESULTS AND DISCUSSION

Historically, the mechanism of property rights protection has played an important role in the development of society and in the process of state formation. Even in the system of Roman law, its protection was given much attention. The most important civil law methods of property rights protection were property claims, in particular, there was vindication (*rei vindicatio*), negatory (*actio negatoria*), the claim of the Publician (*actio Publiciana*), the claim for prohibition (*actio prohibitoria*), and private [19]. In addition to general lawsuits filed for any violation of property rights, lawsuits were also filed against the violator personally in accordance with the nature of his actions, namely – *actio legis Aguiliae*, *actio furti*, *actio iniuriarum*, etc. It should be noted that the modern mechanism of property rights protection is based on the basic principles developed in the Roman Empire, and Ukraine is no exception [18]. Examining the norms of the civil legislation of Ukraine, we will be able to make sure that the methods of civil protection provided by it quite strongly resonate with the corresponding methods of Roman civil law.

Before moving on to the immediate object of our study, let's define the concepts used. Thus, it will be necessary to explore the concept of property rights protection, forms and methods of protection, as well as directly the civil law method. Therefore, the concept of property rights protection does not have a clear legislative definition. Chapter 29 of the Civil Code of Ukraine[1] establishes only the principles of protection of property rights. Scientists also interpret it differently. Ye. Kharitonov believes that "protection of property rights – is a set of legal remedies used by the court, authorized by the state authorities or the owner to ensure the implementation and restoration of the violated property rights" [9]. Ye. Sukhanov defines the concept of property rights protection as a set of civil remedies (methods) that are used in connection with the commission of offenses against property relations [17].

Both definitions are given differently, but fairly accurately reflect the essence of the concept. Ye. Sukhanov based his definition on the cause-and-effect relationship between certain events. Ye. Kharitonov laid a different principle in the construction of his definition of the concept and pointed to the essence of the phenomenon, the subjects that influence it, as well as the purpose of the subjects. We are more impressed by this very concept of understanding the term. The only thing we would like to clarify is that the reason for seeking protection is not only a violated right, but also a non-recognized or disputed one. Therefore, the protection of property rights, in our opinion, should be considered as a set of legal remedies used by the court, authorized by the state authorities or the owner to ensure the implementation of unrecognized or disputed rights, as well as restoration of violated property rights. We believe this version will present the whole set of reasons that determine the right to protection.

There is a point of view where form of subjective rights protection is understood as a set of internally organized organizational measures for the protection of subjective rights, which take place within a single legal regime [10]. The form of protection, according to A. Vershynina, is a procedure or type of jurisdictional action to protect rights in general and due to the type of protection activities [10]. O. Bigniak's opinion is

[1] Civil Code of Ukraine. (2003, September). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20201016#Text

rather interesting too. He characterizes the form of legal protection as the one "aimed at restoring (recognizing) violated (disputed) rights and legitimate interests" [8].

We believe that all the positions of these authors are true, but we are convinced that certain forms of protection should also be based on the concept of establishing the essence of the phenomenon, the subjects related to it, as well as the purpose of their activities. Taking this into account we propose to understand the form of rights protection as a set of internally organized organizational measures to protect subjective rights, carried out by courts, authorized state bodies or legal entities independently and carried out within a single legal regime.

The method of the right protection is the actions provided by the law which are directed on protection of this right. Such actions are the final acts of protection in the form of substantive legal actions or jurisdictional actions to remove obstacles to the exercise of their rights or the cessation of offenses, the restoration of the situation that existed before the violation [20]. The method, according to O. Gulida, embodies the goal to be achieved by the subject of protection, hoping to stop the violation of their rights or compensation for damages incurred in connection with the violation of these rights [11].

Analyzing the method of protection of directly subjective civil law and interest, it should be considered as a system of lawful, ie defined or allowed by law, actions of the subjects of protection and substantive legal effect of these actions, which prevents, eliminates or compensates for violations, non-recognition or challenging subjective civil law and interest [7]. Also, some civilians understand the way to protect subjective civil rights and interests is a type of substantive legal claims that can be made by a person in court [15]. There is also an opinion that the method of protection of subjective civil law and interest is a substantive measure, ie enshrined substantive measures of a coercive nature, through which the restoration (recognition) of the violated (disputed) right and influence on the offender [13]. We are mostly impressed by the first definition given by Ye. Bernada, because it reflects the essence of the concept. The positive thing is that the author deciphers the system of legal actions as those defined or allowed by law. This is fully in line with the constitutional norm on the protection of rights, according to which everyone is guaranteed the protection of their rights, freedoms and interests from violations and unlawful encroachments by any means not prohibited by law[1]. That is, the construction of this constitutional norm provides for the possibility of applying methods of the right protection, including those not provided by procedural norms.

Direct civil law methods of property rights protection establishes Art. 16 of the Civil Code of Ukraine, namely: 1) recognition of the right; 2) recognition of the transaction as invalid; 3) termination of the action that violates the right; 4) restoration of the situation that existed before the violation; 5) compulsory performance of duties; 6) change of legal relationship; 7) termination of the legal relationship; 8) compensation for damages and other methods of compensation for property damage; 9) compensation for moral (non-pecuniary) damage; 10) recognition of illegal decisions, actions or omissions of a body of state power, a body of power of the Autonomous Republic of Crimea or a

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

body of local self-government, their officials and executives[1]. Taking into account the fact that the state is equal to other parties to civil law relations, we claim that it has the same right to legal protection and can use all the above civil law methods to protect their violated, disputed or unrecognized rights. Of course, each of these methods will be characterized by different efficiency, and therefore more or less used. But in order to determine the effectiveness of such methods, it is necessary to characterize the subjects who will participate in the protection procedures.

Thus, the peculiarity of the process of protection of state property is the presence of a wide range of entities that can be involved in it. First of all, these are the prosecutor's offices that represent and protect the rights and interests of the state. In particular, according to part 3 of the Order of the General Prosecutor's Office of Ukraine "About the organization of activity of prosecutors concerning representation of interests of the state in court and at execution of court decisions" from 09/21/2018 No 186, the representative function of prosecutor's office is realized by preparation and presentation of claims; interference in cases initiated by lawsuits (applications) of other persons; initiating the review of court decisions; participation in proceedings; participation in enforcement proceedings in the execution of decisions in cases in which the prosecutor represented the interests of the state [21].

According to O. Pertsov, the prosecutor “appeals to the court in the interests of the state, in a statement of claim or other statement, the complaint proves what is the violation of state interests, their protection, the statutory grounds for appeal to the court, and states the body authorized by the state to functions in disputed legal relations” [22]. The ambiguity of the case law on the prosecutor's representation of the state's interests in court can be seen in the example of the decision of the Commercial Court of Cassation in the Supreme Court in case No4 / 166 "B" of October 2, 2018, the decision of the Commercial Court of Cassation in the Supreme Court in case No923 / 129/17 of 5 December 2018 and the decision of the Supreme Commercial Court of Ukraine in case No911 / 79/14 of 21 July 2015. Thus, according to the first resolution, the prosecutor may represent the interests of the state in court in exceptional cases that are expressly provided by law. At the same time, courts must assess exceptional cases, taking into account the presence (justification by the prosecutor) of a violation or threat of violation of the interests of the state. The legal position of the Armed Forces of Ukraine is based on the fact that the interests of the state should be protected primarily by the relevant subjects of power, and not by the prosecutor. To ensure that the interests of the state do not remain unprotected, the prosecutor plays a subsidiary role, replacing in the proceedings the relevant subject of power, which is either absent or, contrary to the law, does not provide protection or does so improperly. In each such case, the prosecutor must state (and the court must verify) the reasons that prevent the protection of the interests of the state by the proper subject, and which are the grounds for the prosecutor to go to court. The following ruling states that, in considering each case separately, the Court must assess the extent to which the prosecutor's participation in the proceedings complies with the principle of equality of parties. The prosecutor may represent the interests of the

[1] Civil Code of Ukraine. (2003, September). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20201016#Text

state in court in exceptional cases that are expressly provided by law. The extended interpretation of cases (grounds) for the prosecutor to represent the interests of the state in court does not comply with the adversarial principle, which is one of the principles of justice. Similarly, in cases of representing the interests of the state in court, the prosecutor actually replaces in the proceedings the relevant subject of power, which is either absent or, contrary to the law, does not provide protection or does so improperly.

It is important to note the peculiarities of representing the interests of the state in court acting on behalf of the Cabinet of Ministers of Ukraine and the National Bank of Ukraine, because it can be carried out only by the Prosecutor General or Regional Prosecutor's Office only by written order or order of the Prosecutor General or his first deputy. Similarly, while confirming their authority in court, prosecutors must take into account these requirements of the law.

The issue of statute of limitations in cases of violation of the state property rights is also extremely relevant, as the practice of the Supreme Court on this issue has changed significantly. It will be recalled that earlier the position of the Supreme Court of Ukraine was as follows: the statute of limitations began to count from the moment when a legal entity or a subject of governmental powers committed an offense. Nowadays according to the decision of the Grand Chamber of the Supreme Court in case No469 / 1203/15-ts of May 22, 2018 [23], the statute of limitations is calculated from the moment when the person whose right has been violated or the prosecutor learned about such violation. Analyzing these changes, they should be considered positive, as it helps not to lose the statute of limitations in cases of long-term concealment of violations of state property rights, however, the implementation of the updated rule should be considered difficult, as the question remains how a prosecutor can learn about violations when the function of prosecutorial oversight no longer exists

It should also be borne in mind that the participation of the prosecutor in the court is purely representative, and the party to the dispute in its purest form cannot be called that. If the Cabinet of Ministers of Ukraine is on the plaintiff's side; the central body of executive power, which ensures the formation and implementation of state policy in the field of state property management; ministries, other executive bodies and state collegial bodies, the State Property Fund of Ukraine; bodies that ensure the activities of the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine; bodies that manage state property in accordance with the powers defined by certain laws; state business associations, state holding companies, other state economic organizations (hereinafter – economic structures), state enterprise, institution, organization or business association, 100 percent of shares (bonds) which belong to the state or other business company, 100 percent of shares (bonds) owned by the state; or the National Academy of Sciences of Ukraine, branch academies of sciences – all these items are subjects of management of state property objects, and therefore the full-fledged and authorized party in civil proceedings.

While examining the question of whether public authorities and state institutions, enterprises, companies and societies that do not own state property, but which were only in their operational management or full economic management in the territory of the Autonomous Republic of Crimea, can protect state property rights, should be answered unequivocally that these entities can only represent the state in the procedure of violated,

disputed or unrecognized property rights protection. They, as the titular owners, are also not deprived of legally secured opportunities to independently file claims for protection of rights to this property.

If we analyze the causes of damage to the state as the owner in the territory of the Autonomous Republic of Crimea, it should be noted that the annexation of our peninsula was accompanied by the adoption of certain government decisions by illegal authorities. In particular, the resolution of the Verkhovna Rada of the Autonomous Republic of Crimea "On the independence of Crimea" from 17.03.2014, which states that: "State property of Ukraine, which is on the day of this Resolution in the Republic of Crimea, is state property of the Republic of Crimea [24]. Another resolution of the Verkhovna Rada of the ARC "On nationalization of enterprises and property of maritime transport under the control of the Ministry of Infrastructure of Ukraine and the Ministry of Agrarian Policy and Food of Ukraine located in the Republic of Crimea and the city of Sevastopol" illegally nationalized state property (integral property complexes) state enterprises. Due to these illegal decisions, most of the state property was illegally nationalized, which caused great damage to the state economy. Realizing the complexity and duration of court proceedings, if the parties to the case are the state of Ukraine and the state of the Russian Federation, O. Pervomaisky believes that potentially possible participants in court proceedings may be the so-called business entities that (Ukrainian), on the one hand, suffered (losses), and, on the other hand, the Russians, whose actions caused such damage [16]. We completely share this position of the scientist, believing that nowadays this is almost the only possible way out of the situation. However, the issue of jurisdiction should be raised in this regard, as it is not possible to apply any court proceedings without resolving them.

Examining the issue of jurisdiction over disputes over property located in the territory of the Autonomous Republic of Crimea, we should mention the Law of Ukraine "On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine" from 15.04.2014 No1207-VII[1]. This law refers to the temporary occupation of the territory of Ukraine and emphasizes that this territory is subject to the Constitution and Laws of Ukraine. Courts in different categories of cases are clearly established, to which cases are transferred from the courts of the Autonomous Republic of Crimea and which will consider the relevant cases. However, in Art. 65 of the Constitution of the Russian Federation provides that the Republic of Crimea is part of the federation. Such a dual nature of the operation of different laws in the same territory makes it virtually impossible to enforce a court decision, even if it is taken by a national court.

O. Pervomaysky considers the recognition of the decision of the ARC authority and (or) the Sevastopol city authority as illegal among the most promising civil law methods of state property rights protection. As these bodies have made illegal decisions on nationalization, they are responsible for the violation of property rights of the state of Ukraine, according to the author. In this regard, we believe that this method has been

[1] Law of Ukraine No 201207-VII “On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine”. (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1207-18

possible from the first stage of redistribution of property in the republic. It will be recalled that this stage was characterized by the immediate nationalization of state property of the largest national companies, such as Chornomornaftogaz, Ukrtransgaz, railways, ports, and shipping companies. However, it was not possible to implement it. It would be recalled that the Russian constitution recognized Crimea as part of the federation, so companies that did not re-register before March 1, 2015 in accordance with Russian law were deprived of the right to operate in Russia and were subject to liquidation. We have not found any court case concerning the invalidation of the decision of the ARC authority and (or) the Sevastopol city authority. As a result we conclude that, unfortunately, the provisions of the Law adopted in Ukraine "On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine" remained declarative.

If a decision is supposed to be challenging or not recognizing the property right of the state of Ukraine to a specific property, objects or integral property complexes, it is also possible to apply such a method of property rights protection as the recognition of this right. In the case when illegal decisions contributed to the acquisition of state property of Ukraine by economic entities of the Russian Federation, the appropriate ways to protect the property rights of the state of Ukraine or the title rights of Ukrainian economic entities are vindication lawsuits.

It should be noted that the vindication claim in the days of the Roman law protected the owner from infringements of the rights which consisted of actions of other person who kept his property illegally. This method is provided by the Civil Code of Ukraine[1], which contains rules that allow you to claim property from illegal possession. In particular, Art. 330 of the Civil Code of Ukraine provides that if the property is alienated by a person who did not have the right to do so, a bona fide purchaser acquires ownership of it, if in accordance with Art. 388 of the Civil Code of Ukraine such property cannot be demanded from it. At the same time, Art. 388 of the Civil Code also provides that if the property under the repayment agreement is acquired from a person who had no right to alienate it, about which the purchaser did not know and could not know (bona fide purchaser), the owner has the right to demand this property from the purchaser only if the property left the possession of the owner or the person to whom he transferred the property into possession, not of their own volition otherwise. Therefore, the plaintiff may file a vindication lawsuit against a bona fide purchaser in order to claim illegal possession of his property. That is, a vindication claim is a non-contractual requirement of the owner to claim his property from someone else's illegal possession. The property must be individually identified and returned. Examples of the success of such a return are already in national practice. In particular, thanks to the active position of the Prosecutor's Office of the Autonomous Republic of Crimea, on March 6, 2019, the Commercial Court of Kyiv region satisfied the claim of the Deputy Prosecutor of the city of Yalta. The court invalidated the decision of the village council, which illegally allocated to the use of a private enterprise land plot of 0.16 hectares, located in the Autonomous Republic of Crimea, Yalta, Kurpaty village, and obliged to return it to state

[1] Civil Code of Ukraine. (2003, September). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20201016#Text

ownership. This case was considered on a new basis after the cancellation on September 21, 2018 by the Supreme Court of court decisions, which unreasonably denied the claim of the Deputy Prosecutor of the city of Yalta. It is important that due to the procedure of resumption of lost court proceedings initiated by the Prosecutor's Office of the Autonomous Republic of Crimea, the courts satisfied the claims of prosecutors to return real estate to state ownership with a total value of about UAH 4.5 million. Compared to the total amount of damage caused by the occupation of Crimea, this amount seems too meager. But its presence, in our opinion, is of fundamental importance, as it indicates the possibility of defending the violated rights of the state as the owner.

Compensation for damage in the category of cases under investigation also has its own characteristics. V. Yampolsky's research tells about the inexpediency of initiating the opening of cases for lawsuits arising from labor relations (in terms of reinstatement at work or payment of appropriate amounts from enterprises registered in the Crimea); on consumer protection; about compensation for damage. The scientist points out that "under certain conditions, such court decisions can be enforced through international agreements concluded between Russia and Ukraine. In particular, the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, adopted in Minsk on 22.01.93, which provides for the possibility of recognition and enforcement of judgments rendered in civil and family cases, as well as sentences in civil proceedings. The issue of recognition and enforcement of the above categories of decisions is regulated by Sec. III of the Convention, which establishes the procedure for recognizing decisions that have entered into force, depending on whether they require enforcement. A decision that does not require enforcement, in accordance with Article 52 of this document is recognized in the territory of any state party to the convention without special proceedings. However, this rule shall not apply if there is a judgment of a court of that country previously rendered in the same dispute between the same parties and it has entered into force, or the case in question under the convention or the law of that country falls within the exclusive jurisdiction of its courts". In connection with the mentioned above V. Yampolsky considers it expedient to initiate consideration of civil cases on claims on recovery of alimony from a resident of the peninsula, who received a passport of a citizen of the Russian Federation; arising in connection with real estate in the Crimea; regarding the acceptance of the inheritance by the heirs; to carriers arising from contracts of carriage of goods, passengers, luggage, mail. In this regard, we consider the author's position to be correct, insisting on the effectiveness of compensation for damage caused by the defendant's involvement in the state of the Russian Federation [25].

A positive example of this protection method for us is the case considered by the Permanent Court of Arbitration in The Hague on the claim of former Yukos shareholders, represented in the process by Group Menatep Limited (GML), to Russia, according to which the Russian Federation must pay compensation losses of 50.02 billion USA dollars [16]. Of course, consideration of such cases in international courts is possible only after passing all effective national courts [26].

International case law is aware of claim cases for compensation for damage caused by the occupation. Similar lawsuits were filed by Cypriot citizens against Turkey in connection with the events of 1974. The decision of the Grand Chamber of the ECHR in the case of Dimopoulos and Others v. Turkey (2014) awarded the applicants EUR 90

million in damages [20]. In the decision of the Grand Chamber in Georgia v. Russia (3213255/07), the European Court of Human Rights ruled that Russia should pay Georgia EUR 10,000,000 in respect of non-pecuniary damage caused to a group of at least 1,500 Georgian nationals [27]. Seeing real examples of court decisions, we hope that Ukraine will be able to return the occupied territories and the Russian Federation will reimburse the losses caused by the occupation. There are a sufficient number of mechanisms for this, because if the defendant does not want to comply with court decisions, it is always possible to recover the property belonging to the occupier. The only position of all public authorities that are subjects of state property management should be that we do not agree to compensation for nationalized property, because then it will be impossible to return it, we must agree to compensation for the income that the country lost in as a result of the inability to use this property.

If we talk about the situation with the violation of state property rights in eastern Ukraine, it is important to note that in the occupied territories there are 388 state-owned enterprises, 4500 state-owned objects (real estate) [28]. In general, according to experts, about 50% of the industrial potential of Donbass has been lost. The equipment of individual enterprises was exported to the territory of the Russian Federation or dismantled for scrap metal. Therefore, the state's losses from the inability to use its property or its physical destruction are enormous. It is important that the civil law remedies described above in the study of the occupied Crimea are possible and entirely appropriate for the state property situation in Donbas.

