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ОКРЕМІ АСПЕКТИ РЕФОРМУВАННЯ ДЕРЖАВНОЇ СЛУЖБИ

Анотація. *Дослідження проблеми реформування державної служби в Україні у сучасних умовах розвитку українського суспільства та держави є вкрай актуальною темою та потребує відповідного наукового опрацювання. Автор поставив за мету проаналізувати найбільш резонансні реформаторські заходи у сфері державної служби, які започатковані нещодавно державною владою і отримали неоднозначну оцінку суспільства, зокрема, анонсоване скорочення штату державних службовців та введення контрактної форми державної служби, а також запропонувати науково-обґрунтовані пропозиції із вдосконалення відповідних заходів. У роботі із застосуванням загальнонаукових і спеціальних методів наукового пізнання (діалектичного, формально-логічного, порівняльно-правового, системного аналізу) розглянуто правові засади та наукові джерела щодо скорочення штату працівників та контрактної форми прийняття на роботу; порівняно норми національного законодавства про працю з нормами національного законодавства про державну службу, які передбачають правила скорочення штату найманих працівників та державних службовців, а також гарантії їх прав при звільненні за відповідною підставою; досліджено норми національного законодавства щодо правил застосування контрактів при призначенні на посаду державних службовців. Зроблено висновок: 1) про необхідність відповідного доопрацювання Закону України «Про державну службу»; 2) про доцільність створення нових продуктивних робочих місць у різних секторах національної економіки, куди після перепідготовки будуть спрямовуватися державні службовці, яких буде скорочено; 3) про те, що будь-які реформи життєдіяльності суспільства та державного управління необхідно проводити після ґрунтовного вивчення суспільної думки, аналізу можливих негативних наслідків, розробки та запровадження компенсаторних механізмів. Наголошується, що обов'язковим є залучення до процесу розробки реформ у сфері державної служби вчених, експертів-практиків, роботодавців та представників громадських, зокрема профспілкових організацій.*

Ключові слова: державна служба, трудові права, штат, контракт, посада.

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CERTAIN ASPECTS OF STATE SERVICE REFORM

Abstract. *The study of the issues of civil service reform in Ukraine in the current conditions of development of Ukrainian society and the state is an extremely relevant subject and requires appropriate research. The author aims to analyse the most resonant reform measures in the civil service, which were recently initiated by the government and received mixed reviews, in particular, the announced redundancy in the staff of civil servants and the introduction of a contract form of civil service, as well as to offer scientifically sound proposals for improvement of appropriate measures. In the work with the use of general scientific and special methods of scientific knowledge (dialectical, Aristotelian, comparative law, system analysis) the legal bases and scientific sources on redundancy of staff and contractual form of employment are considered; the provisions of the national labor legislation were compared with the provisions of the national legislation on the civil service, which provide for the rules of staffing cuts among civil servants, including guarantees of their rights upon dismissal on appropriate grounds; the provisions of the national legislation concerning the rules of application of contracts upon appointing civil servants are investigated. The conclusion is made: 1) on the need for appropriate revision of the Law of Ukraine "On Civil Service"; 2) on the expediency of creating new productive jobs in various sectors of the national economy, where redundant civil servants will be sent after retraining; 3) that any reforms of society and public administration must be carried out subsequent to an in-depth study of public opinion, analysis of possible negative consequences, development and implementation of compensatory mechanisms. It is emphasized that it is mandatory to involve scientists, experts-practitioners, employers, and representatives of public, in particular trade unions, in the process of developing reforms in civil service.*

Keywords: civil service, labour rights, staff, contract, position.

INTRODUCTION

Qualitative functioning of the civil service is a guarantee of proper development of society and the state. The civil service must ensure effective and democratic public administration of the most important social processes for the state [1; 2]. At the same time, the orientation towards a person and a citizen, towards the quality assurance of their rights and freedoms should become decisive. A person and a citizen should not be considered as managed entities, but as clients to whom the state, represented by a state body or a civil servant, provides services [3]. The current state of political, economic, and other relations in the country requires the fastest reform of the civil service by improving the structure of public bodies, professional growth of civil servants, strengthening their motivation for productive civil service, introduction of modern standards of public service. With that, it is necessary to strictly introduce and strengthen such principles of the civil service as legality,

transparency, professionalism, political impartiality, inevitability of punishment for corruption and other offenses [4-6].