CONCLUSIONS

The occupation of part of the territory of Ukraine and the conduct of hostilities in the east of our state have intensified the issue of the need to protect state property rights as never before. Despite the fact that all categories of owners are harmed, losses due to violations of state property rights directly affect the national security of our country. Nowadays experts estimate the state's losses of about 3 trillion hryvnias. Taking into consideration that self-defense within a non-jurisdictional form of rights protection is virtually impossible in the current situation; it is on judicial protection that the greatest hopes are put. The state, as a party to civil law relations, has an equal subjective right to protection along with other participants, so all methods of protection with greater or lesser effectiveness can be used to protect the right of state property. The study points to the peculiarity of the process of state property protection, which consists of a large number of entities that can be involved in it. The ambiguity of judicial practice has been established in the issue of representation of the state's interests by the prosecutor in this category of cases. It also emphasizes the obligation of the Prosecutor General of Ukraine to speak on behalf of the state in court representing the Cabinet of Ministers of Ukraine and the National Bank of Ukraine or the Regional Prosecutor's Office only by written instruction or order of the Prosecutor General or his first deputy or deputy in action.

It is insisted that the issue of statute of limitations in cases of violation of state property rights is also extremely relevant, as the Supreme Court's practice on this issue has changed significantly: previously the statute of limitations began to count from the moment a legal entity or government official now the statute of limitations is deducted from the moment when the person whose right has been violated or the prosecutor has

learned about such violation. The authors assess these changes positively, however, considers the implementation of the updated rule difficult, as the function of prosecutorial supervision no longer exists, and therefore the prosecutor has limited opportunities to learn about violations. In the study of the subjects of petitions for rights protection, the authors point out that public authorities and state institutions, enterprises, companies and societies that do not own state property, as titular owners, have legally secured opportunities to independently file claims for protection of rights to this property.

Analyzing the direct civil law methods of state property rights protection, in particular the recognition of the decision of the ARC authority and (or) the Sevastopol city authority as illegal, we noted its inefficiency due to the redistribution of property in the republic. Studying examples of successful return of state property by the Prosecutor's Office of the Autonomous Republic of Crimea, the fundamental importance of such cases was pointed out, as they testify to the possibility of defending the violated rights of the state as the owner. It is a general conclusion that the only position of all state authorities that are subjects of state property management should be non-approval of compensation for nationalized property from the aggressor state, because then it will be impossible to return it. We must agree to compensation for the income that the country has lost as a result of the inability to use its property. And all national and international jurisprudence must demonstrate such a will.

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Suggested Citation: Kalaur, I.R., & Moskaliuk, N.B. (2020). Current Features of the Application of Civil Law Methods for Protection of State Property Rights under the Crisis of International Public Law. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(3), 80-94.

Submitted: 08/06/2020
Revised: 19/07/2020
Accepted: 23/08/2020

УДК 347.1
DOI: 10.37635/jnalsu.27(3).2020.95-108

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ТЕОРЕТИЧНІ ТА ПРАКТИЧНІ ПРОБЛЕМИ ЗАХИСТУ ПРАВА ВЛАСНОСТІ В СПАДКОВИХ ПРАВОВІДНОСИНАХ

Анотація. *Актуальність обраної теми обумовлюється тим, що спадкування є однією з найпоширеніших підстав набуття майна у власність фізичними особами. Зважаючи також на ту обставину, що найчастіше спадкоємцями є родичі спадкодавця, з метою уникнення спорів між ними, законодавство має містити ефективний механізм як врегулювання відносин між спадкоємцями з приводу перерозподілу спадщини чи зміни черговості спадкування, так і механізм захисту прав та інтересів спадкоємців у разі виникнення спорів. Метою даної статті є виявлення прогалин та суперечностей в цивільному законодавстві та судовій практиці при дослідженні основних способів захисту прав спадкоємців у спадкових правовідносинах, та способів їх вирішення. Зазначається, що при наявності спорів між спадкоємцями здійснюється не захист права власності, адже спадкоємці ще не набули право власності, а захист права на спадщину, за яким вони зможуть набути право власності на спадкове майно. Відзначається відсутність в законодавстві України конкретного переліку способів захисту прав спадкоємців, що негативно впливає на судову практику, адже часто використовують неналежні способи захисту. В статті аналізується судова практика розгляду спадкових спорів та визначаються основні помилки, які допускають суди при вирішенні таких справ. Окрема увага зосереджена на дослідженні таких способів захисту як визнання свідоцтва про право на спадщину недійсним, визнання спадковим того майна, яке належало померлому, але не ввійшло до складу спадщини. В статті досліджено момент виникнення права власності на спадкове майно у спадкоємців та здійснено критичний аналіз норми ст. 1268 ЦК, якою визначається момент, з якого спадщина належить спадкоємцеві – а саме з моменту відкриття спадщини. Відзначається колізія між нормами ст. 1268 та ст. 3 Закону України «Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень» в частині встановлення моменту виникнення права власності на нерухоме майно в порядку спадкування.*

Ключові слова: спадщина, спадкоємці, заповіт, цивільне законодавство, нерухоме майно.

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THEORETIC AND PRACTICAL ASPECTS OF PROTECTION OF THE RIGHT OF OWNERSHIP IN THE HEREDITARY RELATIONS

Abstract. *The relevance of the subject matter lies in the fact that inheritance is one of the most common grounds for acquiring property by individuals. Considering the fact that the heirs are often relatives of the testator, to avoid disputes between them, the law should contain an effective*

mechanism for resolving relations between heirs over the redistribution of inheritance or change of the order of inheritance, and a mechanism to protect the rights and interests of heirs in case of disputes. The purpose of this study is to identify gaps and inconsistencies in civil legislation and case law in the study of the main ways to protect the rights of heirs in hereditary relations, and ways to resolve them. It is noted that in the presence of disputes between the heirs, it is not the protection of property rights that is carried out, because the heirs have not yet acquired the right of ownership, but the protection of the right to inheritance, according to which they will be able to acquire ownership of the inherited property. There is a lack of a particular list of ways to protect the rights of heirs in the legislation of Ukraine, which has a negative impact on judicial practice, as they often use inappropriate methods of protection. The study analyses the case law of hereditary disputes and identifies the main mistakes that courts make in resolving such cases. Particular attention is focused on the study of such methods of protection as the recognition of the certificate of inheritance as invalid, the hereditary recognition of the property that belonged to the deceased, but was not part of the inheritance. The study investigates the moment of ownership of the hereditary property of the heirs and a critical analysis of the provisions of Article 1268 of the Civil Code, which determine the moment from which the inheritance belongs to the heir – namely from the moment of opening the inheritance. There is a conflict between the rules of Article 1268 and Article 3 of the Law of Ukraine "On state registration of real rights to immovable property and their encumbrances" in terms of establishing the moment of ownership of immovable property by inheritance.

Keywords: inheritance, heirs, will, civil legislation, immovable property.

INTRODUCTION

Acquisition of property by inheritance is often accompanied by disputes between the heirs over the size of the inherited shares, the presence or absence of the right to inherit, as well as the procedure for exercising the right of ownership in the future. Protection of property rights can be carried out not only when the heirs have already acquired the right of ownership of the inheritance and this right is violated by other persons, but also at the stage of acceptance of the inheritance, by other potential heirs. The specific feature of the protection of the rights of potential heirs is that in this case it is not the protection of property rights, because they have not yet acquired it, but the protection of the right to inheritance, under which they can acquire ownership of inherited property.

Inheritance is one of the common grounds for acquiring property by individuals. Legal regulation of inheritance is carried out by Book Six of the Civil Code of Ukraine[1] which defines the grounds and procedure for acceptance and refusal of inheritance, the moment from which the inheritance belongs to the heir, requirements for the will and its types, grounds and procedure for invalidation of the will. However, neither the Book Six nor Article 16 of the Civil Code of Ukraine specify particular ways to protect inheritance rights. Therewith, their list can be determined based on the provisions of Article 16 of the Civil Code of Ukraine, considering the specific features of hereditary relations. Thus, such methods of protection include invalidation of the will, invalidation of the certificate of the right to inherit or invalidation, recognition of the right to inherit in case of its challenge, or non-recognition by other potential heirs, etc.

Hereditary relations have been the subject of research by many civilians, including

[1] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15

M.M. Dyakovych [1], Yu.O. Zaika, O.O. Kot [2], L.V. Kozlovskaya [3], O.V. Korotyuk, O.E. Kukhariev, O.P. Pechenyi, Ye.O. Riabokon, I.B. Spasybo-Fatieieva, S.Ya. Fursa, E.A. Kirillova [4], I.A. Dikovska [5], I. Musaeva [6], M. Hammad [7], K. Spivack [8], V. Tadros [9], V. Zarosylo [10], V.A. Maltsev [11], V.V. Vapniarchuk [12], M. Zalutski [13], A. Bell [14], F. Viglione [15], Z.V. Romovska [16], and others. Therewith, most of them concerned either the general provisions of inheritance law or certain aspects of inheritance relations. Therefore, issues of protection in hereditary legal relations are understudied in the modern period. All this determines the relevance of the chosen subject matter. Thus, Z.V. Romovska analysed the ways of protection of inheritance rights and the types of claims with which the heirs have the right to go to court [16]. M.M. Dyakovych explored the legal nature of the right to inherit [1]. Considering the features of protection of hereditary rights, O.O. Kot notes that the main problems are related to the protection of inheritance rights, due to the lack of modern private law institution of inheritance law [2]. At the same time, not all legislative and practical gaps and contradictions in the protection of inheritance rights have been studied by these civilists, which necessitates a more thorough study.

The purpose of this study is to identify gaps and inconsistencies in civil legislation and case law in the study of the main ways to protect the rights of heirs in inheritance, and ways to resolve them. The main objectives of this study include a thorough analysis of the provisions of the Book Six of the Civil Code of Ukraine, which regulates hereditary relations, as well as the judicial practice of resolving inheritance disputes; determination of the main ways to protect the rights of heirs, identification of the main mistakes made by courts in resolving inheritance disputes; formulation of proposals to fill the gaps and contradictions identified in this study.

1. MATERIALS AND METHODS

To reveal the main ways to protect the rights of heirs in inheritance, the study analyses the Civil Code of Ukraine[1], other laws and regulations governing the acceptance of inheritance, as well as the legal regime of real estate as a type of inherited property. The study also identifies gaps and contradictions in the studied regulations, as well as ways to overcome them. Notably, in the inheritance dispute settlement, it is not the protection of property rights that is carried out, because heirs have not yet acquired them yet, but the protection of the right to inheritance, under which they can acquire ownership of inherited property. There is a lack of a particular list of ways to protect the rights of heirs in the legislation of Ukraine, which has a negative impact on judicial practice, as they often use inappropriate methods of protection. The study analyses the judicial practice of hereditary disputes and identifies the main mistakes that courts make in resolving such cases.

To achieve the purpose of the study, the following research methods were used: comparative, dialectical, and Aristotelian, and other general scientific methods of scientific knowledge, in particular, analysis, synthesis, specific definition, regulatory, systemic, etc. which allowed to identify problems of conflict regulation of the moment of

[1] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15

ownership of inherited real estate, and to draw conclusions for their elimination. The analysis of legislation and legal science demonstrated the diversity of opinions in the civilistic literature and practice on the origin of the right to inherited real estate, the possibility of including in the inheritance mass the real estate unregistered by the testator in its lifetime, etc. The method of synthesis helped define the main approaches to understanding the protection of inheritance rights in the Ukrainian private law doctrine. The methodological base helped identify the basic concepts related to the protection of inheritance rights, and a hermeneutic interpretation of the rules of inheritance law was carried out to clarify the possibility of applying specific rules of law to solve problems associated with contradictions in civil legislation regarding the emergence of property rights to inheritance.

A theoretical and retrospective analysis of scientific articles of leading civilists on the issues of inheritance law and property rights was conducted. This allowed to trace the evolution of approaches to the definition and interpretation of ways to protect inheritance rights. Legislative acts, in particular the Civil Code of Ukraine and the Law of Ukraine "On State Registration of Real Property Rights and Encumbrances"[1]. were analysed with the help of the regulatory approach. Some articles concerning the definition of the right to protection of inheritance rights and ways of their protection are analysed. Much attention is paid to the analysis of the legal positions of the Supreme Court, which on particular examples allowed to describe the ways of protection of inheritance rights in the Ukrainian judiciary, as well as to highlight the opposite positions of courts in the selected category of inheritance cases.

2. RESULTS AND DISCUSSION

Book Six of the Civil Code of Ukraine[2] does not specify particular ways to protect inheritance rights. However, this does not mean that it is impractical to single them out. After all, the rights of heirs can be violated not only by other heirs, but also by third parties, such as creditors, debtors, etc. They must therefore choose an appropriate and effective way of protection, based on the method of violation and other important circumstances. The list of such methods of protection can be determined based on provisions of Article 16 of the Civil Code of Ukraine, considering the specific features of hereditary relations. Exploring the possible grounds for the protection of civil rights in inheritance, Professor Z.V. Romovska, based on the analysis of the Resolution of the Plenum of the Supreme Court of Ukraine No. 7 dated May 30, 2008 "On Judicial Practice in Inheritance Cases"[3] identified 15 requirements to be considered in inheritance cases, including the establishment of family relations with the testator and establishing the fact of living with the testator in one family; on establishing the fact of acceptance of the inheritance; on granting the right to inherit; on recognising the will as invalid; on

[1] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15; Law of Ukraine No 1127 “On state registration of real rights to real estate and their encumbrances”. (2020, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF#Text

[2] *Ibidem*, 2003.

[3] 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#Text

compulsory execution of the will; on the division (redistribution) of inheritance; on granting an additional term for acceptance of inheritance; on making changes to the certificate of the right to inheritance or declaring it invalid; etc. [16].

At the same time, neither the Civil Code of Ukraine[1], nor the above list of requirements that may be the subject of court proceedings does not apply the concept of "methods of protection of ownership of inherited property", "methods of protection of inheritance rights". As noted by some scholars, not all requirements in this list can be considered as ways to protect subjective rights, as some of them are aimed only at creating the preconditions for further protection of the right, and the list is not exhaustive [2]. Accordingly, it was proposed to consider as such the claims for removal from the right to inherit by law, the recognition of property rights by inheritance, the determination of shares in the inheritance [3; 17].

As prescribed by the provisions of Article 1268 of the Civil Code of Ukraine, for the heirs who accepted the inheritance, the right of ownership arises at the time of opening the inheritance, regardless of the time of its acceptance, and therefore there is uncertainty in the legal regime of inherited property from the time of opening the inheritance to the time of its acceptance. Therefore, all claims of heirs to the inheritance in the case of recourse to the court in a period of such uncertainty are aimed not at protecting ownership, but at protecting property rights, which should be carried out mainly by a system of special methods and sanctions of inheritance law, and after acceptance of the inheritance (including by receiving the certificate of the right to inheritance) – mainly by the general ways and the sanctions stipulated by Article 16 of the Civil Code of Ukraine, as well as the rules of Chapter 29 of the same. It is impossible to agree with the position of L.V. Kozlovskaya that when opening the inheritance, the heirs may require recognition of ownership and allocation of shares in kind, and therefore in such situations do not apply the rules of acceptance of the inheritance [3]. Such claims are possible only after the heirs accept the inheritance, because in the period from the opening of the inheritance to the moment of its acceptance, they can not be considered owners.

It is also impossible to unconditionally agree with the position of E.O. Ryabokon, who argues that the proivision of Part 5 Article 1268 of the Civil Code establishes the retroactive legal force of the transaction of acceptance of the inheritance [17]. Firstly, the application for acceptance of the inheritance indicates the date of its submission, and not the moment of opening the inheritance. Secondly, it may not be about giving retroactive effect to the deed of acceptance of the inheritance (because for some categories of heirs it is accepted automatically, so it does not contain all the necessary features of the deed, but constitutes a legal fact), but about giving retroactive effect to the title document (the certificate on acceptance of inheritance). Therewith, there is no provision in any regulation that governs the state registration of real rights to immovable property, which would make provision for the indication of the moment of acquisition of property rights by the heir on the date of opening the inheritance. There is no similar reservation in the certificate of the right to inheritance. Therefore, despite the exclusion from the Civil

[1] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15

Code of Ukraine of Article 1299 of the Civil Code, which stipulated a special moment of ownership of real estate by the heir – from the moment of state registration of this property, in fact, it can be argued that this property still applies to real estate. This fact is also confirmed by other circumstances – neither in fact nor legally, the heir cannot dispose of the inherited property until the state registration of ownership of real estate. Furthermore, the heir may change their mind and refuse to accept the inheritance, therefore it will not be appropriate to consider them the owner of the inheritance. The Law of Ukraine "On state registration of real rights to immovable property and their encumbrances"[1], also fails to solve this issue and, in accordance with its Article 3, "real rights to immovable property and their encumbrances, which are subject to state registration in accordance with this Law, arise from the moment of such registration". Therefore, in fact, despite the provision of Part 5 Article 1268, this law establishes another moment of origin of the property right to the inherited real estate. This problem can be solved by harmonising the provisions of Article 3 of the Law "On state registration…." with the provisions of Part 5 Article 1268 of the Civil Code of Ukraine. Furthermore, it will help to solve this problem and indicate the time of ownership of the inherited property in the certificate of inheritance.

That is, it can be argued that the legislator presumes the emergence of ownership of immovable (and movable) property from the heir. Therewith, in respect of immovable property, the heir has the right of ownership in full only from the moment of receipt of title documents and registration of ownership of the inherited real estate. Ye. O. Ryabokon most convincingly substantiated the feasibility of the existence of the provision of Part 5 Article 1268 of the Civil Code on the moment from which the inheritance belongs to the heir. Thus, in his opinion, in cases where "the hereditary property passed to unauthorised persons between the moment of opening and the moment of acceptance of the inheritance, the heir by virtue of this rule acquires the right to claim this property from someone else's illegal possession, as well as the right to present a claim for damages caused as a result of illegal possession, use, or disposal of the said property" [18].

Therefore, a mention should be given to certain restrictions on the heirs in the choice of methods of protection of inheritance rights due to the lack of the status of the owner in the period established for the acceptance of the inheritance. This deprives them of the opportunity to go to court under Article 392 of the Civil Code with a claim for recognition of ownership of inherited property, as well as claims for recognition of ownership of the deceased, because with such a claim no one but the owner can go to court, as evidenced by existing case law [19].

In our opinion, the heirs can protect the inheritance rights by going to court to sue for the recognition of the property that belonged to the deceased, but was not a part of the inheritance. However, in court practice, the specific features of recognising the right of ownership of property by deceased persons are not always considered in lawsuits. Thus, the Podilskyi District Court of Kyiv by its decision of May 13, 2013 (case No. 2607/12944/12), upheld by the Decision of the Supreme Specialised Court of Ukraine for

[1] Law of Ukraine No 1127 "On state registration of real rights to real estate and their encumbrances". (2020, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF#Text

Civil and Criminal Cases of January 29, 2014, satisfied the claim of the testator's wife about exclusion of the former wife of the testator from the number of heirs, as well as the recognition of property as belonging personally to the deceased [20]. In principle, the court found a somewhat compromise terminology, because in the claim the plaintiff requested to recognise the property of the deceased as personal private property. Satisfaction of the claim in the wording of the plaintiff would lead to incorrect application of Article 392 of the Civil Code, which gives the owners the right to claim recognition of property rights. In the present case, the fact that the property belongs to the deceased at the time of death is not actually recognised, but only confirmed.

In judicial practice, certain errors are made in making decisions when considering inheritance cases. Thus, courts do not always determine the existence of ownership of the testator (in particular, do not require title documents, do not verify their validity), and therefore recognise the ownership of the heir to real estate without a title document issued to the testator [21]. Notably, the incorrect wording of the claims – for example, "cancel the will" instead of declaring it invalid; to decide on the issuance of a certificate of the right to inherit or to oblige the notary office to issue a certificate of inheritance; to deprive a person of the right to a mandatory share instead of reducing the size of such a share or removing it from the right to inherit. Also, the courts do not always correctly establish the circle of heirs and the fact of their acceptance of the inheritance (for example, at the time of opening the inheritance, the heiress was a minor, but the courts did not establish which category of succession she belonged to, and whether there were other heirs; accordingly, they did not check whether she accepted an inheritance based on Part 4 Article 1268 of the Civil Code in the case of the creditor to the heirs). This is important for establishing the scope of persons entitled to appeal to court, because according to the Procedure for the performance of notarial acts by notaries of Ukraine[1], the right to appeal against a notarial action or refusal to execute a notarial act is held by a person whose rights and interests are related to such actions or acts. Therefore, the precondition for applying to the court of the heir should be the refusal of the notary to perform a notarial action, because in the case file there must be a reasoned decision on the refusal of the notary to perform a notarial action, in particular, refusal to issue a certificate of inheritance.

Certain features are inherent in the consideration of inheritance disputes related to the inheritance of real estate, including objects of unfinished construction. Thus, a notary issues a certificate of the right to inherit property, the ownership of which is subject to state registration only after the submission of documents certifying the ownership of the testator to such property. If the inherited property includes immovable property, the notary receives information from the State Register of Real Rights to Immovable Property by direct access to it. If the heir does not have the necessary documents for the issuance of a certificate of inheritance, the notary shall explain the procedure for resolving this issue in court.

Important for decisions in cases related to the acquisition of the right to unregistered real estate is the legal position formulated in the decision of the Supreme

[1] Order of the Ministry of Justice of Ukraine No 296/5 “On the procedure for performing notarial acts by notaries of Ukraine”. (2012, February). (last amended on July 19, 2020). Retrieved from https://zakon.rada.gov.ua/laws/show/z0282-12#Text

Court in case 23523/3522/16-ц of August 14, 2019. Thus, based on the interpretation of provisions of Article 1268 and 1296 of the Civil Code by the Supreme Court, the legislator distinguishes between the concepts "the emergence of the right to inherit" and "the emergence of ownership of immovable property that is part of the inheritance", and connects the emergence of these property rights with different legal consequences. Occurrence of the heir's right to inheritance, which is associated with its acceptance as a property right determines the inclusion of the right to it in the inheritance after the death of the heir, who did not receive a certificate of inheritance and did not carry out state registration [22].

Thus, in case the court did not consider the fact that the testator did not comply with the requirement for proper registration of ownership of the disputed object of unfinished construction, and this, in the opinion of the court, did not affect their ownership of this object, as state registration is only a state confirmation of the right that arose based on the concluded agreement. Therefore, the panel of judges concluded that the registration service does not establish ownership, in particular, of the object of unfinished construction, but registers it based on the clearly defined title documents and the district court erroneously considered that the lack of registration of the object of unfinished construction deprives the heir of this property after the death of the mother, therefore the decision is subject to cancellation with the adoption of a new decision to satisfy the claims [23].

The decision in case No. 638/6703/16-ц is somewhat different, where the decision of the district court was overturned and the decision of the appellate court on claims for recognition of property rights by inheritance by the heir was upheld. The district court noted that the heir (wife) accepted the inheritance in the accordance with the procedure prescribed by law, but due to the lack of title documents for non-residential premises, it was deprived of the right to issue it in the manner prescribed by law, therefore the court concluded that there are grounds for satisfaction of claims. Annulling the decision of the court of first instance and making a new decision to refuse to satisfy the claims, the appellate court reasonably assumed that the plaintiffs did not provide the court with proper and admissible evidence confirming that in their lifetime, the testator registered the ownership of the disputed non-residential premises in the manner prescribed by law. Considering the above and guided by the provisions of Part 3 Article 332 of the Civil Procedural Code of Ukraine[1], the panel of judges rejected the appeal and upheld the decision of the Court of Appeal [24].

One of the most common remedies in hereditary relations is to invalidate the certificate of inheritance. Thus, in accordance with Article 1301 of the Civil Code of Ukraine[2] "certificate of the right to inheritance is rendered invalid by court decision, if it is established that the person to whom it was issued had no right to inherit, as well as in other cases established by law". S.Ya. Fursa notes other grounds for recognising the certificate as invalid: in case of invalidation of the marriage between the spouses and legal inheritance by the surviving spouse; in case of renunciation of the inheritance [25].

[1] Civil Procedure Code of Ukraine. (2020, August). Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15#Text

[2] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15

It should be borne in mind that the certificate of inheritance is not a transaction, so to extend the rules governing the invalidity of transactions to this remedy is incorrect. As noted in the Generalisations of the Supreme Court of Ukraine "Practice of consideration of civil cases on invalidation of transactions by courts", the invalidity of the transaction must be distinguished from the invalidity of other related legal structures. The authors of the Generalisations noted that in the Civil Code of Ukraine this term is applied to invalidation of intellectual property rights (Articles 469, 479, 499); to invalidity of the prohibition of assignment of the right of monetary claim (Article 1080); to invalidation of the certificate of the right to inheritance (Article 1301); to invalidity of the right of claim (Articles 197, 519); to invalidity of the obligation (Articles 198, 548, 565); to invalidity of the act (Article 882); to invalidity of the check (Article 1102) [26].

According to Article 1301 of the Civil Code of Ukraine, the certificate of the right to inheritance can be recognized as invalid by the court decision. It is obvious that the certificate of inheritance has a different legal nature than the transaction. In this regard, the decision of the Supreme Court of Ukraine of May 14, 2014 "On rendering the certificate of inheritance and mortgage agreement invalid"[1] is of some interest. This Resolution notes that contrary to the requirements of Articles 548, 549 of the Civil Code of the Ukrainian SSR[2] the court linked the preservation or loss of the heirs' ownership of the inherited property with the fact of receiving or not receiving a certificate of inheritance, while the certificate is only documentary evidence of rights (Article 560 of the Civil Code of the Ukrainian SSR).

While supporting the overall legal position of the Supreme Court of Ukraine in the above Resolution, one cannot fail to note a certain underestimation of the legal value of a certificate of the right to inheritance, which is not an ordinary documentary evidence of ownership, but should be considered a document of title, securing the presumption of the legality of its acquisition by the owner of the property right. Such title documents also include a certificate of ownership, a certificate of ownership of a share in the joint property of the spouses, a state act on the right of ownership of land. It is important to emphasise that the recognition of such documents as invalid is carried out, according to judicial practice, not according to the rules established for transactions, but according to the rules established by special rules, for example, Article 1301 of the Civil Code of Ukraine[3], which invalidates the certificate of the right to heritage. However, the title of the above Resolution is somewhat incorrectly worded, as it is worded in such a way that it may give reason to believe that it is possible to invalidate the certificate of inheritance and the mortgage agreement under the same rules.

Under certain conditions, in judicial practice, certificates of ownership are also recognised as invalid, despite the absence of a direct rule about this in the Civil Code of Ukraine. For example, the decision of the Supreme Court of Ukraine in the panel of

[1] Resolution of the Supreme Court of Ukraine “On recognising the certificate of inheritance and mortgage agreement invalid”. (2014, May). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/VS140184.html

[2] Civil Code of the Ukrainian SSR. (1963, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1540-06#Text

[3] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15

judges of the Commercial Court of Cassation dated April 3, 2018 states that the certificate of ownership is only a document that formalises the right, but is not a transaction under which this right arises, changes or terminates, such a certificate does not give rise to the subject of the relevant right, but only records the fact of its existence. Therefore, in the opinion of the Supreme Court, since the decision on registration of the right of ownership is lawfully recognised as invalid, the documents that formalise the relevant right must be recognised as invalid [27]. A similar legal position is upheld by the courts in other cases as well [28].

Most of the analysed gaps and contradictions are conditioned by the lack of a unified approach in civil legislation to determine the moment of ownership, which may depend, in particular, on the type of property, the basis for its acquisition. Also, the legislation in the field of inheritance does not actually consider the importance of state registration of real rights to immovable property, recognising the rules of inheritance law as special rules, and not vice versa. Therewith, this legislative approach is caused by the fact that if the heir recognises real estate from the moment of state registration of property rights, firstly, the heir will acquire ownership of movable property from the opening of the inheritance, and real estate – from another moment; secondly, there will be legal uncertainty of the regime of such real estate and its owner from the moment of opening the inheritance to the moment of state registration of real rights to it. Notably, these are not all the gaps and contradictions that arise in hereditary relations, at the same time they can be the subject of separate independent studies. When exercising the right to protect inheritance rights by the heirs of rights, the following should be considered: until the receipt of a certificate of the right to inheritance, it is not the protection of property rights that is carried out, because the heirs have not yet acquired the right of ownership, but the protection of the right to inheritance, by which they can acquire the right of ownership of the inheritance property, and after receiving such a certificate – according to the rules established for the protection of property rights.

There are certain restrictions on the heirs in the choice of methods of protection of inheritance rights due to the lack of them in the period established for the acceptance of the inheritance, the status of the owner. This deprives them of the opportunity to appeal to court under Article 392 of the Civil Code with a claim for recognition of ownership of inherited property, as well as claims for recognition of ownership of the deceased, because with such a claim no one but the owner can appeal to court.

An incorrect wording of the plaintiffs' claims is particularly noted – "cancel the will" instead of declaring it invalid; "resolve the issue of issuing a certificate of inheritance" instead of obliging the notary office to issue a certificate of inheritance; "deprive a person of the right to a mandatory share" instead of reducing the size of such a share or removing it from the right to inherit.

Opposing legal positions in cases of inclusion in the inheritance of the testator's ownership of immovable property during their lifetime are investigated: in some cases the courts recognise the right to inherit such real estate, arguing only the legal confirmation of state registration of property rights and the presumption of legality; in other cases, which have more convincing arguments, deny the heirs the inclusion of such property in the inheritance and do not recognise the heirs' ownership of such property.

Specific features of invalidation of certificates of the right to inheritance and

certificates of the right of ownership are investigated.

Other gaps and inconsistencies in civil legislation also require further study. Thus, the Civil Code of the Ukrainian SSR made provision for the possibility of disposing of movable property, including funds acquired by the heirs since the opening of the inheritance on certain grounds, while the current Civil Code of Ukraine does not make provision for such a possibility. The legislation also does not define the consequences of disposing of the testator's property until the moment of receipt of the certificate of the right to inherit, including the misapplication of such property by the heir (heirs). Other heirs have the right to apply to the court for the return of unjustifiably obtained property in a conditional claim.

In Article 1281 of the Civil Code defines the term for filing a claim by the creditor to the heir(s) and the period within which the heirs must notify the creditor(s) of the testator of their acceptance of the inheritance, while Article 1282 does not stipulate the period in which the heir(s) must satisfy the claim of the creditor(s), but only states the need for the heir(s) to satisfy the claim by a single payment. Therefore, the question arises whether it is possible to extend to these legal relations the provisions of Part 2 Article 530 of the Civil Code of Ukraine, which establish a 7-day grace period for performance of obligations. It is not uncommon when, upon accepting an inheritance, discrepancies are found in the characteristics of the real estate that is part of the inheritance in the title document and in a certificate from the property inventory and registration authority on the specifications of a real estate object that was not registered in the state register of real rights to immovable property due to the acquisition of such property by the testator prior to the moment when such a register was put into operation. However, so far the judicial practice does not clearly define the method of resolving such a problem and does not define a particular way to protect the rights and interests of the heir(s).

CONCLUSIONS

Based on the foregoing, it should be noted that there are gaps in the civil legislation in the field of protection of inheritance rights. They can be eliminated by the creation of appropriate legal positions by the Supreme Court of Ukraine, as well as by consolidating the list of requirements with which the heirs have the right to apply to the court at the level of decisions of the Plenum of the Supreme Court.

Despite the fact that Art. 1268 of the Civil Code of Ukraine determines the moment of the emergence of ownership of the heir from the moment they accepts the inheritance, in fact, the heir is not endowed with all the powers of the owner from that moment. This is especially true in relation to immovable property, which is part of the inheritance.

The study notes the absence of a unified approach to determining the moment of emergence of ownership of inherited immovable property in the civil legislation. Thus, according to the Civil Code of Ukraine, the only moment is determined – the opening of an inheritance, regardless of the type of property. According to the legislation on state registration of rights to real estate, such a moment is exclusively the moment of state registration of real rights. This problem is caused by the exclusion of a provision from Article 1299 of the Civil Code of Ukraine, which stipulated a special moment for the emergence of ownership of real estate by the heir – from the moment of state registration

of this property. The purpose of this exclusion was to unify the moment of acquiring ownership of such property by the moment of accepting the inheritance. Therewith, the legislation on registration of rights to real estate has not changed in this part. This problem can be solved by harmonising the provisions of Article 3 of the Law of Ukraine "On State Registration..." with the provision of Part 5 Article 1268 of the Civil Code of Ukraine. Furthermore, it will help to solve such a problem and indicate the moment when the ownership of the inherited property arises in the certificate of the right to inheritance.

Therefore, the indicated gaps and contradictions, as well as other problems related to the exercise of the right to inheritance by the heirs and the right to protection in case of its violation, non-recognition or contestation, which arise during the consideration of hereditary disputes, may be the subject of a separate scientific study.

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Suggested Citation: Dzera, I.O. (2020). Theoretic and practical aspects of protection of the right of ownership in the hereditary relations. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(3), 95-108.

Submitted: 04/06/2020
Revised: 14/07/2020
Accepted: 27/08/2020

УДК 347.44
DOI: 10.37635/jnalsu.27(3).2020.109-127

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НОВІТНІ ЦИВІЛІСТИЧНІ ІНСТРУМЕНТИ МЕДИЧНОЇ РЕФОРМИ: ПРОБЛЕМНІ ПИТАННЯ ПРАВОРЕАЛІЗАЦІЇ ТА ПРАВОЗАСТОСУВАННЯ

Анотація. *Дослідження новітніх цивілістичних інструментів медичної реформи зумовлене його метою, яка полягає у з'ясуванні правової природи декларації про вибір лікаря, який надає первинну медичну допомогу та договору про медичне обслуговування населення за програмою медичних гарантій, висвітленні особливостей реалізації права на вибір лікаря, зумовлених окресленим інструментарієм, а також виявленні лакун і контроверзій у законодавстві України, судовій практиці при правозастосуванні в цій царині. Основним методом при науковому пошуку став метод вивчення судової практики, що уможливив оцінку ефективності правозастосування, рівня сприйняття законодавства в цій царині на практиці, а також визначення необхідності удосконалення правового регулювання. Висвітлено проблемні аспекти пов'язані з реалізацією права на вільний вибір лікаря, зокрема зумовлених законодавчими змінами щодо медичної реформи. Розкрито правову суть декларації про вибір лікаря, який надає первинну медичну допомогу, з'ясовано, що вона не є правочином, а документом, який засвідчує реалізацію права на вільний вибір лікаря первинної ланки. Проаналізовано договір про медичне обслуговування населення за програмою медичних гарантій та встановлено його цивільно-правову матерію. Визначено, що він є договором про надання послуг за державним замовленням, що укладається на користь третіх осіб. Також досліджено договір про реімбурсацію, що також є договором на користь третіх осіб – пацієнтів у частині повної або часткової оплати відпущених їм лікарських засобів. Проаналізовано судову практику, що дає підстави стверджувати про проблеми з правореалізацією і правозастосуванням, та зроблено пропозиції до удосконалення чинного законодавства, в тому числі в аспекті предмета договору за програмою медичних гарантій. «Законне сподівання», що виникає в людини при наявності нормативних гарантій, перебуває під конвенційним захистом, що ілюструється Європейським судом з прав людини у рішеннях, а для зміни парадигми здійснення необхідні трансформації законодавства. Практичне значення цього дослідження полягає в активізації наукової розвідки в цьому напрямі, в удосконаленні правового регулювання цих новельних юридичних конструкцій, оптимізації правореалізації та правозастосування в окресленій цивілістичній площині.*

Ключові слова: декларація, договір про медичне обслуговування, право на медичну допомогу, медичні послуги, пільгове придбання ліків.

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MODERN CIVILISTIC INSTRUMENTS OF MEDICAL REFORM: ISSUES OF LAW IMPLEMENTATION AND LAW ENFORCEMENT

Abstract. *The study of the latest civilistic instruments of medical reform is conditioned by its purpose, which is to clarify the legal nature of the declaration of choice of primary care physician and the contract for medical care under the programme of medical guarantees, highlighting the specific features of the right to choose a doctor, conditioned by the outlined tolls, as well as identifying gaps and controversies in the legislation of Ukraine and judicial practice in law enforcement in this area. The main method of the study was the method of studying judicial practice, which allowed to assess the effectiveness of law enforcement, the level of perception of legislation in this area in practice, as well as to determine the necessity of improving the legal regulation. The study highlights the problematic aspects related to the exercise of the right to free choice of a doctor, in particular due to legislative changes regarding medical reform. The legal essence of the declaration on the choice of a primary care physician has been covered. The study clarifies that it is not a transaction, but a document certifying the exercise of the right to freely choose a primary care physician. The contract on medical care of the population under the programme of medical guarantees is analysed and its civil law matter is established. It is determined that it is a contract for the provision of services under the public procurement, concluded for the benefit of third parties. The reimbursement agreement was also investigated, which is also an agreement in favour of third parties – patients in terms of full or partial payment for their medicines. The judicial practice is analysed, which gives grounds to assert the problems with enforcement and administration of law, and proposals are made to improve the current legislation, including in the aspect of the subject of the contract under the programme of medical guarantees. The "legitimate expectation" that arises in a person in the presence of regulatory guarantees is under conventional protection, as illustrated by the European Court of Human Rights in its decisions, and to change the paradigm of implementation requires a transformation of legislation. The practical significance of this study is to intensify scientific intelligence in this direction, to improve the legal regulation of these innovative legal constructions, to optimise the enforcement and administration of law in the outlined civilistic plane.*

Keywords: declaration, contract on medical care, the right to medical care, medical services, preferential purchase of medicines.

INTRODUCTION

With the adoption of the Law of Ukraine No. 2168-VIII "On State Financial Guarantees of Medical Care" dated 19.10.2017 (hereinafter referred to as the Law No. 2168-VIII), which is considered to have initiated medical reform in Ukraine, the latest tools that affect both the exercise of a constitutional human right to health care, medical aid and medical insurance, which is guaranteed in Article 49 of the Fundamental Law of the state, and the personal intangible right to medical care, enshrined in Article 284 of the Civil Code of Ukraine. The civilistic arsenal has been replenished with such basic tools as a declaration on the choice of a doctor who provides primary care (hereinafter referred

to as "the Declaration") and an contract on medical care for the population under the medical guarantee programme (hereinafter referred to as "the Contract under the medical guarantee programme").

The relevance of these legal constructions for discussion by scholars and practitioners is significant in view of many factors, including: 1) medical reform is being reviewed for constitutionality in the Constitutional Court of Ukraine within the framework of proceedings on the constitutional petition of 59 people's deputies of Ukraine on the compliance (constitutionality) of the Law No. 2168-VIII with Constitution of Ukraine; 2) the scientific search launched in 2018 with regard to innovative documents at the level of thesis work currently remains at the initial stage of the study, because there are no new studies on those issues; 3) the discussion on the Declaration and the Contract under the medical guarantee programme went beyond being purely scientific, is already illustrated in judicial practice, the analysis of which shows both regulatory controversies and theoretical gaps in these issues. Some aspects of this issue were studied by H. Myronova in the monograph "Modernisation of civil legislation in medical care: theoretical principles and practice of implementation" [1], H. Haro and O. Bobak – in a research-to-practice publication [2]. In the monographic study, H. Myronova addresses only the indirect analysis of the content of the Declaration, namely, clarifies the specific features of the status of the patient's trustee, which is indicated in this document. The researcher identifies the problem of uncertainty of the status of a new subject of legal relations and concludes that the patient's trustee acts based on a contract of voluntary representation on the basis of the relevant articles of the Civil Code of Ukraine and international legal standards recognised by Ukraine, which are applicable to the regulation of relations on voluntary representation of a person in the field of decision-making on treatment and medical care [1]. The authors H. Haro and O. Bobak cover the basic algorithms for concluding the Declaration without addressing its legal essence. Foreign publications contain many articles that cover issues of medical care and contractual constructions in this area, including the work of such scientists as: H.V. Kolisnykova [3], R. Iunes [4], N.S. Vasilevskaya [5], V.Yu. Mammadova [6], Yu. Baulin [7], S. Shishido [8], T. Zhang [9], C. Pardo [10], M.Z. Abesalashvili [11], S. Grant [12], E. Freidson [13]. Gaps in the doctrinal basis are already felt in law enforcement, and therefore, the effectiveness of human rights protection raises doubts. This study continues the scientific monologue with the hope of further constructive dialogues that will be capable of developing a proper doctrinal foundation for practice, including judicial.