Public authorities in Ukraine are currently taking some steps to reform the civil service. However, not all of these steps are clearly perceived by the population of Ukraine, including civil servants, in particular, this refers to the announced reduction in the number of civil servants and the use of contracts in the appointment of civil servants [7]. Thus, at the end of 2019, the Minister of the Cabinet of Ministers of Ukraine D.O. Dubilet stated: "We are cutting the staff of district state administrations (DSA) by 18,449 positions. As long as the internal communication channels do not work properly in our state bodies, I would like to address those civil servants who will be affected by such optimization. The decision on redundancy was difficult but necessary. We must significantly increase the efficiency of government agencies". According to the official, the Cabinet of Ministers of Ukraine analysed all the functions of the DSAs and counted 111 of them in 11 areas. It was decided to reduce their number [8].

The Law of Ukraine No. 117-IX "On Amendments to Certain Laws of Ukraine on Reset of Power" dated September 19, 2019[1] amended the Law of Ukraine "On Civil Service"[2], which in particular provides for simplification of the procedure for admission to civil service and dismissal from it, increasing the responsibility of civil servants for achieving the results of their activities, and a contractual form of admission to the civil service was introduced. The latter requires special attention, as the contract is a special form of fixed-term employment contract, the specific features of which are the need for its permanent renegotiation (two months prior to the expiration of the contract, it may be extended or concluded for a new term by agreement of the parties) and the possibility of dismissal of civil servant exclusively based on the expiration of the contract. This significantly weakens the position of civil servants in civil service relations [9-11]. It should be noted that the issues of legal regulation of relations in the civil service have been studied by such researchers as: V.S. Venediktov [12], K.Yu. Melnyk [13; 14], P.D. Pylypenko [15], V.I. Prokopenko [16] and others. Despite the existence of a wide array of publications that investigate various issues of legal regulation of relations in the civil service in different historical periods, recent changes in relevant national legislation have not yet been the subject of scientific research.

In view of this, the scientific analysis of the abovementioned reform measures in the context of protection of the rights of civil servants and further functioning of state bodies currently appears to be important.

1. MATERIALS AND METHODS

The paper is based on the study of scientific achievements of foreign and domestic scientists and the results of research of provisions of national labour legislation and the provisions of national legislation on civil service. The study examined the work of representatives of the science of labour law, which highlights the legal nature of the

[1] Law of Ukraine No. 117-IX "On Amendments to Certain Laws of Ukraine on Reset of Power" (2019, September). Retrieved from https://zakon.rada.gov.ua/laws/show/117-20.

[2] Law of Ukraine No. 889-VIII "On Civil Service". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19.

reduction in the number of employees and the civil service contract as a kind of labour contract. The provisions of the Labour Code of Ukraine and the Laws of Ukraine No. 889-VIII "On Civil Service" dated December 10, 2015[1] and No. 117-IX "On Amendments to Certain Laws of Ukraine on Reset of Power" dated September 19, 2019[2], were developed, which provide rules for the application of the contract upon hiring and introducing redundancy of civil servants. To achieve the purpose of the article, which is to provide scientifically sound conclusions and proposals for improving reform measures in the civil service regarding redundancy of civil servants and introduction of a contractual form of involvement in the civil service, an appropriate research algorithm was selected, inherent in the set of collected materials, conditions, and the forms of the paper.

The methodological basis of the study included general scientific and special scientific methods, the use of which is conditioned upon the purpose of the study and the need to use theoretical advances in labour and administrative law. The paper employed the dialectical method, the Aristotelian logical method, the comparative law method, and the method of system analysis. In their interaction, all the specified methods allowed to carry out a full-fledged completed legal study, each of the methods was used at a certain stage of the study, so the methodology is complex, multiple, and pluralistic. The basis of the research methodology is the dialectical method as an objectively necessary logic of the movement of cognition, which allows to consider the subject matter in its development, the interrelation arising from the material conditions of social life. This method allows to elaborate on the essence of such a complex phenomenon as civil service, including the specific features of identifying this essence in the particular historical conditions of modern Ukraine. The dialectical method allowed to investigate the issues of civil service reform in their development and interrelation and to determine the feasibility of such reform measures as reducing the staff of civil servants and the introduction of a contractual form of involvement in the civil service.

The Aristotelian method allowed to study the contract for civil service as a holistic legal phenomenon and to determine the features of concluding a contract for civil service. With the help of the Aristotelian method, the shortcomings of legislative provisions that may affect the quality of guarantees of the rights of civil servants were identified, and proposals for their elimination were provided. The use of the comparative law method allowed to determine the differences between the provisions of national labour legislation and provisions of national legislation on civil service, which provide for rules to reduce the staff of civil servants, including guarantee their rights upon dismissal on a corresponding basis.

The method of systematic analysis was used in the study of scientific positions on the nature of staff reductions and the contractual form of employment, including the relevant provisions of national legislation. System analysis convincingly proves that the modern science of administrative and labour law requires a new understanding of the place of relations of civil service in the subject of these branches of law. The solution to this issue will help resolve the extension of the general labour legislation to civil servants and

[1] Law of Ukraine No. 889-VIII "On Civil Service". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19.

[2] Law of Ukraine No. 117-IX "On Amendments to Some Laws of Ukraine on Restarting Power". (2019, September). Retrieved from https://zakon.rada.gov.ua/laws/show/117-20.

bring the civil service legislation regarding the record of service in accordance with the Labour Code of Ukraine.

2. RESULTS AND DISCUSSION

The legal literature expresses the position that the reduction of staff should improve the operations of the institution, optimize the number of employees. Thus, A.R. Matsiuk and Z.K. Symorot points out that staff reduction is one of the measures aimed at improving the work of the enterprise, institution, organization, staffing them with the most qualified personnel [17]. According to Ye.A. Klonov, staff reduction is a reduction in the established number of employees of the enterprise or institution with a simultaneous reduction of the scope of work (or without such), which is carried out by the administration in accordance with certain procedures, and aims to improve the organization of the apparatus, rationalization of the enterprise (institution) and retention of the most skilled workers [18]. O.B. Prudyvus notes that the reduction of staff is carried out on the initiative of the owner or its authorized body; the purpose of redundancy is to improve the work of the enterprise, institution, organization and to staff it with the most qualified personnel. The redundancy entails the removal of a full-time position. If downsizing can occur without the elimination of the relevant positions, the redundancy always entails a reduction in the number of employees [19].

The above indicates that both modern government officials and scientists point to the undoubted benefits for government agencies, enterprises and organizations to apply staff redundancy. Indeed, to optimize the activities of legal entities and for their more efficient functioning in certain situations, the use of staff redundancy is appropriate. However, we should not forget about the other side of this measure, because staff redundancy leads to negative consequences for the latter, when the employee is dismissed and needs to find another job. Moreover, a situation is created when employees are "redundant" and unable to continue working in the absence of their guilt and signs of incompatibility with the position. These negative aspects of staff reductions are to some extent offset by the provisions of national labour legislation, which establish enhanced measures to protect the rights of employees in case of such dismissal. In particular, the Labour Code of Ukraine (hereinafter referred to as the Labour Code)[1] establishes general guarantees for all employees in this area.

We shall note that the redundancy of civil servants is based on the rules of special legislation. Thus, paragraph 1 of Part 1 of Art. 87 of the Law of Ukraine No. 889-VIII "On Civil Service" dated December 10, 2015[2] as a basis for termination of civil service at the initiative of the appointing entity provides for the redundancy of civil servants, displacement of a civil service job due to changes in the structure or staffing of public bodies without reduction of staff of civil servants, reorganization of the state body.

It should be noted that the latest amendments to the Law of Ukraine No. 889-VIII “On Civil Service” dated December 10, 2015 introduced by the Law of Ukraine No. 117-IX “On Amendments to Certain Laws of Ukraine on Reset of Power” dated September 19,

[1] Labour Code of Ukraine. (1971). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08.

[2] Law of Ukraine No. 889-VIII “On Civil Service”. (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19.

2019[1] repealed the following rules of Part 3 of Art. 87 of the Law of Ukraine "On Civil Service"[2], which should be considered as guarantees of the rights of civil servants upon redundancy: "The procedure for redundancy of civil servants based on paragraph 1 of part 1 of this article is determined by labour legislation. Redundancy based on paragraph 1 of part 1 of this article is allowed only if the civil servant cannot be transferred to another position in accordance with their qualifications or if they refuse such transfer". Furthermore, the draft Law of Ukraine No. 1066 "On Amendments to Certain Laws of Ukraine on Reset of Power" dated August 29, 2019[3] attempted to steamroll in Art. 5 of the Law of Ukraine "On Civil Service"[4] the provision that the provisions of labour legislation do not apply to civil servants, except cases directly stipulated by this Law. Such a provision, if adopted, would completely remove the possibility of applying the provisions of labour legislation on redundancy to civil servants.