The purpose of the study is to clarify the legal nature of the Declaration and the Contract under the medical guarantee programme, to highlight the features of the right to choose a doctor due to the latest tools, as well as identify gaps and controversies in Ukrainian law and judicial practice upon the administration of law in this subject area. Achieving the scientific purpose is possible by performing the following tasks: 1) to disclose the exercise of personal non-property right to free choice of a doctor, which has undergone significant transformations due to medical reform and inconsistency of regulations; 2) to establish the legal nature of the Declaration and the problems of legal understanding in the application of legislative provisions, which creates a violation of the patient's rights; 3) to highlight the new contractual constructions in the field of medical

care and to show the legislative dissonances and problems of judicial practice with conventional inclusions through the lens of the decision of the European Court of Human Rights (hereinafter referred to as "the ECHR").

1. MATERIALS AND METHODS

The methodology of this study is determined by its purpose, objectives and is to highlight the development of legal structures of medical reform, identify features of the latest tools to establish their civilistic matter and place in the civilistic arsenal, which was carried out by means of analysis and interpretation of legal provisions and through the lens of legal science. The scientific study used general scientific methods, primarily dialectical, which occupied a prominent place in the study of modern civil tools, serving to clarify the development of these structures, the development of the author's position on the need to improve their civil regulation and proposals to achieve these goals; methods of analysis and synthesis were the key to distinguishing the features of the analysed legal constructions, the development of conclusions; system method – to clarify the place of the Declaration and the Contract under the medical guarantee programme among the civil law categories. In the process of study, special legal methods were used: Aristotelian – to analyse the internal construction of legal provisions; the method of studying legal practice – for the analysis and generalisation of law enforcement practice and the method of interpreting the law – for clarifying the content of the relevant legal provisions. The theoretical basis is practically absent, because scholars have not studied the problems of the outlined innovative tools in practice, have not developed a sufficient scientific foundation that would serve to optimise the enforcement and administration of law and be the basis for prevention of human rights violations in healthcare. For the first time, the Declaration and the Contract under the medical guarantee programme were scrutinised in the monograph [14] of the author of this study, although despite the urgency and demand of time, it failed to enter the scope of scientific dialogue. This study is a logical continuation of the scientific author's search to catalyse the attention of scholars to the issue, as well as to be useful for practitioners who solve complex issues in both medical and legal practices almost every day.

The legal framework of the study comprises the provisions of the Civil Code of Ukraine[1], several other laws of Ukraine, including Law No. 2168-VIII[2], the Law of Ukraine "Fundamentals of the legislation of Ukraine on healthcare" (hereinafter referred to as "the Fundamentals")[3]. The subject of the analysis also included sublegislative regulations that "implement" medical reform in practice, detailing legislative provisions. The Resolution of the Cabinet of Ministers of Ukraine No. 410 "On some issues of agreements on medical care under the programme of medical guarantees" dated

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

[2] Law of UkraineNo 2168-VIII "On state financial guarantees of medical care". (2017, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2168-19#Text

[3] Law of Ukraine No 2801-XII "Fundamentals of the legislation of Ukraine on health care". (1992, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2801-12#Text

25.04.2018 (hereinafter referred to as "the Resolution No. 410")[1], the Resolution of the Cabinet of Ministers of Ukraine No. 136 "Some issues regarding reimbursement agreements" dated 27.02.2019 (hereinafter referred to as "the Resolution No. 136")[2], the Order of the Ministry of Health of Ukraine No. 503 "On approval of the Procedure for selection of a doctor who provides primary care and the form of declaration on the choice of a doctor who provides primary care" dated 19.03.2018 (hereinafter referred to as "the Order No. 503")[3]. were also thoroughly studied. The empirical basis of the study included the national judicial practice, namely the decisions adopted in civil and administrative proceedings, as well as the legal positions of the ECHR.

2. RESULTS AND DISCUSSION

The study will cover the specific features of exercising the right to free choice of a doctor, which was influenced by Law No. 2168-VIII, introducing, in particular, the Declaration. Part 2 Article 284 of the Civil Code of Ukraine[4] stipulates that an individual who has reached the age of 14 and who has applied for medical care has the right to choose a doctor and choose treatment methods in accordance with the latter's recommendations.

The exercise of the right to free choice of physician is fraught with numerous statutory dissonances. In accordance with paragraph "d" of Article 6, Part 1 Article 38 of the Fundamentals[5], Part 2 Article 284 of the Civil Code of Ukraine, the patient has the right to freely choose a doctor if the latter can offer their services. Paragraph 3 Part 1 Article 6 of the Law No. 2168-VIII[6] enshrines the patient's right to choose a doctor in accordance with the procedure prescribed by law. According to Article 9 of the Law No. 2168-VIII, in case of need for medical services and medicines under the medical guarantee programme, the patient or their legal representative exercises their right to choose a doctor by submitting a Declaration to the medical service provider. The provision of medical services and medicines under the programme of medical guarantees related to secondary, tertiary, palliative care and medical rehabilitation is carried out under the direction of a primary care physician or a physician in accordance with the procedure prescribed by law, except cases when a doctor's referral is not required according to the legislation.

[1] Resolution of the Cabinet of Ministers of Ukraine No 410 “On some issues of agreements on medical care under the program of medical guarantees”. (2018, April 25). Retrieved from https://zakon.rada.gov.ua/laws/show/410-2018-%D0%BF#Text

[2] Resolution of the Cabinet of Ministers of Ukraine No 135 “Some issues of reimbursement of medicines”. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/135-2019-%D0%BF#Text

[3] Order of the Ministry of Health No 503 “On approval of the Procedure for selection of a doctor who provides primary care and the form of declaration on the selection of a doctor who provides primary care”. (2018, March). Retrieved from https://zakon.rada.gov.ua/laws/show/z0347-18#Text

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

[5] Law of Ukraine No 2801-XII “Fundamentals of the legislation of Ukraine on health care”. (1992, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2801-12#Text

[6] Law of Ukraine No 2168-VIII “On state financial guarantees of medical care”. (2017, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2168-19#Text

Article 35-1 of the Fundamentals establishes the general procedure for choosing a family doctor, the details of which are in the sub-legislative act of the Ministry of Health of Ukraine, namely the Order No. 503[1]. At the secondary and tertiary levels of medical care, there is no free choice of doctor, as it is stated that the attending physician for secondary or tertiary care in a healthcare institution that provides such care is determined by the head of this institution or a person authorised to take the corresponding decisions (Articles 35-2, 35-3 of the Fundamentals). However, Part 2 Article 34 of the Fundamentals guarantees the patient's right to demand a change of doctor.

Provision of medical care to patients at the secondary level is carried out: 1) under the direction of the attending physician for the provision of primary care; 2) at the direction of the attending physician of the healthcare institution that provides secondary (specialised) or tertiary (highly specialised) medical care; 3) without referral is provided to patients who have applied to: a) obstetrician-gynaecologist; b) dentist; c) a paediatrician; d) patients with chronic diseases who are registered at the dispensary in this healthcare institution; e) patients who are in an emergency.

Similarly, Article 35-3 of the Fundamentals establishes the conditions for the level of tertiary care. Tertiary care is provided to patients: 1) at the direction of the attending physician for the provision of primary or secondary (specialised) medical care; 2) at the direction of a healthcare institution that provides primary, secondary (specialised) or tertiary (highly specialised) medical care, including other specialisation; 3) without referral is provided: a) to patients with chronic diseases who are registered at the dispensary in the relevant highly specialised multidisciplinary or single-profile healthcare institution; b) patients who are in an emergency.

Thus, the patient's ability is regulated within one legislative document – the Fundamentals, but there is a regulatory diversity in approaches: on the one hand, the patient can choose any doctor, but, on the other hand – the choice is full of obstacles. Such statutory conflict creates the need to resolve it through the lens of the letter of the Ministry of Justice of Ukraine No. 758-0-2-08-19 "On the practice of applying the law in case of conflict" dated 26.12.2008[2] in favour of a special provision. Finding out which of the provisions is special, the study addresses the fact that Articles 6 and 38 of the Fundamentals concern precisely the rights of the patient, while Articles 35-1 through 35-3 of the Fundamentals concern the procedure for providing medical care of various types. Thus, there is reason to believe that in case of internal conflicts of provisions, those concerning the rights of the patient will be special. Such internal legal disputes should be eliminated by amending the Fundamentals and choosing a single model to regulate the exercise of the right to free choice of physician.

The aggravation of statutory dissonances is conditioned by the adoption of the Order of the Ministry of Health of Ukraine No. 586 "On approval of the Procedure for referring patients to healthcare institutions and individuals-entrepreneurs who have

[1] Order of the Ministry of Health No 503 “On approval of the Procedure for selection of a doctor who provides primary care and the form of declaration on the selection of a doctor who provides primary care”. (2018, March). Retrieved from https://zakon.rada.gov.ua/laws/show/z0347-18#Text

[2] Letter of the Ministry of Justice of Ukraine No 758-0-2-08-19 “On the practice of applying the law in case of conflict”. (2008, December). Retrieved from https://zakon.rada.gov.ua/laws/show/v0758323-08#Text

received a license to conduct business in medical practice and provide medical care" dated 28.02. 2020[1] (hereinafter referred to as "the Order No. 586"). The patient will be provided with medical services in an outpatient or inpatient setting, medical services provided by field teams, laboratory, instrumental or functional studies only through the referral. The initiator of the referral is the primary care physician on the choice of whom the patient has submitted a relevant declaration in accordance with the law, or another attending physician of the patient who decides on the referral. Item 4 Section I of the Order approved by the Order no. 586 expands the specialties of doctors whose care patients can seek without referral when receiving secondary medical care, namely: a) an obstetrician-gynaecologist; b) a psychiatrist; c) a narcologist; d) a dentist; e) a paediatrician; e) a tuberculosis specialist. Wording of Part 9 Article 35-2 of the Fundamentals gives grounds to claim an exclusive list of medical specialties, which should not be detailed in the sub-legislative act, but the legislator has chosen the path of an expansionary approach and the definition of additional specialties. When a patient applies for medical services, the authorised person of the service provider must, in particular, agree with the patient on the choice of a doctor or other medical professional of the business entity who will provide referral services if possible. Therefore, there is another regulatory barrier "if possible", which is an evaluative concept and it is unclear what objective criteria should be followed, keeping in mind the guaranteed personal inalienable right to medical care with full choice, but in a transformational change – with the maximum restriction on the volume of sales.

In summary, the Law No. 2168-VIII is special, because it regulates the procedure for providing medical care at the expense of the State Budget of Ukraine under the programme of medical guarantees. Therefore, the following conclusions can be drawn:

1) when providing medical care under the programme of medical guarantees, the patient's right to freely choose a doctor is limited by the choice of a primary care physician;

2) the choice of a doctor in the provision of other types of medical care under the programme of medical guarantees is subject to numerous regulatory restrictions, which does not allow to fully experience the freedom of choice in the exercise of personal non-property right to medical care;

3) when providing medical care outside the programme, free choice must be provided based on Articles 6 and 38 of the Fundamentals. However, it is clear that this does not correlate with Article 24 of the Constitution of Ukraine[2]: citizens have equal constitutional rights and freedoms and are equal before the law.

Next, the study analyses the tool for exercising the right to free choice of a doctor – the Declaration, which serves as the beginning of exercising the right to medical care, considering it with a projection on judicial practice. The decision of the Melitopol Municipal and District Court of the Zaporizka Oblast dated 18.12.2019 (case No.

[1] Order of the Ministry of Health of Ukraine No 586 “On approval of the Procedure for referring patients to health care institutions and individuals – entrepreneurs who in the manner prescribed by law received a license to conduct business in medical practice and provide medical care of the appropriate type”. (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/z0235-20#Text

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

937/9145/19) [15] ruled as follows: to satisfy the claims of PERSON_1 to the Municipal Non-Profit Enterprise "Centre of Primary Health Care of Melitopol District Council of the Zaporizka Oblast", Terpinnia Outpatient Clinic of General Practice of Family Medicine, Municipal Non-Commercial Enterprise "Melitopol Central District Hospital" on the recognition of the actions of the defendants as illegal and its obligation to take certain actions. To recognise the actions of the Municipal Non-Profit Enterprise "Centre of Primary Health Care of Melitopol District Council of Zaporizhia Region", Terpinnia Outpatient Clinic of General Practice of Family Medicine, Municipal Non-Commercial Enterprise "Melitopol Central District Hospital" as illegal, which lie in refusing to provide medical services. To oblige the authorised persons of the Terpinniv Outpatient Clinic of General Practice of Family Medicine to conclude the agreement with PERSON_1 on rendering medical services.

The plaintiff PERSON_1 substantiated his claims by the fact that since 2018, he applied to the local hospital with a proposal to enter into a contract with a therapist four times, but was denied, and he is an elderly man who underwent heart surgery and amputation of his left arm. The therapist PERSON_2 explained that she refused to sign a contract with him not during, but after she and her colleagues entered into contracts with other patients (*author's note – please note that this refers to the Declaration, which is incorrectly interpreted herein as a contract*) when doctors began to deny patients medical care. The plaintiff stated that he could not come to the doctor and receive therapeutic services.

Furthermore, the plaintiff noted that on May 27, 2016 at 1:30 p.m. he came to the district hospital to visit the dentist. However, the dentist refused to see him because the plaintiff had not previously made an appointment with a doctor, although there were no patients in the dentist's office. The plaintiff stated that he did not have a landline phone to make an appointment with a doctor, and it was expensive for him to call from a mobile to a landline phone. By his refusal, the doctor caused material damage to the plaintiff because he had spent money on this trip. As a result, the medical staff of the Central District Hospital once again ignored the right of citizens stipulated in Article 49 of the Constitution of Ukraine.

In court proceeding, the representative of the defendant of Municipal Non-Commercial Enterprise "Melitopol Central District Hospital" objected to the claim, considering it unfounded and groundless. She noted that PERSON_1 applied to the dentist's office on 27.05.2019, but after working hours, at 2:40 p.m. He was informed about the work schedule of the dentist and was recommended to contact the standby dentist at "Melitopol City Dental Clinic" under the Melitopol City Council of the Zaporizka Oblast, or on 28.05.2019 to Municipal Non-Commercial Enterprise "Melitopol Central District Hospital" under the Melitopol District Council for medical care. He was not deprived of the right to medical care. The hospital did not render services to the plaintiff, and the plaintiff was only informed about the work schedule of the dentist and was recommended to contact the standby dentist. The representative of the defendant requested the court to deny the plaintiff in satisfaction of the claims in full.

Representative of the defendant of the Municipal Non-Profit Enterprise "Centre of Primary Health Care of Melitopol District Council of the Zaporizka Oblast", the structural unit of which is Terpinnia Outpatient Clinic of General Practice of Family

Medicine – V. V. Soroka at the hearing against the claim objected, explained that the plaintiff was denied a declaration for primary care, because the doctors available in the clinic have already made the optimal number of declarations. The optimal number of persons with whom doctors of general practice of family medicine can conclude Declarations is 1,800 people per one general practitioner-family doctor, 2,000 people per one doctor-therapist. According to the staff list of Municipal Non-Profit Enterprise "Centre of Primary Health Care of Melitopol District Council of the Zaporizka Oblast" in the outpatient clinic of general practice of family medicine of the Terpinnia Village work three family doctors. At the time of the inspections at the request of the plaintiff, i.e. on 08.05.2019, it was established that all doctors of the Terpinnia Outpatient Clinic of General Practice of Family Medicine have concluded the optimal number of Declarations, in the amount of over 1,800 per doctor and therefore are incapable of concluding a declaration with the plaintiff.

Having comprehensively analysed the circumstances in their entirety, having assessed the evidence gathered in the case, the court, proceeding from its internal conviction, which is based on a full, objective, and comprehensive clarification of the circumstances of the case, considered that the actions of the defendants, which lay in refusing to provide PERSON_1 with therapeutic and dental services are illegal. Furthermore, according to the medical report of Terpinnia Outpatient Clinic of General Practice of Family Medicine dated 30.09.2014, the plaintiff is a person with a disability, can move in the surrounding area near the house where he resides in the Terpinnia Village, and the conclusion of a contract for primary care (*author's note – again, please note that this is a Declaration, which does not constitute a transaction*) with doctors of outpatient clinics of general practice of family medicine in the villages of Semenivka, Astrakhanka, Myrne urban-type settlement, Myrne village, Polianivka village, Novopylypivka village will create inconvenience to the plaintiff and lead to a violation of his rights and freedoms guaranteed by the Constitution of Ukraine (*author's note – and, admittedly, personal non-property right to medical care, prescribed in Article 284 of the Civil Code of Ukraine*).

The court obliged the authorised persons of Terpinnia Outpatient Clinic of General Practice of Family Medicine to enter into a contract with PERSON_1 on the provision of medical services, and satisfied the claims of PERSON_1 as legal and reasonable.

The given decision testifies to numerous problems with the enforcement and administration of law, namely: a) the decision should not be about the contract for the provision of medical services, but the Declaration, which will allow the patient to receive primary care, and if necessary, under the direction of a primary care physician – other types of medical care. It appears that the court incorrectly defined the legal nature of the Declaration by obliging the healthcare institution to enter into a contract; b) incorrectly chosen method of protection of the plaintiff's right. According to Item 5 Section 3 of the Order of a choice of the doctor providing primary medical care, and the form of the declaration on the choice of the doctor providing primary medical care approved by the Order No. 503, primary care providers are prohibited from refusing to accept the Declaration and keep the patient, in particular based on the patient's chronic disease, age, sex, social status, financial status, registered place of residence, etc. However, the patient must take into account that they have the right to choose a doctor who provides primary

care, provided that the number of patients who have already chosen such a doctor in accordance with the Procedure does not exceed the optimal practice (paragraph 2 Section 2 of the Order). Therefore, considering that the patient's application for the Declaration was timely, but was wrongly denied, the court should have ordered the adoption of the Declaration, which would therefore serve to provide medical care to the patient.

In continuation of this case, the decision of the Novokakhovka City Court of the Khersonska Oblast dated 01.06.2020 (case No. 661/557/20) deserves attention [16], which fully satisfied the claims of PERSON_2 to the Municipal Non-Commercial Enterprise "Centre of Primary Healthcare of the City of Nova Kakhovka" under the Novokakhovka City Council regarding the cancellation of the order on disciplinary punishment. The reason for disciplinary action, according to the employer, was a misdemeanour, namely not accepting the patient for admission. The plaintiff stated that this patient was examined by him as a physician on November 13, 2019, as evidenced by the record of her examination, and based on recommendations for discharge from the infectious diseases department and infectious disease specialist of the Infectious Diseases Office, was sent for consultation to a neurologist Central City Hospital of the Nova Kakhovka city. The plaintiff also noted that the patient PERSON_6 concluded the Declaration with another physician who was at work. The parties in the case did not deny the fact that PERSON_6 voluntarily concluded the Declaration with another doctor-therapist and on 13.11.2019, the registry staff, for unknown reasons, registered him for an appointment with a doctor-therapist PERSON_2, who also holds the position of head of the Outpatient Clinic No. 2 under the Hospital.

Notably, in accordance with Item 3 Section 2 of the Procedure approved by Order No. 503, during the period of temporary absence of the doctor chosen by the patient, due to leave or other circumstances that make it temporarily impossible to receive patients by a doctor, the patient has the right to receive medical services from another doctor of the same primary care provider without new Declaration. In view of the circumstances of the case and national law, the court in this case correctly established the absence of a disciplinary offence in the actions of PERSON_2.

Judicial practice gives grounds to dwell once more on the clarity of the legislation and the proper theoretical substantiation of new legal constructions. According to Order No. 503, declaration means a document confirming the will of the patient (their legal representative) to choose a doctor who will provide them with primary care. In the Operational Manual of the Ministry of Health of Ukraine "How to organise the system of primary healthcare at the local level" [17] the Declaration means the statement of the patient (their legal representative), which confirms the patient's will to choose a doctor who will provide primary care. Declaration form approved by Order No. 503 has already undergone regulatory changes and updates, and therefore, its legal essence has changed. Therefore, the Declaration is not legal in nature.