We shall remind you that the labour legislation of Ukraine establishes quite significant guarantees for the rights of employees who are dismissed in such way. Thus, in accordance with Parts 1 and 2 of Art. 49-2 of the Labour Code workers shall be given personal advance notice no later than two months prior an upcoming dismissal. Upon dismissal, the pre-emptive right to retain the job, stipulated by Art. 42 of the Labour Code[5]. , is considered. Such right is primarily granted to workers with higher qualifications and productivity. Under equal conditions of labour productivity and qualification, the advantage in job retention is given to: 1) family – in the presence of two or more dependents; 2) persons in whose family there are no other employees with independent earnings; 3) employees with long continuous work experience at the given enterprise, institution, organization; 4) employees who study in higher and secondary special educational institutions on the job; 5) participants in hostilities, victims of the Revolution of Dignity, persons with disabilities as a result of war and persons covered by the Law of Ukraine "On the Status of War Veterans, Guarantees of Their Social Protection"[6], including persons rehabilitated in accordance with the Law of Ukraine "On the Rehabilitation of Victims of Repressions of the Communist Totalitarian Regime of 1917-1991"[7], from among those who were subjected to repressions in the form (forms) of deprivation of liberty (imprisonment) or restriction of liberty or forced unjustified placement of a healthy person in the psychiatric facility according to the decision of a quasi-judicial body or other enforcement bodies; 6) authors of inventions, utility models, industrial designs and innovation proposals; 7) employees who received an occupational

[1] Law of Ukraine No. 117-IX "On Amendments to Some Laws of Ukraine on Restarting Power". (2019, September). Retrieved from https://zakon.rada.gov.ua/laws/show/117-20.
[2] *Ibidem*, 2019.
[3] Law of Ukraine No. 1066 "On Amendments to Certain Laws of Ukraine on Reset of Power". (2019, August). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/JI00045A.html.
[4] Law of Ukraine No. 889-VIII "On Civil Service". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19.
[5] Labour Code of Ukraine. (1971). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08.
[6] Law of Ukraine No. 3551-XII "On the Status of War Veterans, Guarantees of Their Social Protection". (1993, November). Retrieved from https://zakon.rada.gov.ua/laws/show/3551-12.
[7] Law of Ukraine No. 962-XII "On the Rehabilitation of Victims of Repressions of the Communist Totalitarian Regime of 1917-1991". (1991, April). Retrieved from https://zakon.rada.gov.ua/laws/show/962-12.

injury or occupational disease at this enterprise, institution, organization; 8) persons deported from Ukraine, within five years from the time of return to permanent residence in Ukraine; 9) employees from among former servicemen of conscript service, military service on conscription during mobilization, for a special period, military service on conscription of officers and persons who served alternative (non-military) service – within two years from the date of their discharge from service; 10) employees who have less than three years left before the retirement age, at which the person is entitled to receive pension benefits. Preference in leaving work may be given to other categories of employees, if it is envisaged by the legislation of Ukraine.

Part 3 of Art. 49-2 of the Labour Code[1] stipulates that simultaneously with the notice of dismissal, the owner or its authorized body shall offer the employee another job at the same enterprise, institution, organization. In the absence of jobs in the relevant profession or specialty, as well as in case of refusal of the employee to transfer to another job at the same enterprise, institution, organization, the employee, at its discretion, seeks help from the state employment service or becomes self-employed. If the redundancy is collective, then in accordance with Art. 48 of the Law of Ukraine "On Employment of the Population"[2], the owner or its authorized body shall notifiy the state employment service of the planned redundancy. It should be noted that today the Law of Ukraine "On Civil Service" contains rules that in some way comply with the Labour Code, which establishes guarantees of the rights of employees who are dismissed due to staff redundancy. Thus, Part 4 of Art. 87 of the Law of Ukraine "On Civil Service"[3] envisages that in case of dismissal from the civil service based on paragraph 1 of part 1 of this article, the civil servant shall be paid severance pay in the amount of the average monthly salary. A similar provision is contained in Art. 44 of the Labour Code[4], which establishes that upon termination of the employment contract on the studied grounds, the employee shall be paid severance pay in the amount of not less than the average monthly salary.

The following provisions of the Law of Ukraine "On Civil Service"[5] do not contradict the provisions of the Labour Code[6]:

- a civil servant who was dismissed according to paragraph 1 of Part 1 of this article, if a new post is created in the state body from which they are dismissed or a vacant post corresponding to the qualification of a civil servant appears within six months from the date of dismissal by decision of the appointing entity may be appointed to an equivalent or subordinate post of civil service, if they were appointed to a position in this body according to the results of the competition (Part 3 of Article 87);

- an order (instruction) on dismissal of a civil servant in cases envisaged by Part 1 of this Article may be issued by the appointing entity or the head of the civil service during the period of temporary incapacity of the civil servant or his leave, indicating the date of

[1] Labour Code of Ukraine. (1971). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08.
[2] Law of Ukraine No. 5067-VI "On Employment of the Population". (2012, July). Retrieved from https://zakon.rada.gov.ua/laws/show/5067-17.
[3] Law of Ukraine No. 889-VIII "On Civil Service". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19.
[4] Labour Code of Ukraine. (1971). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08.
[5] Law of Ukraine No. 889-VIII "On Civil Service", op. cit.
[6] Labour Code of Ukraine, op. cit.

dismissal, which is the first working day after the day of termination of temporary incapacity for work specified in the document on temporary incapacity for work, or the first working day after the end of leave (Part 5 of Article 87).

The above analysis of the provisions of national legislation proved the selective approach of the legislator to enshrine in the Law of Ukraine "On Civil Service" the provisions of general labor legislation on guarantees of employees' rights upon dismissal in case of redundancy. This creates a situation when in one case the provisions of the Law of Ukraine "On Civil Service"[1] duplicate the provisions of the Labour Code, in another – do not contradict the provisions of the Labour Code, in yet another – do not envisage the provisions of the Labour Code[2].

Given the negative consequences for the civil servant, which entails dismissal on redundancy, and based on the fact that the Labour Code of Ukraine stipulates a set of guarantees for the rights of employees upon dismissal on appropriate grounds, which have been tested over time, it is appropriate to extend the respective provisions of the Labour Code[3] to civil servants. To this end, we propose to supplement Part 3 of Art. 87 of the Law of Ukraine "On Civil Service"[4] with provision of the following content: "The procedure for dismissal of civil servants according to paragraph 1 of Part 1 of this article, in the part that is not regulated by this Law, shall be determined by labour legislation".

The innovation of the Law of Ukraine No. 889-VIII "On Civil Service" dated December 10, 2015[5], introduced by the Law of Ukraine No. 117-IX "On Amendments to Certain Laws of Ukraine on Reset of Power" dated September 19, 2019[6], is the introduction of a contract form of civil service. Thus, Part 1 of Art. 31-1 of the Law of Ukraine "On Civil Service"[7] provides that with a person appointed to the post of public service, a contract for civil service may be concluded in accordance with the procedure approved by the Cabinet of Ministers of Ukraine at the request of the central executive body, which provides for the formation and implements national policy in civil service. It should be noted that the contract as a basis for emergence of labour relations in Ukraine was introduced by the Law of the USSR "On Amendments to the Labour Code of the Ukrainian SSR upon the Transition of the Republic to a Market Economy" dated 20.03.1991[8]. As noted by P.D. Pylypenko, it was originally thought that a contract is a tried and tested option in the West for recruiting, which encourages the employee to work creatively and selflessly. With its help, the employer has the opportunity to develop a more qualified workforce capacity and get rid of lazy, dishonest employees who violate labour discipline. Thus, contracts were supposed to solve all the problems that existed at the time in socialist communal organization of labour [15]. V.S. Venediktov points out that the contract became widespread in the regulation of labour relations in the branches of the national

[1] Law of Ukraine No. 889-VIII "On Civil Service". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19.
[2] Labour Code of Ukraine. (1971). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08.
[3] *Ibidem*, 1971.
[4] Law of Ukraine No. 889-VIII "On Civil Service", op. cit.
[5] *Ibidem*, 2015.
[6] Law of Ukraine No. 117-IX "On Amendments to Some Laws of Ukraine on Restarting Power". (2019, September). Retrieved from https://zakon.rada.gov.ua/laws/show/117-20.
[7] Law of Ukraine No. 889-VIII "On Civil Service", op. cit.
[8] Labour Code of Ukraine, op. cit.

economy due to the fact that it provided greater freedom in the regulation of labour relations by employers by means of appropriate consensus to establish the content of the contract, especially benefits and guarantees of social security [12]. We shall note that the contract is a fixed-term employment agreement. Nowadays, the scope of contracts, in accordance with Part 3 of Art. 21 Labour Code, is limited by the laws of Ukraine. That is, contracts can be concluded by employers only with those categories of employees that are clearly defined by law. This means that the state sets certain barriers to the application of contracts, primarily because the main employment contract in Ukraine, in accordance with Art. 23 Labour Code[1], is indefinite.