Analysis of Article 202 of the Civil Code of Ukraine, Law No. 2168-VIII and Order No. 503 suggests several conclusions about the legal nature of the Declaration:

1) the change in the regulations of the Declaration affected the change of its legal nature: from a unilateral transaction in the original version (which creates obligations not only for the person who committed it, i.e. an individual, but also for other persons, in particular, for the health care provider, the National Health Service of Ukraine) in the

action of an individual (statement on the will of an individual of the choice of the doctor who provides primary care) in the current wording;

2) the declaration serves the emergence of new legal relations on another basis – the Contract under the medical guarantee programme;

3) it appears that the applicant is indicated incorrectly in the Declaration, namely as a patient. According to Article 3 of the Fundamentals, a patient is an individual who has sought and/or is receiving such care. The declaration does not give rise to legal relations in the field of medical care, an individual who applies to a healthcare provider does not do so for the purpose of receiving medical care, therefore, to mark the applicant as a patient is incorrect. The provision of Part 2 Article 9 of Law No. 2168-VIII is similarly incorrectly worded. An individual will become a patient only if they apply, for example, for primary care to a healthcare provider;

4) the declaration has a double legal meaning:

a) certifies the exercise of the right to freely choose a doctor (although an individual is not yet a patient);

b) is a legal fact that confirms the emergence of a natural person's status as a third party pursuant to the Contract under the medical guarantee programme;

5) the declaration is an element (legal fact) of the legal structure, which gives rise to legal relations in the field of medical care.

Another instrument generated by medical reform, which affects the exercise of personal non-property right to medical care, is the *Contract under the medical guarantee programme*, which is concluded for the benefit of third parties. The concept of this Contract was introduced into the legislative plane by Law No. 2168-VIII and detailed in Resolution No. 410[1]. The parties to the Contract under the medical guarantee programme are the provider of medical services (healthcare institutions and individuals-entrepreneurs engaged in economic activities in medical practice) and the Authorised body (central executive body that implements the national policy in the field of public financial guarantees of medical care – the National Health Service of Ukraine). The Contract under the medical guarantee programme can be concluded either in writing or in electronic form. A patient who requires the provision of medical services or medicines under the medical guarantee programme, or their legal representative, applies to the medical service provider and submits a Declaration.

The analysis of regulations and doctrinal sources suggests the following: a) the Contract under the medical guarantee programme by nature is a contract for the provision of services; b) according to the principle of dichotomy, this contract consists of two parts: 1) in the part "customer – provider", it is a contract for the provision of services under public procurement; 2) in terms of rendering medical services by the provider to the patient, it is a contract for the benefit of third parties. This position, in particular, received regulatory confirmation in Article 8 of the Law 2168-VIII and item 13 of the Standard form of the Agreement on medical service of the population under the medical guarantee programme approved by the Resolution No. 410.

We believe that the Contract under the medical guarantee programme is civil in

[1] Resolution of the Cabinet of Ministers of Ukraine No 410 “On some issues of agreements on medical care under the program of medical guarantees”. (2018, April). Retrieved from https://zakon.rada.gov.ua/laws/show/410-2018-%D0%BF#Text

nature and is described by the following features: a) the parties to the agreement are equal participants in the contractual relations with a statutorily defined scope of rights and obligations; b) the purpose of entering into these contractual relations is to meet the state needs related to medical care, because everyone has a natural inalienable and inviolable right to medical care. The state need is formed based on the programme of the state guarantees of medical service of the population; c) payment for medical services provided under the contract will be made at the expense of the State Budget of Ukraine based on budget legislation, which does not affect the civil nature of the obligations of the parties under the contract (Parts 4-5 Article 18 of the Fundamentals); d) to become a contractor under a healthcare contract, the business entity must comply with regulatory requirements, in particular register in the electronic healthcare system, also register its medical staff, and the customer has no right to refuse to enter into a contract in case of compliance with them and provide relevant medical services (within the medical guarantee programme).

According to Article 8 of Law 2168-VIII, the subject of the agreement on medical care is medical services and medicines under the medical guarantee programme, and in Resolution No. 410 – medical services only. Therefore, the logical question arises: how does the legislator see the practical aspect of purchasing medicines within the medical guarantee programme? It is necessary to introduce changes to the standard form of the contract, because Resolution No. 410 contains a double mention of medicines (subparagraph 6 of paragraph 19, paragraph 24-1 of the Standard form of the Contract under the medical guarantees programme)), and therefore, the broad wording of the subject is problematic considering the nature of the contract.

Article 9 of Law No. 2168-VIII stipulates that in case of need for medical services and medicines under the medical guarantee programme, the patient (their legal representative) applies to the provider of medical services in accordance with the procedure prescribed by law. The procedure for reimbursement of medicinal products under the medical guarantee programme for the relevant year, the standard form of the reimbursement agreement, the procedure for its conclusion, changes and termination shall be approved by the Cabinet of Ministers of Ukraine.

To date, a Standard Form of Reimbursement Agreement has been developed and approved by Resolution No. 136[1], and also the regulations of reimbursement of medicines are defined based on the Resolution of the Cabinet of Ministers of Ukraine No. 135 "Some issues of reimbursement of medicines" dated 27.02.2019[2]. Please note that the reimbursement of medicines is carried out for the outpatient treatment of cardiovascular disease, type II diabetes, and asthma. The subject of the reimbursement agreement is medicines dispensed by pharmacies at retail prices specified in the Register of medicines subject to reimbursement, approved in accordance with the procedure prescribed by law, with reimbursement of the cost of medicines by the National Health Service of Ukraine in full or in part to the pharmacy, The medicines are granted to

[1] Resolution of the Cabinet of Ministers of Ukraine No 136 “Some issues regarding reimbursement agreements”. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/136-2019-%D0%BF#Text

[2] Resolution of the Cabinet of Ministers of Ukraine No 135 “Some issues of reimbursement of medicines”. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/135-2019-%D0%BF#Text

patients based on electronic prescriptions, records of which are entered into the electronic healthcare system. This agreement is also an agreement for the benefit of third parties-patients in terms of full or partial payment for their medicinal products.

Problems that arise in practice through new contractual algorithms are best traced through court case illustrations.

On June 16, 2020, the Eighth Administrative Court of Appeal considered the case [18] on declaring illegal the defendant's inaction on failure to take measures to restore the violated right to preferential purchase of medicines; recognition of the defendant's inaction on failure to take measures to resolve the issue of liability of persons due to whose fault the plaintiff's rights to preferential purchase of medicines were committed; declaring illegal the defendant's inaction on failure to take measures to compensate for material damage caused to the plaintiff as a result of violation of his right to preferential purchase of medicines; the defendant's obligation to take measures to compensate for material damage caused to the plaintiff as a result of violation of his right to preferential purchase of medicines; restoration of the violated right of the plaintiff to preferential purchase of medicines; resolving the issue of liability of persons through whose fault the plaintiff's rights to preferential purchase of medicines were violated; recovery of non-pecuniary damage in the amount of 133,102.50 UAH from the Department of Health of Lutsk City Council in favour of the plaintiff.

According to Part 5 Article 38 of the Law of Ukraine "On the fundamentals of social protection of persons with disabilities in Ukraine"[1] persons with disabilities of the first and second categories, being in outpatient treatment, have the right to purchase drugs on prescription with payment of 50 percent of their cost. The plaintiff is a person with a disability of II category who, on 08.01.2020, based on a prescription for preferential purchase of medicines, applied to the pharmacy No. 65 DVTP "Volynpharmpostach" in order to purchase drugs with a 50 percent discount, however, employees of the pharmacy denied the plaintiff the sale of medicines by prescription for preferential purchase of medicines, as a result of which the plaintiff paid the full cost of medicines in the amount of 173,.80 UAH. The plaintiff therefore considered that he had suffered material damage in the amount of UAH 86.90. On 09.01.2020, the plaintiff sent a complaint to the Health Department of the Lutsk City Council with a request to compensate the damage and provide information about the officials guilty of violating his legal rights. Department of Health of Lutsk City Council by letter No. 17-18/40/2020 dated 27.01.2020 informed the plaintiff that the receipt of medicines on preferential terms is possible after the conclusion of the relevant agreement between the medical institution and the pharmacy. Since such an agreement was concluded on 13.01.2020, after this date the plaintiff had the right to apply for the purchase of medicines on preferential terms. By virtue of the peremptory provision of Article 38 of the Law of Ukraine "On the Fundamentals of Social Protection of Persons with Disabilities in Ukraine", the plaintiff considered the defendant's refusal to ensure the right to preferential purchase of medicines to be unlawful.

The position of the defendant was that in accordance with the Resolution of the Cabinet of Ministers of Ukraine No. 391 "On approval of requirements for the provider

[1] Law of Ukraine No 875-XII “On the basis of social protection of persons with disabilities in Ukraine”. (1991, March). Retrieved from https://zakon.rada.gov.ua/laws/show/875-12#Text

of medical services, with which the main managers of budget funds concluded agreements on medical care" dated 28.03.2018, the Department of Health of the Lutsk City Council enters into agreements on medical care for the population for the budget year with municipal non-profit health care enterprises as recipients of budget funds[1], the Department of Health of the Lutsk City Council enters into agreements on medical care for the population for the budget year with municipal non-profit health care enterprises as recipients of budget funds.

According to the decision of the session of the Lutsk City Council No. 68/3 "On the Budget of the Lutsk City Territorial Community for 2020" dated 24.12.2019 concerning limit certificates of the Department of Finance and Budget of Lutsk City Council for 2020 dated 08.01.2020, the Department of Health of Lutsk City Council provided limit certificates to municipal non-profit healthcare enterprises of Lutsk City Territorial Community and concluded agreements on medical care for the budget year from 09.01.2020 with certain amounts of expenditures directed at the use of budget funds, including for reimbursement of free prescriptions for privileged categories of patients.

According to the requirements of the Budget Code of Ukraine, municipal healthcare enterprises have the right to initiate the procedure of concluding agreements with enterprises and organisations, including pharmacies, in the presence of budget allocations. Therefore, only from the moment of allocation of budgetary funds to the municipal healthcare institution, such has the right to begin the procedure of concluding agreements with pharmacy.

Municipal enterprise "Lutsk Primary Care Centre No. 1", where the plaintiff was on an outpatient treatment, entered into a contract with the pharmacy DVTP "Volynpharmpostach" on 13.01.2020. Therefore, the defendant considered that it had not committed unlawful inaction, as it had taken the necessary steps to ensure that the right of citizens, including the plaintiff, to receive medicines on preferential terms was ensured.

Item 2 of the Resolution of the Cabinet of Ministers of Ukraine No. 1303 "About streamlining of free and preferential release of medicines according to prescriptions of doctors in case of out-patient treatment of separate groups of the population and on certain categories of diseases" dated 17.08.1998 (hereinafter referred to as "the Resolution No. 1303")[2] stipulates that the release of medicines free of charge and on preferential terms in the case of outpatient treatment of persons is carried out by pharmacies on prescriptions issued by doctors of treatment and prevention facilities at the place of residence of these persons. Paragraph 2 of Annex No. 1 to Resolution No. 1303 stipulates that persons with disabilities of I and II category belong to the groups of the population in the case of outpatient treatment of which prescription medicines are dispensed with payment of 50 percent of their cost in accordance with the Law of

[1] Resolution of the Cabinet of Ministers of Ukraine No 391 “On approval of requirements to the provider of medical services, with which the main managers of budget funds enter into agreements on medical services”. (2018, March). Retrieved from https://zakon.rada.gov.ua/laws/show/391-2018-%D0%BF#Text

[2] Resolution of the Cabinet of Ministers of Ukraine No 1303 “On streamlining free and preferential dispensing of medicines on prescription in the case of outpatient treatment of certain groups of the population and for certain categories of diseases”. (1998, August). Retrieved from https://zakon.rada.gov.ua/laws/show/1303-98-%D0%BF#Text

Ukraine "On Fundamentals of Social Protection of Persons with Disabilities in Ukraine".

The Court of Appeal found that the plaintiff is a person with a disability of II category, in accordance with Resolution No. 1303 has the right to release drugs on prescription with payment of 50 percent of their cost. At the same time, the Court of Appeal noted that the dispensing of prescription drugs with payment of both 50 percent of their cost and free of charge takes place in accordance with a particular procedure established by the state.

In particular, the Resolution of the Eighth Administrative Court of Appeal states: medical care is provided free of charge at the expense of budget funds in healthcare facilities and individual entrepreneurs who are registered and licensed to conduct business in medical practice, with which the main budget managers have concluded agreements on medical care for the population. Medical care contracts are concluded within the budget funds provided for healthcare for the relevant budget period, based on the cost and volume of health care services, the customer of which is the state or local governments. The cost of a health care service is calculated based on the cost structure required to provide such a service in accordance with industry standards in the field of healthcare. The Cabinet of Ministers of Ukraine approved the method of calculating the cost of medical services and the list of paid medical service. The procedure for concluding agreements on medical care for the population under the medical guarantee programme and the procedure for determining tariffs for payment for medical services and medicines shall be established by the Law No. 2168-VIII.

Dispensing of prescription drugs with payment of 50 percent of their cost, and free of charge, is carried out depending on the funds provided for this purpose in the state and local budgets. The Law No. 2168-VIII, which regulates the procedure for concluding contracts for medical care under the medical guarantee programme and the procedure for determining tariffs for payment of medical services and medicines, does not make provision for the terms of concluding contracts for medical care.

Thus, the appellate court held that the defendant did not commit unlawful inaction, because it took all necessary steps to ensure the right of citizens, including the plaintiff, to receive drugs on preferential terms. Therefore, the court refused in satisfaction of the claim for inaction of the defendant to ensure the right the plaintiff on preferential purchase of medicines.

This is an example of causing negative consequences for an individual, in particular, being a person with a disability who has the right to dispense prescription medicines with payment of 50 percent of their cost, which was established by the court and clearly guaranteed by the Law of Ukraine "On Fundamentals of Social Protection with Disabilities in Ukraine". Resolution No. 1303 does not make provision for any contractual conditions in the regulation of the granting of preferential provision of medicines. Thus, regulatory obstacles exist precisely because of the vagueness of the provisions of the Law No. 2168-VIII, as noted by the Court of Appeal, stating that the terms of the contract are not stipulated, and therefore, everything is left to the discretion of the authorities. Legal uncertainty negatively affects the exercise of human rights in the field of healthcare and not always an individual can get effective protection of their rights in court. The authors of this study do not agree with the assessment of the Court of Appeal in the outlined case, believing that legislative shortcomings should not negatively

affect the implementation of human rights in view of Articles 3 and 8 of the Constitution of Ukraine.

Elements of the rule of law are the principles of equality and justice, legal certainty, clarity, and unambiguity of the rule of law, as otherwise cannot ensure its uniform application, does not preclude unrestricted interpretation in law enforcement practice and inevitably leads to arbitrariness (paragraph 2 of subclause 5.4 clause 5 of the motivating part of the Decision of the Constitutional Court of Ukraine No. 5-рп/2005 dated 22 September 2005[1]).

The study draws attention to the Decision of the European Court of Human Rights in the case "Fedulov v. Russia" [19], where the European Court of Human Rights recognised a violation of Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. The applicant complained that the authorities had failed to provide him with the free medicines he was entitled to in connection with his cancer treatment. Mr. Fedulov was diagnosed with cancer in 2007. He was entitled to free medication, in this case Bicalutamide, which he needed for 8-12 months. However, the pharmacy, which was intended to give him the medicine free of charge, provided it only once on these terms. In all other cases, he was informed that Bicalutamide was not available free of charge, but that he could purchase it at his own expense. In the following months, he paid 1,400 euros for treatment. He complained to the authorities and the courts about the lack of free medicines and sought reimbursement, but in February 2008 the district court dismissed his claim in full. The court found that the authorities involved, the St. Petersburg Health Insurance Fund and the St. Petersburg Health Committee, had done everything required by law. The applicant complained that he had not been provided with the medicines to which he was entitled under the law free of charge and that the authorities had not reimbursed him after he had had to purchase the necessary medicines at his own expense, basing his position on Article 1 of Protocol No. 1 (protection of property). The ECHR stated in its assessment that the parties did not deny that four times out of five the applicant had not been able to obtain the medication needed to treat his illness due to the lack of this medicine for distribution free of charge. Considering the finding that the applicant had a "legitimate expectation" that he would receive preferential assistance, the ECHR concluded that there had been an interference with the applicant's right under Article 1 of the First Protocol, and it is therefore necessary to determine whether this interference was justified.

The first and most important requirement of Article 1 of the First Protocol is that any interference by a public authority in peaceful possession should be lawful. As for the "law", Article 1 of the First Protocol refers to the same concept as the Convention, where the term is employed, and requires that the measure complained of be based on a sufficiently accessible and sufficiently precise domestic legal provision. Furthermore, the rule of law, one of the fundamental principles of a democratic society, is inherent in all articles of the Convention. So, the question of whether a fair balance has been struck between the requirements of the general interest of the community and the requirements

[1] Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 51 People's Deputies of Ukraine on the constitutionality of the provisions of Article 92, paragraph 6 of Section X “Transitional Provisions” of the Land Code of Ukraine (case on permanent use of land), No 5-рп/2005. (2005, September). Retrieved from https://zakon.rada.gov.ua/laws/show/v005p710-05#Text

of protection of fundamental human rights becomes relevant only after it is established that the intervention satisfies the rule of law and was not arbitrary.

In the present case, the ECHR notes that, although the applicant's right to the benefit in question was never in doubt, the domestic courts had, in fact, justified the refusal by reference to the lack of budgetary resources earmarked for that purpose by the St. Petersburg residents of this city for free medicine. Therewith, they did not invoke any legislative provision which would stipulate the refusal to provide the relevant benefit by any restrictions on budget funds, which made provision for any discretion on the part of the executive authorities to reduce or deny this right after reaching the budget allocation limit or any such provision that could provide legal grounds for such a conclusion. In this regard, it is noteworthy that in subsequent court decisions taken in proceedings on similar claims, it was clearly stated that the existing legal framework establishes the right of those who are entitled to the necessary medicines not only free of charge but also without any restrictions, and that the establishment of a maximum number of specific medicines per person or insufficient budgetary funding allocated to a particular region cannot serve as grounds for refusing to provide interested persons with medicines that are important for their lives.

The study of innovative legal constructions gives grounds to assert that legislative shortcomings, first of all vagueness and uncertainty of the legal essence of civil instruments, source gaps and lack of scientific interest, have already caused problems in law enforcement and, consequently, have violated human rights in healthcare.

CONCLUSIONS

Having studied the new legal constructions through the lens of judicial practice, their civilistic nature was clarified and recommendations were made to optimise the enforcement and administration of the law:

1. Law No. 2168-VIII is special, because it regulates the procedure for providing medical care at the expense of the State Budget of Ukraine under the medical guarantee programme. Therefore, the following conclusions are drawn: 1) when providing medical care under the medical guarantee programme, the patient's right to freely choose a doctor is limited by the choice of a primary care physician; 2) the choice of a doctor in the provision of other types of medical care under the medical guarantee programme is subject to numerous regulatory restrictions, which does not allow to fully feel the freedom of choice in the exercise of personal non-property right to medical care; 3) when providing medical care outside the programme, free choice must be provided on the basis of Articles 6 and 38 of the Fundamentals, which does not correlate with Article 24 of the Constitution of Ukraine.

2. The declaration on the choice of a doctor providing primary healthcare has the following legal significance: a) certifies the exercise of the right to freely choose a doctor; b) by its legal nature is not a transaction; c) is a legal fact that confirms the emergence of a natural person's status of a third party under the Agreement under the medical guarantee programme.

3. The contract under the medical guarantee programme on the legal essence is the contract on rendering of services. According to the principle of dichotomy, this contract consists of two parts: 1) in the part "customer – provider", it is a contract for the provision of services under public procurement; 2) in terms of rendering medical services

by the provider to the patient, it is a contract for the benefit of third parties; 3) is civil legal in nature.