The legal literature expresses a negative attitude towards the use of contracts in its modern form. Thus, K.Yu. Melnyk points out that the contract, given its fixed-term nature, does not ensure the stability of labour relations. Furthermore, this type of fixed-term employment contract does not even allow the possibility of its transformation into an employment contract for an indefinite period. "Contracts for service in law enforcement agencies reduce the protection of employees of these bodies in labour relations. This is primarily manifested in the fact that employees can be dismissed at the end of the contract without explanation. Also, the use of contracts in recruitment opens up certain opportunities for abuse by law enforcement officials", said the scientist [14]. According to S.V. Vereitin, the application of contracts is beneficial, first of all, to the employer, i.e. the management of police bodies and departments, as it allows to dismiss a police officer at the end of the contract without explanation. For the police officers, concluding contracts is unprofitable, as it weakens their position, making them to some extent a "temporary" employee [20]. V.I. Prokopenko points out that the contract significantly restricts the labour rights of workers, even without containing conditions that infringe on their rights. And if it still includes conditions when even the minimum labour guarantees are not observed by the employer, it is hardly possible to refer to the proper protection of labour rights of workers and the need for legal regulation of labour relations in general by the state. With that, there is a threat that the violation of labour rights may not be compensated by any additional benefits and advantages [16]. The Law of Ukraine "On Civil Service" sets restrictions on the use of contracts in state agencies. Thus, in accordance with Part 1 of Art. 31-1, paragraph 3 of Part 2 of Art. 34 and Part 3 of Art. 34 of the Law[2], firstly, the contract may be concluded if necessary to ensure the organization and performance of tasks of a temporary nature (for civil service positions of categories "B" and "C"), secondly, the number of civil service positions in the state agency, for which a fixed-term appointment is made (including under a contract), may not exceed 7 percent of the total number of full-time civil service positions in a state agency.

The legislator does not clearly define the range of positions for which appointments can be made with the conclusion of a contract for civil service. Thus, in accordance with Part 3 of Art. 31-1 of the Law of Ukraine "On Civil Service"[3], the decision to allocate a civil service position to positions for which the appointment is made with the conclusion of a contract for civil service, is made by the appointing entity or the head of the civil

[1] Labour Code of Ukraine. (1971). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08.
[2] Law of Ukraine No. 889-VIII "On Civil Service". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19.
[3] *Ibidem*, 2015.

service before the competition. We believe that the national legislator made a better call in Art. 63 of the Law of Ukraine "On the National Police"[1], which clearly defined the categories of posts for which appointment is carried out under the contract. The indicated approach, in our opinion, reduces subjectivity and corruption risks upon recruiting.

The positive thing is that the national legislator in Parts 4 and 5 of Art. 31-1 of the Law of Ukraine "On Civil Service"[2] stipulated the need to provide information on the essential terms and conditions of the contract in the announcement of the competition for civil service positions, appointments to which are made with the conclusion of a civil service contract, and established a list of essential contract terms and conditions. These are, firstly, the place of work and position in the civil service, secondly, special requirements for persons applying for a position in civil service, thirdly, the date of entry into force and duration of the contract, fourthly, the rights and obligations of the parties, fifthly, tasks and key indicators of effectiveness, efficiency, and quality of their implementation, deadlines for their implementation, sixthly, the regime of work and rest, seventhly, terms of remuneration, eighthly, the responsibility of the parties and dispute resolution, ninthly, the grounds for amendment, termination, and cancellation of the contract. It is impossible to fully agree with the attribution of special requirements to persons applying for a civil service position to the essential terms and conditions of the contract. Such requirements are established by special legislation and apply regardless of their inclusion or non-inclusion in the contract of civil service. It is also necessary to agree with K.Yu. Melnyk, who considers it inexpedient to include in the list of essential terms and conditions of the contract such a terminological construction as "termination and cancellation of the contract", because the term "termination of the contract" is broader than "cancellation of the contract" and includes the latter. The researcher believes that it is enough to leave along with the amendment of the contract its termination in the list of essential terms and conditions of the contract [13].

The Law of Ukraine "On Civil Service" stipulates that a contract for civil service is concluded for a period of up to three years. Therefore, the lower limit of the contract term is not established by legislation, and so contracts can be concluded for any minor period, even for one month. In our opinion, the use of such "temporary" civil servants may reduce the efficiency of state agencies, given the lack of interest of civil servants in achieving the long-term purpose of a state agency and maintaining its authority. Thus, we consider it appropriate to word Part 8 of Art. 31-1 of the Law of Ukraine "On Civil Service"[3] as follows: "The contract for civil service is concluded for a period of one to three years".

CONCLUSIONS

Analysis of current issues of civil service reform provides several proposals and recommendations for improving national legislation in the field of civil service and the practice of its application, namely:

[1] Law of Ukraine No. 580-VIII “On National Police”. (2015, July). Retrieved from https://zakon.rada.gov.ua/laws/show/580-19.
[2] Law of Ukraine No. 580-VIII “On National Police”, op. cit.
[3] Law of Ukraine No. 889-VIII “On Civil Service”. (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19.

1. There is a feasibility of appropriate revision of the Law of Ukraine "On Civil Service": 1) to supplement Part 3 of Art. 87 of the Law of Ukraine "On Civil Service" with the following provision: "The procedure for dismissal of civil servants based on paragraph 1 of part 1 of this article, in the part not regulated by this Law, is determined by labour legislation"; 2) to supplement Art. 31-1 of the Law of Ukraine "On Civil Service" with an indicative list of categories of positions to which appointments may be made under a contract for civil service; 3) to word Part 8 of Art. 31-1 of the Law of Ukraine "On Civil Service" as follows: "The contract for civil service is concluded for a period of one to three years".

2. It is necessary to create new productive jobs in various sectors of the national economy prior to the planned collective redundancy of civil servants, where they will be sent after retraining.

3. Reforms of society and public administration should be carried out after a thorough study of public opinion, analysis of the possible negative consequences of these reforms, the development and implementation of compensatory mechanisms. It is also mandatory to involve scientists, practitioners, employers, and representatives of public, including trade unions, in the reform process. Especially when it is reforms that affect the rights and freedoms of citizens in the field of providing them with livelihoods.

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ДЕЯКІ ПРОБЛЕМНІ АСПЕКТИ ЗДІЙСНЕННЯ ТА ЗАХИСТУ МАЙНОВИХ ПРАВ ПОДРУЖЖЯ

Анотація. *Актуальність дослідження проблем, пов'язаних зі здійсненням подружжям закріплених в сімейному законодавстві майнових прав та їх захистом у разі невизнання, оспорювання чи порушення зумовлена тим, що майнові права подружжя становлять основу правового статусу чоловіка і дружини, а їх реалізація слугує зміцненню майнових засад сім'ї, забезпеченню матеріального добробуту як подружжя, так і дітей. Мета дослідження полягає у виявленні прогалин у законодавстві, що регулює майнові відносини подружжя та з'ясуванні їх впливу на забезпечення здійснення та захисту їхніх майнових прав. При проведенні дослідження були використані різноманітні методи наукового пізнання. Так, історичний метод використовувався при аналізі норм Кодексу законів про шлюб та сім'ю України, що регулювали майнові права подружжя та визначали способи їх захисту. Порівняльно-правовий метод застосовувався для порівняння норм ЦК України та СК України, що регулюють подібні або схожі відносини, зокрема щодо спільної сумісної власності, визнання недійсними договорів тощо. Методи аналізу і синтезу застосовувалися для виявлення недоліків і прогалин в чинному сімейному законодавстві та в практиці його застосування. На підставі формально-логічного методу сформульовані пропозиції щодо удосконалення деяких положень сімейного законодавства України. В роботі розглянуто загальне правило, згідно з яким дружина, чоловік розпоряджаються майном, що є об'єктом права спільної сумісної власності подружжя, за взаємною згодою. Інший аспект здійснення майнових прав подружжя стосується утримання та його правового регулювання. Не менш проблемним аспектом здійснення та захисту майнових прав подружжя, який розглянутий в роботі, є питання щодо поділу майна. Зокрема, в судовій практиці при розгляді справ про поділ майна подружжя виникають складнощі у разі відступу від засади рівності часток подружжя за обставин, що мають істотне значення. Такі обставини, що аналізуються в статті, можуть бути підставами як зменшення, так і збільшення частки одного з подружжя, у тому числі – колишнього. Одержані результати можуть бути використані при удосконаленні сімейного законодавства та практики його застосування, в подальших наукових дослідженнях, що стосуються майнових прав подружжя, а також при викладанні курсу сімейного права в навчальних закладах вищої освіти.*

Ключові слова: спільне майно, визнання договору недійсним, утримання одного з подружжя, поділ майна, шлюбний договір.