4. Theoretical gap leads to problems of legal understanding in the application of Ukrainian legislation, which has a negative impact on the effectiveness of human rights protection in the field of healthcare, which can be clearly seen in the analysis of judicial practice.

5. The "legitimate hope" that arises in a person in the presence of regulatory guarantees is under conventional protection, as illustrated in the decisions of the ECHR, and to change the paradigm, a transformation of the law is required. The principle of the rule of law is guarded so that dissonance does not deepen and "legitimate expectations" through a guaranteed right does not depend on the lack of public funds.

The subject matter is multidisciplinary, important for both lawyers and healthcare professionals, therefore scientific intelligence should be spectral and in-depth in order to provide better scientific cognition of the analysed legal constructions, and thus develop a doctrine that will best protect human rights, including in the administration of justice.

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Suggested Citation: Senyuta, I.Ya. (2020). Modern civilistic instruments of medical reform: issues of law implementation and law enforcement. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(3), 109-127.

Submitted: 18/05/2020
Revised: 29/07/2020
Accepted: 19/08/2020

УДК 343.15:347.991
DOI: 10.37635/jnalsu.27(3).2020.128-141

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Відділ дослідження проблем кримінального процесу та судоустрою
Науково-дослідний інститут вивчення проблем злочинності
імені академіка В.В. Сташиса
Національної академії правових наук України
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РОЛЬ ВЕРХОВНОГО СУДУ В МЕХАНІЗМІ ЗАБЕЗПЕЧЕННЯ СТАЛОСТІ ТА ЄДНОСТІ СУДОВОЇ ПРАКТИКИ: ОКРЕМІ АСПЕКТИ

Анотація. *Одним із засобів забезпечення сталості та єдності судової практики є рішення Верховного Суду, в яких здійснюється відступ від висновку щодо застосування норми права у подібних правовідносинах. Чинне кримінальне процесуальне законодавство України чітко регламентує порядок здійснення такого відступу, який в цілому відповідає практиці Європейського суду з прав людини та міжнародним рекомендаціям у цій сфері. Проте вказаному порядку іманентні істотні особливості, що потребують наукового аналізу чинної процесуальної форми в даному її сегменті з точки зору її адекватності потребам у забезпеченні права кожного на справедливий суд та очікуванням суспільства щодо розумної прогнозованості судових рішень. З огляду на це, в межах даної наукової роботи здійснено дослідження категорій «єдність» та «сталість» судової практики як предмету забезпечення Верховним Судом. Для досягнення поставленої мети авторами використано комплекс сучасних загальнонаукових та спеціальних правових методів. У роботі розглянуто процесуальний порядок відступу Верховним Судом від висновку щодо застосування норми права в подібних правовідносинах; проаналізовано правову природу питання ієрархії правових позицій Верховного Суду. Встановлено, що ключовою ідеєю, яка втілена законодавцем у нормативну модель порядку відступу від висновку щодо застосування норми права, є те, що можливість такого відступу від висновку залежно від складу суду, в якому його було прийнято, надається суду у складі більшої кількості суддів Верховного Суду, що й зумовлює «вищий ступінь значення» такого висновку та застосування саме його в подальшій судовій практиці. Дослідження вказаних напрямів здійснено з урахуванням рекомендацій Консультативної ради європейських суддів, а також релевантної практики Верховного Суду.*

Ключові слова: *правова позиція; Касаційний кримінальний суд, сталість та єдність судової практики, ієрархія правових позицій Верховного Суду, висновок щодо застосування норми права.*

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THE ROLE OF THE SUPREME COURT IN THE MECHANISM OF ENSURING THE SUSTAINABILITY AND UNITY OF JUDICIAL PRACTICE: SOME ASPECTS

Abstract. *One of the means of ensuring the stability and unity of judicial practice is the decision of the Supreme Court, which deviates from the conclusion on the application of the rule of law in such legal relations. The current criminal procedural legislation of Ukraine clearly regulates the procedure for such a derogation, which is generally in line with the case law of the European Court of Human Rights and international recommendations in this area. However, this procedure has immanent significant features that require scientific analysis of the current procedural form in this segment with regard to its adequacy to the needs of ensuring the right of everyone to a fair trial and society's expectations for reasonable predictability of court decisions. In view of this, within the framework of this study, the categories "unity" and "sustainability" of judicial practice as a subject of provision by the Supreme Court was carried out. To achieve this purpose, the authors used a set of modern general and special legal methods. The study considers the procedural order for the Supreme Court to deviate from the conclusion on the application of the rule of law in such legal relations; the legal nature of the issue of the hierarchy of legal positions of the Supreme Court is analysed. It is established that the key idea embodied by the legislator in the statutory model of the procedure for deviating from the opinion on the application of the rule of law is that the possibility of such a deviation from the opinion, depending on the composition of the court in which it was adopted and determines the "higher degree of significance" of such a conclusion and its application in further judicial practice. These areas were studied with the consideration of the recommendations of the Advisory Council of European Judges, as well as the relevant practice of the Supreme Court.*

Keywords: *legal position; Criminal Court of Cassation, sustainability and unity of judicial practice, hierarchy of legal positions of the Supreme Court, conclusion on the application of the rule of law.*

INTRODUCTION

Traditionally, in most states governed by the rule of law, the Supreme Court has a leading role in shaping the stability and unity of judicial practice. It is no coincidence that the legislator of Ukraine has determined the functional purpose of the Supreme Court in the judicial system of Ukraine precisely because of ensuring the stability and unity of judicial practice. Thus, in accordance with Part 1 of Art. 36 of the Law "On the Judiciary and the Status of Judges"[1], the Supreme Court is the highest court in the judicial system of Ukraine, which ensures the stability and unity of judicial practice in accordance with the procedure prescribed by procedural law. For the practice of the Supreme Court to be

[1] Law of Ukraine No 31 "On the Judiciary and the Status of Judges". (2020, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19#Text.

an example of law enforcement and fulfil its functional purpose, admittedly, the decisions of the Supreme Court must be of high quality (legal, reasonable, and fair) and demonstrate a unified approach of the highest judicial body to resolve disputes [1-9]. In this regard, it should be noted that the Opinion of the Advisory Council of European Judges (ACEJ) No. 20 "On the role of courts in ensuring the uniform application of the law" (Strasbourg, November 10, 2017) [10] (hereinafter referred to as "the ACEJ Opinion") emphasises the need of the existence of mechanisms within the Supreme Court capable of correcting inconsistencies in the practice of that court. Thus, paragraph 24 of this ACEJ Opinion states that the availability of tools to ensure uniformity of practice in one court is particularly relevant for supreme courts. This issue becomes extremely important in cases where the Supreme Court itself is a source of uncertainty and conflicting case law instead of ensuring its unity. Thus, the existence of mechanisms within the Supreme Court that can correct inconsistencies in the practice of this court is of paramount importance. Relevant instruments may include, for example, appealing to the Grand Chambers or convening larger chambers in cases where the case law of the Supreme Court becomes different, or where it is possible to review and reverse a precedent [10].

It is at solution of this problem that is the mechanism created by the national legislator is aimed – the institution of "overruling" (a special procedure for changing the legal position of the highest judicial body on a particular issue used by the highest courts of the Anglo-Saxon legal tradition). The current criminal procedure law makes provision for the transfer of a case by a panel of the Supreme Court hearing in cassation to a chamber, joint chamber or Grand Chamber of the Supreme Court, if the court hearing the case in cassation deems it necessary to depart from the conclusion on application of rules of law in such legal relations, set out in a previously adopted decision of the Chamber, the Joint Chamber or the Grand Chamber of the Supreme Court (Articles 434-1, 434-2 of the Criminal Procedural Code of Ukraine (CPC))[1].

The introduction of this mechanism has proved effective as a means of overcoming differences in the practice of the Supreme Court. At the same time, the existence of opposing legal positions of a higher judicial body is not uncommon, which negatively affects law enforcement and disorients lower courts in resolving similar legal issues, and thus reduces the functional role of the Supreme Court in the overall mechanism of stability and unity of judicial practice. The above requires a scientific search towards studying the existing mechanism for resolving differences in judicial practice and assessing the existing legal situation to ensure its sustainability and unity.

During the study, it was stated that theoretical and applied issues of sustainability and unity of judicial practice were investigated in the articles of many experts of different times, all of whom studied the legal status of the Supreme Court (Ukraine) and covered issues of ensuring the unity of judicial practice, including N. Bakaianova, I. Beitsun, N. Bobechko, Ye. Bondarenko, S. Bratus, S. Vasyliev, M. Vilhushinskyi, V. Horodovenko, O. Hotin, M. Demenchuk, Ye. Dodin, V. Dolezhan, A. Drishliuk, O. Zhydkov, L. Zuievich, N. Zozulia, S. Kashkin, O. Kibenko, S. Kivalov, M. Kosiuta, V. Kravchuk, N.

[1] Criminal Procedural Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.

Slotvinska, O. Kot, N. Krestovskay, N. Kuznietsova, L. Luts, B. Malyshev, V. Marochkin, L. Moskvych, P. Muzychenko, V. Musievskyi, I. Nazarov, L. Nesterchuk, N. Nor, I. Olender, P. Orlovskyi, L. Ostafichuk, N. Pylgun, M. Popovych, Yu. Polianskyi, S. Pohrebniak, S. Prylutskyi, B. Potylchak, B. Poshva, M. Rudenko, D. Radysh, O. Romanov, Ya. Romaniuk, T. Rosik, O. Svyda, M. Siryi, O. Skakun, V. Serdiuk, V. Sukhonos, Yu. Fidria, L. Fesenko, O. Uvarova, S. Shevchuk, O. Sheredko, V. Shyshkin, etc. Among foreign scholars, the problem of ensuring the unity of judicial practice by the supreme (higher) courts was studied by A. Bonica, M. J. Woodruff [11], M. Marietta, T. Farley, [12], Yu. A. Dzepa [13], E. P. Parera [14], R. S. Davies [15], J. L. Torres [16], T. Pryor [17], E. Pons Parera [18], and others.

1. MATERIALS AND METHODS

The methodological framework of the study was a set of modern general scientific and special methods used in legal science. Therewith, the study primarily proceeded from the fact that the system of methods should be associated with the recognition of the objectivity of existence and the necessity of developing the legal phenomena – unity and sustainability of case law, Supreme Court decisions resolving existing differences in law enforcement as one of the key means of ensuring the unity and sustainability of judicial practice, social and legal expectations from the quality of judicial practice of the Supreme Court at the present stage of development of society, etc. Discrepancy in law enforcement should be understood as the existence of different legal positions of law enforcers regarding the application of the same legal provision in similar legal relations. In this case, the legal position can be both expressed and formalised in the structure of the content of a particular court decision, and such that is developed in the minds of law enforcement officers only at the stage of a court decision based on the assessment of a legal situation in particular criminal proceedings.

The general level of methodology is represented by the method of materialist dialectics, which has not lost its relevance, as it requires comprehensiveness and objectivity to the knowledge of real phenomena, as well as their links with practical activities in criminal proceedings. The choice and use of specific methods of the research process depended on the stage of cognition and the objective that was set at a particular stage of cognitive activity. Thus, the dialectical method suggested that the unity and stability of judicial practice are closely related to ensuring the right of everyone to a fair trial, creating the necessary basis for this, which is to implement the principle of legal certainty and ensure reasonable predictability of court decisions. Therewith, the use of the dialectical method allowed to conclude that the consistency of judicial practice reflects the constant state of uniform law enforcement. In other words, it is a "rooted" unity of the same legal issues as a direct indicator of the transition from quantity to quality.

A set of methods of theoretical cognition was used to generalise and develop a holistic vision of the mechanism for resolving differences in judicial practice. The systematic method allowed to consider the sustainability of the practice of the Supreme Court as an important element of the system of legal means to ensure the unity of judicial practice, which is interconnected and interdependent, used to solve a particular problem – ensuring the unity and sustainability of judicial practice in criminal proceedings. in fact,

it acts as an integrative quality that describes the very system of these means. The method of abstraction was used to present the relevant legal positions of the Supreme Court in schematic language, to determine the main and reject the insignificant to demonstrate the existence of opposing decisions of this body, and thus the lack of unity of its practice on a particular issue.

The formal legal method was used to clarify the framework of categories and concepts of this study (in particular, with regard to the concept of sustainability of judicial practice); to formulate the existing statutory mechanism for overcoming the conflict of legal positions of the Supreme Court in the way the court directs criminal proceedings for consideration by a chamber, joint chamber or the Grand Chamber of the Supreme Court, depending on who formulated the conclusion on application of law in such legal relations; to determine the position of the legislator on the hierarchy of legal positions of the Supreme Court. The logical method (methods of analysis, synthesis, and induction) allowed to analyse the problematic issues of uniform application of the provisions of law by the Supreme Court in similar legal relations and to determine legal means to ensure the unity of judicial practice, which is a necessary condition for overcoming the problem of diametrically opposed judicial positions.

The comparative legal method was used to study the vision of the phenomenon of sustainability and unity of judicial practice of the highest judicial body at the international level. The method of idealisation and modelling allowed to develop an ideal theoretical model of the mechanism for resolving differences in judicial practice. In this case, all scientific research methods were used in the interrelation and interdependence, which contributed to the comprehensiveness, completeness, objectivity of the study and allowed to lay the foundation for further possible directions of development of theoretical ideas about the subject matter.

2. RESULTS AND DISCUSSION

2.1 Regarding the sustainability of judicial practice

As noted in the introduction, Part 1 Article 36 of the Law of Ukraine "On the Judiciary and the Status of Judges"[1] stipulates that the Supreme Court is the highest court in the judicial system of Ukraine, which ensures the stability and unity of judicial practice in accordance with the procedure prescribed by procedural law. In contrast to the current version of the law, prior to 2016 amendment, Part 1 Article 38 of the Law of Ukraine "On the Judiciary and the Status of Judges"[2] stipulated as follows. The Supreme Court of Ukraine is the highest judicial body in the system of courts of general jurisdiction of Ukraine, which ensures the unity of judicial practice in the accordance with the procedure prescribed by procedural law. Thus, apart from the unity of judicial practice, which means its identity, uniformity, the subject of the Supreme Court, in accordance with current legislation of Ukraine, is the consistency of judicial practice.

Paragraph 14 of the above-mentioned ACEJ Opinion [10] states that in the countries of continental law, as a rule, a consolidated and coordinated number of court decisions on a certain issue (jurisprudence constant) is required for a certain position to

[1] Law of Ukraine No 31 "On the Judiciary and the Status of Judges". (2020, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19#Text.
[2] *Ibidem*, 2020

be relevant. Admittedly, this does not preclude a decision from having legal force when the Supreme Court adopts it for the first time in a corresponding legal matter, the practice of which has not yet been established. A common fact is the lack of a formula according to which it is possible to determine the moment when the case law can be considered as established. Many supreme courts in continental law are currently empowered to select cases to set standards to be applied in future cases. Therefore, in these cases, even a single decision of the Supreme Court, which was adopted to set a precedent, can be considered as authoritative case law. Analysis of the concept of "established case law" by S. Shevchuk points out that in most legal systems of countries there are different doctrines to justify the binding force of case law. The Anglo-Saxon doctrine of obligation is based on the stare decisis doctrine, according to which judges are bound by precedents in previous cases, while in Romano-Germanic countries doctrines similar to the French jurisprudence constant are applied, according to which a set of previously adopted and agreed court decisions are considered as convincing evidence of the correct interpretation of the legal provision [19].

Although the countries of continental law do not officially recognise the judicial precedent a source of law, the European Court of Human Rights (hereinafter referred to as "the ECHR"), upon analysing the existence of grounds for restriction of the right under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] (hereinafter referred to as "the CPHRFF"), in accordance with French law (Kruslin v. France) stated that the relevant established case law cannot be disregarded. Paragraph 2 Article 8 of the Convention and other similar provisions have always interpreted the Court not as "formal" but as "substantive"; in the Court's view, it covers both regulations of a lower category than legislation, and unwritten law. It is undisputed that decisions in the cases of De Wilde, Ooms, and Versip concerned the United Kingdom, but, as the Government rightly pointed out, it would be wrong to exaggerate the discrepancy between countries with a legal system based on common law and continental countries. Statutory law, admittedly, is also important in a country with a common law system. Conversely, in continental countries, case law has traditionally played a major role, to such extent that entire branches of positive law have largely emerged from court decisions. The Court has repeatedly taken into account the case law of such countries. If the Court had disregarded the case law, it would have undermined the legal system of the mainland States, almost as the judgment in the Sunday Times of 26 April 1979 would have the legal system of the United Kingdom "shaken to its foundations" if the Court had excluded the common law from the concept of law (paragraph 29) [20].

Considering the etymological content and statutory context in which the concepts of "sustainability" and "unity" of judicial practice are used, it appears that the stability of judicial practice reflects the constant state of uniform law enforcement. In other words, it is the "rooted" unity of the same legal issues as a direct indicator of the transition from quantity to quality; the more identical court decisions on a disputed legal issue, the more grounds there are to describe such law enforcement as permanent. The unity and

[1] Convention for the Protection of Human Rights and Fundamental Freedoms. (2013, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

permanence of judicial practice are closely linked to ensuring the right of everyone to a fair trial, creating the necessary basis for this, which is to implement the principle of legal certainty and ensure reasonable predictability of court decisions.

2.2 Regarding ensuring the sustainability and unity of judicial practice by a decision (ruling) of the Supreme Court, which resolves the existing differences in judicial practice

A separate means of ensuring the sustainability and unity of judicial practice are decisions (rulings) of the Supreme Court that resolve differences existing in judicial practice. Notably, there have recently been many cases of contradictory and even polar legal opinions of the highest judicial body on the application of certain provisions of law. One of the clearest examples of controversy in law enforcement is the resolution of the issue of the legal consequences of the absence of a resolution on the appointment of an investigator or prosecutor in the materials of criminal proceedings. Thus, in the decision of the Supreme Court of Cassation of 19.05.2020 in the case No. 490/10025/17 the position of the court on the non-binding nature of the decision to appoint a particular investigator or prosecutor, in connection with which its absence in the criminal proceedings per se does not mean that the investigator or prosecutor did not have the appropriate authority. After analysing the current legal regulation of this issue, the court noted in that based on the rule *casus omissus pro omisso habendus est*, it sees no grounds for amending the text of the law with the requirement that is not stated in it and considers that the lack of relevant provisions directly related to regulation this issue, mentioning the need for a resolution, means that such a resolution is not necessary to determine the particular investigator or prosecutor who is entrusted with the exercise of relevant powers in a particular case. The court also noted that information on which investigators were conducting the pre-trial investigation and which prosecutors were conducting the proceedings had been entered into the Unified Register of Pre-Trial Investigations. Prolonged pre-trial investigation, use of resources by investigators and prosecutors and other factors of proceedings indicate that the investigation and procedural management of these persons was carried out according to the respective decisions of their managers[1].

However, in the decision of the Supreme Court of Cassation of 17.06.2020 in case No. 754/7061/15 the court of cassation reached the opposite conclusion on this matter. It emphasised the mandatory nature of the duly executed decision on the appointment of a prosecutor, which empowers a particular prosecutor to supervise compliance with laws during the pre-trial investigation in the form of procedural guidance of the pre-trial investigation in a particular criminal proceeding. Therefore, it is necessary to deviate from the conclusion on the application of the rule of law in such legal relations, set out in the previously adopted decision of 19 May 2020 (proceedings No. 51-6116км19) of the Supreme Court in the panel of judges of the First Judicial Chamber. In these circumstances, to ensure the unity of judicial practice, the criminal proceedings against PERSON_1 is subject to transfer to the joint chamber of the Criminal Court of Cassation of the Supreme Court based on Part 2 Article 434-1 of the Criminal Procedural Code of

[1] Resolution of the First Judicial Chamber of the Criminal Court of Cassation of the Supreme Court No 490/10025/17. (2020, May). URL: http://www.reyestr.court.gov.ua/review/89621459 (access date: 25.05.2020).

Ukraine[1].

It should be added that the latter position of the Supreme Court on the obligation to issue a decision on the appointment of an investigator or a prosecutor was also formulated in several other earlier decisions (in particular, the decisions dated 19.04.2018 in the case No. 754/7062/15-к; dated 17.12.2019 in the case No. 235/6337/18; dated 05.02.2020 in the case No. 676/5972/17, etc.). This example not only demonstrates the existence of opposing decisions of the Supreme Court, and hence the lack of unity of its practice on this matter, but also necessitates an analysis of the mechanism of ensuring the unity of case law by the Supreme Court, because in one case, as shown above, a decision made is contrary to the current practice of the Supreme Court on this issue, in another – if necessary to deviate from the position of the panel, the court decides to transfer criminal proceedings to the joint chamber of the Criminal Court of Cassation of the Supreme Court. This also raises the question of the obligation of the court of cassation to refer to the procedure of transfer of criminal proceedings stipulated by Article 434-1 of the CPC of Ukraine[2], if it deems it necessary to depart from the conclusion on the application of law in such legal relations. Furthermore, the problem of the existence of opposite decisions on the application of the rule of law decisions of the Criminal Court of Cassation in the Supreme Court is clearly illustrated in many recent articles, in particular, the lawyer O. Gotin's study [21; 22].

As already mentioned, the current criminal procedure legislation makes provision for the transfer of a case by a panel of the Supreme Court hearing in cassation to a chamber, joint chamber, or Grand Chamber of the Supreme Court, if the court hearing the case in cassation deems it necessary to deviate from the conclusion on the application of the rule of law in such legal relations, set out in a previously adopted decision of a chamber, joint chamber or Grand Chamber of the Supreme Court (Article 434-1). Since the adoption of these legislative provisions, this institution (which, in fact, is the essence of the above-mentioned institution of "overruling") is actively used in practice and has proven to be an effective means of ensuring the unity of judicial practice.

Analysing the issue of the quality of the law in the context of Article 1 of Protocol No. 1 to the Convention, the ECHR in its judgment in Serkov v. Ukraine dated 07.07.2011 noted: The Court recognises that, indeed, there may be compelling reasons to reconsider the interpretation of the legislation to be followed. The Court, applying dynamic and evolutionary approaches in the interpretation of the Convention, may, if necessary, depart from its previous interpretations, thus ensuring the effectiveness and relevance of the Convention. However, the Court sees no justification for changing the legal interpretation encountered by the applicant. In fact, the Supreme Court did not put forward any arguments to explain the corresponding change in interpretation. Such a lack of transparency was bound to affect public confidence and faith in the law. In the circumstances of the present case, the Court considers that the manner in which the

[1] Criminal Procedure Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text. Resolution of the Third Judicial Chamber of the Criminal Court of Cassation of the Supreme Court No 754/7061/15. (2020, June). Retrieved from http://www.reyestr.court.gov.ua/review/89929110

[2] Criminal Procedural Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.

domestic courts interpreted the relevant provisions of the law adversely affected their predictability (paragraph 39, 40 [23]. In paragraph 49 of Opinion No. 11 (2008) of the Advisory Council of European Judges to the Committee of Ministers of the Council of Europe on the quality of judgments states that judges must generally apply the law consistently, but when a court decides to depart from previous practice, this should be clearly stated in its decision [24].

In the context of considering the issue of the mechanism stipulated by national legislation for the Supreme Court to ensure the sustainability and unity of its own practice, it makes sense to address the statutory structure of Article 434-1 of the CPC of Ukraine[1], imperatively makes provision for the need to refer the case to a chamber, a joint chamber or the Grand Chamber of the Supreme Court, if the court deems it necessary to depart from the conclusion on the application of the rule of law in such legal relations. In other words, the procedure established by Article 434-1 of the CPC of Ukraine[2] for overcoming the legal position previously formulated in the relevant opinion of the Supreme Court does not provide the court's decision with the opposite position, but directs the court to use another procedural way – transfer consideration of a chamber, a joint chamber or the Grand Chamber of the Supreme Court. Observance of this procedure excludes the situation of diametrically opposed legal positions of the Supreme Court panels on the same issue, which has a negative impact on law enforcement practice, creating a situation of legal uncertainty and grounds for possible abuses in this area. It is important to emphasise that the initiator of the deviation from the conclusion on the application of the rule of law can be not only the court but also the parties to the criminal proceedings (who in adversarial criminal proceedings bear the burden of proving cassation claims), citing the grounds for this complaint, although only the court decides on the need to resort to the procedure stipulated by Article 434-1 of the CPC of Ukraine[3], if it considers this derogation justified.

In view of the above, experts fairly point out that in this way the legislator has created a procedural mechanism for overcoming differences in the legal approaches of the Court by creating extended panels for "trial over court" [7]. Continuing this thesis, it is logical to assume that if the only way to overcome the conflict of legal positions of the Supreme Court is to direct criminal proceedings by a court, a joint chamber or the Grand Chamber of the Supreme Court, depending on who actually formulated the conclusion on the application of law in such legal relations, the legislator has thus established a certain hierarchy of legal positions of the Supreme Court, which must be followed in law enforcement. Therefore, the position formulated by the panel of judges of the Supreme Court of Cassation in the decision of 13.02.2019 in the case No. 130/1001/17, namely – based on teleological (target), logical and systematic interpretation of the provisions of Articles 434-1 – 434 -2 of the CPC of Ukraine[4] and Articles 13, 36 of the Law of Ukraine

[1] Criminal Procedural Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[2] *Ibidem*, 2020
[3] *Ibidem*, 2020
[4] *Ibidem*, 2020

"On the Judiciary and the Status of Judges"[1], it can be concluded that the criminal procedural law defines procedural mechanisms to ensure the unity of judicial practice, which lies in the application of a special procedure for derogating from the rules of law in previously ruled decisions of the Supreme Court. The logic of construction and purpose of the existence of these procedural mechanisms indicates that to apply the law in such legal relations in the presence of opposing legal conclusions of the court of cassation should be based on the fact that the conclusions contained in court decisions of the Criminal Court of Cassation take precedence over the conclusions of the panel of judges, the conclusions of the joint chamber of the Criminal Court of Cassation – over the conclusions of the chamber or panel of judges of this court, and the conclusions of the Grand Chamber of the Supreme Court – over the conclusions of the joint chamber, chamber and panel of judges of the Court of Cassation[2].

The above conclusion of the court fully complies with the statutory structure of Article 434-1 of the CPC of Ukraine[3] and, in fact, reflects the basic idea laid down by the legislator in this legal provision:

a) deviation from the conclusion on the application of the rule of law in such legal relations in view of the specific circumstances is quite justified;

b) such derogation should be carried out only in accordance with the procedure established by law;

c) the possibility of deviating from the opinion, depending on the composition of the court in which it was adopted, is given to a court composed of a larger number of judges of the Supreme Court, which determines the "higher degree of significance" of such an opinion.

A more detailed consideration of these provisions implies the need to address the following. Firstly, the deviation from the previously formulated legal position of the court in some cases is quite natural, considering the existence of circumstances that directly affect such a legal position. According to V. Kravchuk, a judge of the Administrative Court of Cassation of the Supreme Court, different decisions constitute the immanence of practice that is inherent in all judicial systems. The unity of judicial practice aims to ensure the same interpretation, in other words, to give a template, which will then find practical application in such cases [25]. Paragraph 30 of the above-mentioned ACEJ Opinion states that ensuring equality, uniform interpretation and application of the law should not lead to inflexibility of the law and the emergence of obstacles to its development. Thus, the requirement "such cases should be treated similarly" should not be taken as absolute. The development of judicial practice as such should not run counter to the proper administration of justice, as the failure to develop and adapt judicial practice will create a risk of impeding the reform or improvement of the law. Changes in society may necessitate a new interpretation of the law and thus lead to the abandonment of a precedent that already exists. Moreover, decisions of national

[1] Law of Ukraine No 31 "On the Judiciary and the Status of Judges". (2020, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19#Text.

[2] Resolution of the Second Judicial Chamber of the Criminal Court of Cassation of the Supreme Court No 130/1001/17. (2019, February). Retrieved from http://reyestr.court.gov.ua/Review/79957847.

[3] Criminal Procedural Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.

courts and bodies established under international treaties (such as the Court of Justice or the ECHR) often also have the effect of adjusting national case law [10].

Secondly, deviation from the court's conclusion on the application of the rule of law in such legal relations in accordance with current legislation should be carried out only by transferring criminal proceedings in which the court deems it necessary to transfer the case for the consideration of a larger number of judges. Such a derogation is stipulated by law only for the Supreme Court, in connection with which Articles 434-1, 434-2 of the CPC of Ukraine[1] introduced grounds and separate procedures for the transfer of criminal proceedings from the court panel to the chamber, the joint chamber and the Grand Chamber of the Supreme Court. In accordance with Part 3 Article 434-2 of the CPC of Ukraine, the issue of transferring criminal proceedings to the Chamber, the Joint Chamber or the Grand Chamber of the Supreme Court may be resolved before the decision of the court of cassation.

This approach appears to be a fairly clear guide for the law enforcer, who must make a decision in the presence of different conclusions of the Supreme Court on the application of the rule of law in such legal relations. Finally, the issue of applying the legal positions of the Grand Chamber of the Supreme Court in case of deviation from the conclusion on the application of the rule of law was resolved in the decision of the Grand Chamber of the Supreme Court of 30.01.2019 in case No. 755/10947/17. According to this ruling, regardless of whether all rulings setting out the legal position from which the Grand Chamber of the Supreme Court has departed are listed, the courts must take into consideration the last legal position of the Grand Chamber of the Supreme Court upon resolving identical disputes[2].

CONCLUSIONS

1. One of the legal means of ensuring the stability and unity of judicial practice is the decisions of the Supreme Court, which resolve the existing differences in law enforcement.

2. The unity and permanence of judicial practice are closely linked to ensuring the right of everyone to a fair trial, creating the necessary basis for this, which is to implement the principle of legal certainty and to ensure reasonable predictability of judicial decisions. Therewith, the constancy of judicial practice reflects the constant state of a single law enforcement, in other words, it is a "rooted" unity of the solution of the same legal issues as a direct indicator of the transition from quantity to quality.

3. In accordance with the current criminal procedure legislation of Ukraine, deviation from the conclusion on the application of the rule of law in such legal relations is allowed only under the procedure stipulated by Articles 434-1, 434-2 of the CPC of Ukraine, i.e. for judges of the Supreme Court.

4. The performance of the functional role of the Supreme Court in ensuring the sustainability and unity of judicial practice presupposes the requirement of stability and

[1] Criminal Procedural Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.

[2] Resolution of the Grand Chamber of the Supreme Court No 755/10947/17. (2019, January). Retrieved from http://reyestr.court.gov.ua/Review/79834955.

unity of its own practice, which excludes the existence of differences in its legal positions. That is why Articles 434-1, 434-2 of the CPC of Ukraine clearly define the mechanism for resolving such differences, imperatively making provision for the necessity of transferring criminal proceedings from the Supreme Court considering the case in cassation to the Chamber, the Joint Chamber, or the Grand Chamber of the Supreme Court, if the court hearing the case in cassation deems it necessary to depart from the conclusion on the application of the rule of law in such legal relations set out in a previously adopted decision of the Chamber, the Joint Chamber, or the Grand Chamber of the Supreme Court. Observance of this order excludes the situation of diametrically opposed legal positions of the panels of the Supreme Court on the same issue, which has a negative impact on law enforcement practice, creating grounds for legal uncertainty and possible abuses in this area.

5. This legal mechanism for resolving differences in the practice of the Supreme Court reflects the position of the legislator on the hierarchy of legal positions of the Supreme Court. The key idea is that the possibility of deviating from the opinion on the application of the rule of law, depending on the composition of the court in which it was adopted, is given to a court composed of more judges of the Supreme Court, which determines the "higher degree of significance" of such a conclusion and its application in further judicial practice.

6. Another type of ruling of the Supreme Court that resolves existing differences in judicial practice is the decisions of the Grand Chamber, which are aimed at resolving an exclusive legal problem and ensuring the development of law and the development of a unified law enforcement practice. Only the Grand Chamber of the Supreme Court has the power to resolve disputes over legal positions in this area. Considering the specifics of the procedure for transferring criminal proceedings to the Grand Chamber of the Supreme Court and the criteria for establishing the exceptional nature of the legal problem, this matter requires separate consideration.

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Suggested Citation: Shylo, O.H., & Hlynska, N.V. (2020). The role of the Supreme Court in the mechanism of ensuring the sustainability and unity of judicial practice: some aspects. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(3), 128-141.

Submitted: 22/04/2020
Revised: 18/08/2020
Accepted: 01/09/2020

УДК 343.98
DOI: 10.37635/jnalsu.27(3).2020.142-154

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МЕХАНІЗМ ЗЛОЧИНУ ЯК КАТЕГОРІЯ КРИМІНАЛІСТИКИ

Анотація. *Сучасний етап розвитку криміналістики характеризується активним формуванням її загальної теорії, визначенням об'єктно-предметної сфери дослідження цієї галузі знань. Актуальність досліджуваної в статті проблематики обумовлена необхідністю розробки сучасної наукової концепції предмета науки криміналістики, виокремлення кола закономірностей, що вивчаються. Метою дослідження є аналіз сучасних наукових підходів до розуміння механізму злочину як структурного елемента предмета науки криміналістики. Задля досягнення цієї мети були використані такі загальнонаукові та спеціальні методи дослідження, як діалектичний, історичний, формально-логічний, системно-структурний, правового прогнозування, системного і семантичного аналізу. Доведено, що механізм злочину як цілісна система обставин, процесів, факторів, що обумовлюють виникнення матеріальних та інших носіїв інформації про саму подію злочину, її учасників, забезпечує можливість висунення робочих слідчих версій, планування розслідування, цілеспрямованого пошуку наслідків злочину, встановлення злочинця, потерпілого (жертви), сприяє кримінально-правовій кваліфікації скоєного, а відтак без сумніву виступає об'єктом криміналістичного пізнання. Наголошено, що механізм злочину лише обумовлює виникнення слідів (матеріальних та ідеальних), а тому сліди як наслідки і як результат відображувального процесу виходять за межі його внутрішньої структури (будови). Тому процес відображення механізму злочину в оточуючому середовищі, а відтак і виникнення інформації про злочин та його учасників слід вважати окремим аспектом предмету криміналістики. Зазначено, що криміналістичне вчення про механізм злочину досліджує природу, сутність і зміст функціональної сторони злочинної діяльності, закономірності процесів взаємодії учасників злочинної події між собою і з оточуючою матеріальною обстановкою (середовищем), а також закономірності, що обумовлюють виникнення джерел криміналістично значущої інформації про сам злочин і його учасників. Процес же безпосереднього утворення матеріальних та ідеальних слідів, закономірності відбиття в них необхідної інформації мають досліджуватися іншим окремим криміналістичним вченням про механізм слідоутворення. Звернуто увагу на те, що механізм злочину має зв'язки з іншими категоріями криміналістики і передусім з криміналістичною характеристикою злочинів. Констатовано, що криміналістична характеристика злочинів – це наукова абстрактна категорія, в якій відображена якісно-кількісна інформація ретроспективної спрямованості як результат пізнання механізму певних різновидів злочинів, тобто механізм злочину – це об'єкт що відображується, а криміналістична характеристика – це форма його відображення.*

Ключові слова: суб'єкт, жертва, обстановка, спосіб, знаряддя, засоби, сліди злочину, злочинна діяльність, предмет злочинного посягання.

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CRIME MECHANISM AS A CATEGORY OF CRIMINALISTICS

Abstract. *The current stage of criminalistics' development is characterized by the active formation of its general theory, the definition of the object-matter area of research in this field of knowledge. The relevance of the issues studied in the paper is due to the need of a modern scientific concept of the matter of criminalistics development, identifying the range of patterns studied. The paper is aimed at analysing modern scientific approaches to understanding the crime mechanism as a structural element of the matter of criminalistics science. To achieve this goal, general and special research methods such as dialectical, historical, formal-logical, system-structural, legal forecasting, system and semantic analysis were used. It is proved that the crime mechanism as a holistic system of circumstances, processes, factors that determine the emergence of material and other information carriers about the crime event itself, its participants, provides the opportunity to put forward working investigative versions, investigation planning, targeted search for the consequences of the crime, offender's identification, victim's identification, contributes to the criminal legal qualification of the offense, and therefore undoubtedly acts as an object of criminalistics' cognition. It is emphasized that the crime mechanism only determines the occurrence of traces (material and ideal), and therefore traces as consequences and as a result of the reflective process go beyond its internal structure (building). Therefore, the process of reflecting the crime mechanism in the environment, and hence the emergence of information about a crime and its participants should be considered as a separate aspect of the matter of criminalistics. It is noted that the criminalistics teaching on the crime mechanism studies the nature, essence and content of the functional side of criminal activity, patterns of interaction of participants of a criminal event with each other and with the surrounding material situation (environment), as well as patterns that determine the sources of criminalistics' significant information on the crime itself and its participants. The process of direct formation of material and ideal traces, the patterns of reflection of the necessary information in them should be studied by another separate criminalistics teaching on the mechanism of trace formation. Attention is paid to the fact that the crime mechanism has connections with other categories of criminalistics and, above all, with the crimes' criminalistics characteristics. It is stated that crimes' criminalistics characteristics is a scientific abstract category, which reflects the qualitative and quantitative information of retrospective orientation as a result of cognition of the mechanism of certain types of crimes, i.e. that the crime mechanism is a reflected object, and criminalistics characteristics is a form of its reflection.*

Keywords: subject, victim, situation, method, weapon, means, vestiges of crime, criminal activity, subject of criminal encroachment.

INTRODUCTION

Throughout the history of its establishment and development, criminalistics has traditionally studied the functional side of the crime (criminal activity), i.e. it was mainly interested in answers to the questions: where, when, at what time, in what circumstances, in what way, with what tools was a socially dangerous act committed. In general, being well aware of what the subject matter of criminalistics, criminalists for a long time could not offer a universal, unifying term that would most accurately and comprehensively

cover the content of the subject matter in this field of knowledge. Such term appeared in the early 1970s and it was the "crime mechanism".

As a scientific category, the concept of "crime mechanism" was first used by O.M. Vasiliev in defining the subject of criminalistics, which he considered as the science of organising a systematic investigation of crimes, effective detection, collection, and study of evidence in accordance with criminal procedure law, and prevention of crimes by special techniques and means developed based on natural, technical, and some other special sciences based on *studying the crime mechanism* (emphasis ours – *V.Zh.*) and development of proofs [1]. Subsequently, R.S. Belkin formulated the definition of criminalistics as a science of *the laws of the crime mechanism* (emphasis ours – *V.Zh.*), the emergence of information about the crime and its participants, collection, research, evaluation, and use of evidence, and special tools and methods of judicial investigation and prevention of crimes based on knowledge of these laws [2]. Later, this concept became dominant and in most of the proposed definitions of the subject of criminology there is an indication of the regularity of the crime mechanism. Summing up, A.F. Volobuev states that "the crime mechanism, being its functional (dynamic) side, is part of the objective reality and therefore acts as an object, and some of its properties act as the subject matter" [3]. Indeed, the mechanism of crime as a holistic system of circumstances, processes, factors that determine the emergence of material and other media about the event of the crime, its participants, provides the opportunity to put forward working investigative versions, planning investigations, targeted investigation, identification of the perpetrator, the victim(s), contributes to the criminal law qualification of the offence, and therefore should undoubtedly act as the object of criminalistic cognition.

The crime mechanism as a criminalistic category, as well as the specifics of the development of a separate doctrine of this object of criminalistic cognition in different years were studied by such criminalists as O. V. Aivazova, O. P. Antonov, R. S. Belkin, O. M. Vasiliev, A. F. Volobuev, Y. P. Garmaev, O. Y. Golovin, A. V. Dulov, E. P. Ishchenko, E. I. Zuev, Z. I. Kirsanov, M. K. Kaminsky, S. Yu. Kosarev, V. Ya. Koldin, Yu. G. Korukhov, A. M. Kustov, O. F. Lubin, V. O. Obraztsov, M. V. Saltevsky, O. G. Filipov, O. V. Chelysheva, S. N. Churilov, V. Yu. Shepitko, A. V. Shmonin, M. P. Yablokov, etc. At the same time, regarding the definition and content of the term "crime mechanism", its connections with other criminalistic categories, conceptual approaches to the development of a separate forensic doctrine of the mechanism of crime, scientists have made far ambiguous opinions in modern criminalistic literature. On many issues, criminalists have not yet reached an agreed position. This once again necessitates further independent study of the problems that arise in this area.

1. MATERIALS AND METHODS

These specified problematics relate to the scientific problems of the general theory of criminalistics connected to the definition of its object-subject area, outlining the boundaries of scientific research in this subject area, the development of conceptual approaches to building a separate criminalistic doctrine of the crime mechanism. The basic materials that served as the starting point for the preparation of this study are the dissertations of A.M. Kustova [4] and O. F Lubin [5], as well as a monographic study by

A.F. Volobueva [3]. Therewith, unfortunately, the above-mentioned problems are understudied in Ukrainian criminalistics. That is why the emergence of A. F. Volobuev's monograph "The crime mechanism and its connection with the conceptual provisions of criminalistics" was positively received by the scientific community.

To solve the outlined problems, a set of general scientific and special methods of scientific cognition was used in the study. In particular, the dialectical and historical methods of cognition allowed to study the evolution of scientific views on criminalistics, enrichment of its terminology, including with such a term as "crime mechanism". The method of semantic analysis is used to specify the meaning of the term "crime mechanism", its features, structure, integrative functions, differences from other criminalistic categories. The comparative method allowed to analyse the recently proposed approaches in the forensic literature to define the concept of "crime mechanism", the creation of a separate criminalistic doctrine of the crime mechanism, the separation of structural elements of the crime mechanism and its inherent patterns, the cognition of which enriches the content of criminalistics and serves as the basis for the implementation of technical means, tactics, and methodological recommendations for the investigation of criminal offences.

The use of formal-logical and system-structural methods led to the conclusion that the crime mechanism is a complex dynamic system of circumstances that determines the content of criminal activity and includes the situation of the crime, a set of actions of the offender and their accomplices; the attitude of the subject of the crime towards their actions and their consequences; the behaviour of the victim and the actions of persons who became accidental participants in the crime; links between actions and criminal outcome.

The method of systematic analysis provided a generalisation of the accumulated theoretical knowledge on the development of the term "crime mechanism", its correlation with key categories of criminology, in particular the criminalistic characteristics of crimes. The method of legal forecasting provided an opportunity to identify possible areas for further development of scientific views on the category of "crime mechanism", its integration into the terminology of criminalistics, the prospects of creating a separate criminalistic doctrine of the crime mechanism. Thus, it can be argued that the applied methodology provided objective cognition: a) of the crime mechanism as an integral element of the subject matter of criminalistics; b) patterns of evolution of the establishment and development of this criminalistic category, the development of its content and structure; c) the prospects of creating a separate criminalistic doctrine of the crime mechanism.

2. RESULTS AND DISCUSSION

The term "mechanism" has an interdisciplinary meaning and is used in various fields of legal knowledge, in particular in criminal law and criminology to describe the mechanism of negligent crimes [6], criminal law mechanism to combat offences [7], the mechanism of qualification of crimes [8], the mechanism of legal regulation fight against crime [9]. In criminalistics, the development of the term "crime mechanism" has come a long and difficult way, where, according to A. M. Kustov, the following stages can be distinguished:

1. Inclusion of one of the main elements of the crime mechanism in the subject of criminalistics – the method of its commission – the end of 19th century – 1940s.

2. The beginning of the use of the term "crime mechanism" in criminalistics, as well as in criminal law and criminological aspects – the 1970s.

3. The emergence of the scientific term "crime mechanism", the study of methods of preparation, commission, and concealment of crimes – the late 1970 – early 1980s.

4. The establishment and development of the modern doctrine of the crime mechanism – the 1980s – the present time [4].

Proceeding from the etymology of the term "mechanism" – a system, internal structure that determines the order of a certain type of activity [10], the special literature offers various definitions of "crime mechanism", where the main features are as follows:

1. The process of committing a crime, including its method and all the actions of the offender, accompanied by the formation of material and non-material traces, which can be used to detect and investigate crimes [1].

2. Dynamic system of illegal behavioural acts, which are implemented in certain conditions, direction, and sequence, and the phenomena caused by them, which have criminalistic significance [11].

3. The set of interacting material systems and processes that form the event under investigation and cause the emergence of sources of forensic information [12].

4. Spatial-temporal development of the crime event, the order, combination of sequence and dynamics of individual elements that create it [13].

5. The set of material objects and processes in the preparation, commission, and concealment of a crime [14].

6. The movement of the elements of the structure of the crime (objects, subjects, instruments of the crime) to the point of interaction; the process of interaction itself; further movement (action) of elements before the onset of the criminal result [15].

7. The system of processes of interaction of the participants of the crime, both direct and indirect, with each other and with the material environment associated with the use of appropriate tools, means, and other individual elements of the situation [16].

8. Complex (multi-element) dynamic system, developed primarily by the actions of the subject of the crime, aimed at achieving a criminal result in relation to a particular object of encroachment, as well as the actions of the victim and others, including those who happened to be at the scene [17].

9. Temporary and dynamic order of connection of separate elements, situation, factors of preparation, commission, and concealment of a crime, allowing to recreate a picture of process of its commission [18].

10. The system of interacting of certain elements (their complexes) in space and time, focused on the occurrence of a socially dangerous consequence in the form of a criminal result, as well as the evasion of the subject(s) of a socially dangerous act from criminal liability and punishment [19].

These and many other definitions of the term "crime mechanism" given in the criminalistic literature eloquently testify to the debatability and ambiguity of the interpretation of the criminalistic category under consideration [20; 21]. Furthermore, the controversy is added by those scientists who use the term "crime commission mechanism" [22; 23] instead of the "crime mechanism", with which it seems impossible

to agree, because "commission" is only one aspect, elements of the system of criminal activity (behaviour) along with preparation and concealment as independent acts in the structure of activity, and therefore it is more apt to speak of "crime mechanism" as a full-fledged structure of the functional side of criminal activity.

Scientists also express far from unambiguous opinions regarding the structural elements of the crime mechanism. Thus, R.S. Belkin defined the elements of the crime mechanism as a complex dynamic system as follows: the subject of the crime; the attitude of the subject of the crime towards their actions, their consequences and accomplices; subject of encroachment; method of crime (as a system of deterministic actions); criminal result; the situation of the crime (place, time, etc.); behaviour and actions of persons who turned out to be accidental participants in the event; circumstances that promote or prevent criminal activity; connections and relations between actions (method of crime and criminal result, between participants of the event, between actions and situation, subject of crime and object of encroachment, etc.) [24].

A.M. Kustov considers the following to be the main elements of the crime mechanism: activity (rarely – individual actions and movements) of the subject of the crime (perpetrator, criminal group, group of persons with prior consent of organised group, criminal group); complex (set) of actions, deeds, and other movements of the victim of the crime; complex (set) of actions, deeds, and other movements of persons who turned out to be indirectly connected with the criminal event; certain elements of the situation used by the participants in the criminal event; subject of criminal encroachment. According to the scientist, these components of the crime mechanism in constant motion and development. With this in mind, information about them can be used in the process of detecting and investigating a particular crime [25].

According to Z.I. Kirsanov, the structure of the crime mechanism includes the following elements: the person(s) implementing the criminal plan by purposeful behaviour (actions); method of crime (preparation, commission, and concealment); the victim, their behaviour related to the crime; the subject of criminal encroachment; tools, means of crime, and other objects used for criminal purposes (such as tools for the manufacture of instruments of crime); persons indirectly involved in the crime, such as those who unknowingly assisted in the acquisition or concealment of the tools or means of the crime; material situation (environment) in which the crime was prepared and took place or measures were taken to conceal it, i.e. areas and premises (for example, the place of hiding), household items, objects or things left by the offender or the victim at the scene, as well as material processes that took place during the crime (e.g. fire, accident, production processes, etc.) [26].

A.F. Volobuev, unlike previous scientists, along with the subject, situation, object of encroachment, victim and method, includes traces of the crime in the structure of the crime mechanism, considering them to be the last element, because traces are a consequence (result) of the crime [3]. In the development of the proposed structure, A. F. Volobuev identifies two groups of inherent patterns of crime: 1) natural connections between the elements of the crime mechanism and the relations between the specific features of the subject of the crime and their chosen subject of encroachment; the connections and dependencies between the specific features of the subject of the crime and their chosen place and time of the crime and the favourable situation, connections

and dependencies between the specific features of the subject and their chosen method of criminal encroachment (including selected means and tools); connections and dependencies between the chosen subject of the method of criminal encroachment and traces of their actions, both material and non-material, 2) natural connections that are manifested in the development and manifestation of individual elements of the crime mechanism (connections and dependencies that appear in the formation of traces, connections and dependencies that are manifested in the formation of the identity of the offender, connections and dependencies that are manifested in the formation of aid to the crime) [3]. Summing up, A.F. Volobuev notes that "in the light of the modern doctrine of the crime mechanism, the indication of the regularity of the crime mechanism and the regularity of information about the crime and its participants in R. S. Belkin's definition of the subject of criminalistics is incorrect, because the origin of information about the crime traces) is a component of the crime mechanism. Therefore, it should be considered more accurate to indicate only the laws of the crime mechanism, which cover the considered dependencies and connections of both levels and are established by forensic science as a result of studying such an object as criminal activity [3].

Admittedly, there is no doubt that material and ideal traces are a means of reflecting the circumstances of the crime and carry forensically significant information about the perpetrator, the victim and their actions. And this is natural, because in criminalistics the description of the crime is performed with consideration of the causal, spatiotemporal, informational, and other connections of individual acts of activity. In particular, the spatial relation reflects the position and interposition of material objects within a particular space, such as the positional relationship of objects at the scene; the nature of the spatial area of individual operations and episodes; the general orientation of the event and related processes in space; lack of spatial connections between individual objects and the event of the crime. Temporal connection describes the sequence of manifestation of certain phenomena and processes, shows the specifics of their course. As for the crime, it shows the ratio of elements of the mechanism of the crime in time, the duration of certain events, their beginning and end, the possibility of committing certain actions in a fixed time interval. Causation can manifest itself in two forms: 1) when all criminal consequences are conditioned by the wilful actions of the offender; 2) when the subject of the crime is a material element of the mechanism of the investigated event, and the voluntary actions of which do not significantly affect the consequences of the crime. Therewith, K. T. Aitbayev draws attention to the fact that there is an obvious dependence between space-time and causal relations, the so-called space-time isomorphism, when spatial changes of things are also their time changes; space and time covered by motion can interflow [27]. In view of the above, I. Yu. Baimuratov states that the following levels of interaction can be distinguished in the mechanism of crime as a complex structure: elementary simple interaction (reflective act); interaction (paired display systems); complex (multilateral) interaction of three or more objects; all processes of interaction as a part of the mechanism of the investigated event [28]. In this aspect, the opinion of V. E. Kornoukhov is also clear that it is impossible not to investigate the crime mechanism when covering the content of the doctrine of traces of crime, and the mechanism is determined by the characteristics of the offender. Therewith, a person manifests oneself by committing and concealing a crime, the variability of

which is determined by criminal situations, which leads to the variability of traces of the crime, which, moreover, is determined by the circumstances [29].

Assessing the feasibility of including traces in the structure of the crime mechanism, it is necessary to assume that the mechanism is an internally closed dynamic system of processes and states of the investigated event that occur during the interaction of persons, material objects and that is, the crime mechanism only determines the appearance of traces. In turn, the traces as consequences and as a result of the reflective process go beyond the internal structure of the crime mechanism and therefore it seems controversial to include them in this structure. A. F. Volobuev himself refers to the connections and dependencies that are manifested in the formation of traces to the second level of patterns of the crime mechanism crime, i.e. to connections that go beyond the internal structure of interacting elements and have an external, side effect [3]. Moreover, the process of reflecting the crime mechanism in the environment, and hence the emergence of information about the crime and its participants, should be considered a separate aspect of the subject of criminalistics. In this regard, A. M. Kustov fairly points out that the laws of the crime mechanism constitute an element (part) of the subject of criminalistics, the second element is the laws of origin (development) of information about the crime and its participants, the third is the laws of law enforcement to detect, investigate, and solve a criminal event [30].

Considering the above, the criminalistic doctrine of the crime mechanism examines the nature, essence, and content of the functional side of criminal activity, the patterns of interaction of participants in a criminal event with each other and with the surrounding material environment, as well as patterns due to which emerge the sources of criminalistically significant information about the crime and its participants. The process of direct formation of material and ideal traces, the patterns of reflection of the necessary information in them should be studied by other separate criminalistic doctrines (R. S. Belkin mentions the doctrine of the trace formation mechanism [31]; A. M. Kustov – the doctrine of detection, record, and study of sources of criminalistically significant information [25]).

A. F. Volobuev's thesis that "the doctrine of the mechanism of crime should be developed precisely as the doctrine of the object of forensic investigation (and its subject)" also needs some clarification [3]. Undoubtedly, the prevailing scientific concept nowadays is that the mechanism of crime is the object of forensic knowledge. But the mechanism of crime as a functional aspect of criminal activity is only one of the components of the object of forensic knowledge. Therewith, recently there have been constant proposals to expand the object-subject sphere of criminalistics in the criminalistic literature [32]. In particular, O. S. Andreev proposes to supplement the structure of the object of criminology with such an element as "post-criminal behaviour of persons associated with criminal activity" [33; 34]. Moreover, the doctrine of the object of criminology defines only general, conceptual approaches to understanding its components, while a more in-depth study should be carried out within individual criminological doctrines, including the doctrine of the crime mechanism. As A. M. Kustov points out, the criminalistic doctrine of the crime mechanism should deservedly take its place among such separate criminalistic theories as criminalistic identification and diagnosis, the doctrine of the identity of the offender and the victim, investigative

situations and criminalistic characteristics of certain crimes and others, which have already been developed, substantiated, and applied [25].

The study of the crime mechanism also presupposes the need to clarify the question of the correlation with other criminalistic categories and, above all, with the criminalistic characteristics of the offence. Notably, two approaches have been developed in criminalistics regarding this matter. According to the first one, the criminalistic characteristics of crimes are actually separated from the crime mechanism and interpreted as an abstract scientific concept that is the result of scientific analysis of a particular type of criminal activity (type or kind of crime), generalisation of its typical features and characteristics [35; 36]. As A. M. Kustov notes, despite some external similarities of the constituent components, the mechanism of the crime and the criminalistic characterisation of crimes are not identical and substitute concepts. These are two independent scientific categories that have the right (according to their significance for the general theory of criminalistics and practice) to exist and further development and research [37]. Among the arguments in favour of his position, A. M. Kustov points out that criminalistic characteristics of crimes contain a system of typical information, data on methods of preparation, commission, and concealment of crimes of a particular kind (genus), but they do not contain information on the dynamics of relations through actions between accomplices, victims, and other participants. In the crime mechanism of a certain type, elements of this system are shown in dynamics, in interrelation, step-by-step, typical actions of the criminal on preparation, commission, and concealment of a criminal event are specified, as well as typical and other behavioural acts of the victim and other persons casually involved in a criminal event [38].

Proponents of the second approach assume that the crime mechanism is the subject of criminalistics, the result of the knowledge of which is the knowledge about it, accumulated in the criminalistic characterisation of crimes. In this regard, O. V. Chelysheva writes that the elements of the crime that could potentially be included in the crime mechanism should be described in the criminalistic characteristics [39]. O. Yu. Antonov emphasises that the development of criminalistic characteristics of certain types of crimes is impossible without studying the essence of the term "crime mechanism", its elemental composition and the natural connections between its elements [40]. E. V. Smakhtin points out that the patterns of the crime mechanism together form a forensic characterisation of the crime as some abstract model [32]. S. N. Churilov proposes to refer to the generalised data on the crime mechanism of a certain type with the term "criminalistic characteristics of the crime mechanism", considering it identical to the concept of "laws of the crime mechanism" [41]. O. V. Aivazova notes that the crime mechanism reflects the dynamic nature of criminal activity, while the systematised results of its scientific cognition in a complete, more static state are presented in the form of criminalistic characteristics of crimes [42]. O. Yu. Golovin emphasises that the crime mechanism should be the object of scientific research, the result of which will be the development of forensic characteristics [43]. Summing up, A. F. Volobuev states that "the crime mechanism is an object of cognition (reality), and criminalistic characteristics are a set of knowledge about this object (part of the content of criminalistics). And this is the only difference between them when the elements coincide, as is the case with adequate reflection" [3].

Thus, criminalistic characterisation of crimes is a scientific abstract category, which reflects the qualitative and quantitative information of retrospective orientation as a result of knowledge of the crime mechanism of certain types, i.e. the crime mechanism is an object that is reflected [44], and criminalistic characterisation is a form of its reflection [45-47].

CONCLUSIONS

The crime mechanism is an internal, systemic, complex, dynamic order of interaction of criminologically significant elements of criminal activity of the subject and factors of objective reality that reflect the content of criminal activity and cause the emergence of criminalistically significant information. This system includes the situation of the crime; the subject of criminal encroachment; a set of actions of the criminal and persons related to them to prepare, commit and conceal crimes; the subject's attitude to the crime, their actions and consequences thereof; the behaviour of the victim and the actions of persons who became accidental participants in the crime; links between actions and criminal outcome.

The crime mechanism is an internally closed dynamic system of processes and states of the investigated event, which arise in the course of persons' interaction in the crime, material objects, and which generates the emergence of sources of criminalistic information, i.e. the mechanism of the crime only causes traces. In turn, traces as consequences and as a result of the reflective process go beyond the internal structure of the crime mechanism. Criminalistic doctrine of the crime mechanism explores the nature, essence, and content of the functional side of criminal activity, patterns of interaction of participants in a criminal event with each other and with the surrounding material environment, as well as patterns that determine the sources of criminalistic information about the crime. The process of direct formation of material and ideal traces, the patterns of reflection of the necessary information in them are the subject of study of another separate criminalistic doctrine of the trace formation mechanism.

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Suggested Citation: Zhuravel, V.A. (2020). Crime mechanism as a category of criminalistics. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(3), 142-154.

Submitted: 10/06/2020
Revised: 22/07/2020
Accepted: 26/08/2020

Journal of the National Academy of Legal Sciences of Ukraine

Volume 27, Issue 3
2020

Responsible for the release of *O. V. Petryshyn*

Desktop publishing *O. Fedoseeva*

Signed to the print with the original layout 21.09.2020.
Mind. print. ark. 18,1. Acc. publ. ark. 15,0.

The publisher the Right of National Academy of legal Sciences of Ukraine and the Yaroslav Mudryi National Law University
61002, 80A Chernyshevskaya Street, Kharkiv, Ukraine
Tel/Fax: (057) 716-45-53
Website: www.pravo-izdat.com.ua
e-mail for authors: verstka@pravo-izdat.com.ua
e-mail for orders: sales@pravo-izdat.com.ua

Certificate of registration of the subject of publishing in the state register of publishers, manufacturers and distributors of publishing products series DK No. 4219 dated 01.12.2011

Вісник Національної академії правових наук України

Том 27, № 3
2020

(Англійською мовою)

Відповідальний за випуск *О. В. Петришин*

Комп'ютерна верстка *О. А. Федосєєвої*

Підписано до друку з оригінал-макета 21.09.2020.
Ум. друк. арк. 18,1. Обл.-вид. арк. 15,0.

Видавництво «Право» Національної академії правових наук України
та Національного юридичного університету імені Ярослава Мудрого
вул. Чернишевська, 80а, Харків, 61002, Україна
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Свідоцтво про внесення суб'єкта видавничої справи
до державного реєстру видавців, виготівників і розповсюджувачів
видавничої продукції — серія ДК № 4219 від 01.12.2011 р.