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SOME PROBLEM ASPECTS OF IMPLEMENTATION AND PROTECTION OF PROPERTY RIGHTS OF SPOUSES

Abstract. *The relevance of research on the problems associated with the implementation by spouses of enshrined in family law property rights and their protection in case of non-recognition, contestation or violation due to the fact that the property rights of spouses form the basis of the legal status of spouses and their implementation serves to strengthen the family's the material well-being of both spouses and children. The purpose of the study is to identify gaps in legislation governing spouses' property relations and to determine their impact on securing the enjoyment and protection of their property rights. Various methods of scientific knowledge were used in the research. Thus, the historical method was used in the analysis of the provisions of the Code of Laws on Marriage and Family of Ukraine, which regulated the property rights of spouses and determined ways to protect them. The comparative legal method was used to compare the norms of the CC of Ukraine and the FC of Ukraine governing alike or similar relations, in particular regarding shared ownership, invalidation of contracts and the like. Methods of analysis and synthesis were used to identify the shortcomings and gaps in current family law and in the practice of its application. On the basis of the formal-logical method, proposals for improvement of some provisions of the family law of Ukraine were formulated. The paper considers the general rule that a husband, wife disposes of the property, which is the subject of the joint property right of the spouse, by mutual consent. Another aspect of spousal property rights concerns the maintenance and legal regulation of a spouse. No less problematic aspect of the exercise and protection of property rights of spouses, which is considered in the paper, is the issue of property division. In particular, in case law, when considering cases of separation of property of a spouse, difficulties arise in the event of deviation from the principle of equality of spouses in the circumstances of significant importance. Such circumstances, which were analysed in the article, may be the reasons for both a decrease and an increase in the share of one of the spouses, including the former. The results obtained can be used to improve family law and the practice of its application, in further scientific studies concerning the property rights of spouses, as well as in teaching the course of family law in higher education.*

Keywords: joint property, invalidation of a contract, support of one spouse, separation of property, marriage contract.

INTRODUCTION

An important area of application of the rules of family law, designed to regulate relations between spouses, is the sphere of property relations, characterised by certain characteristics. The specificity of these relations is, in particular, that they are regulated, in

addition to the norms of the Family Code of Ukraine[1] (hereinafter – the UK Code), by a number of general rules on property, means, property rights, protection of property rights, etc. of the Civil Code of Ukraine[2] (hereinafter – the CC of Ukraine), as well as rules of other laws governing obligations, corporate relations, inheritance relationships, and more. In the literature, attention has been paid to the unequal application by the courts of the provisions of the Civil Code of Ukraine and the Ukrainian Criminal Code in cases when it comes to the exercise of their property rights by spouses [1; 2]. One of the problems that needs to be resolved is to ensure that the property rights of spouses are properly exercised by them and to protect the said rights in case they are not recognised, violated or contested.

Among the principles of family law, some authors refer, in particular, to the principle of judicial protection of family rights and interests [3-6]. One of the arguments of this statement is called the norm of Part 10 of Art. 7 of the Criminal Code of Ukraine, according to which "every participant in family relations has the right to judicial protection".

The right to defence (not only judicial but also in extrajudicial form, including the right to self-defence of the infringed right and interest) in the general theory of law and in the science of civil law is considered by most scholars to be one of the competences within the subjective law. Therefore, it can be assumed that the exercise of the subjective right of a participant in family relations also includes the possibility of protecting that right. Therefore, the allocation of the right to defence as an independent subjective right and as a principle of family law is considered to be unjustified. At the same time, the issues related to the implementation of spouses' property rights are inextricably linked to the issues of their protection.

Despite the fact that Part 1 of Art. 18 of the IC of Ukraine, in contrast to Part 1 of Art. 15 of the Civil Code of Ukraine, does not indicate in which case a participant of family relations has the right to appeal to a court for the protection of his right or interest, it is clear that there are cases of its violation, non-recognition or contestation. Similarly, in this part of Art. 18 of the FC of Ukraine should not be about any interest, but interest protected by law. However, the wording of Part 1 of Art. 18 of the IC of Ukraine is built in such a way that the main focus is on the attainment of a family member of a certain age, which gives him the right to apply to a court for the protection of his right or interest. In this regard, the author proposes to formulate part 1 of Art. 18 of the IC of Ukraine as follows: "1. Every member of a family who has attained the age of fourteen has the right to a direct appeal to a court for the protection of his or her right in the event of its non-recognition, violation or contestation, and protected by law interest.

1. MATERIALS AND METHODS

Background materials for the study of some of the problematic aspects of the implementation and protection of property rights of the spouses were the provisions of the CC of Ukraine, the FC of Ukraine[3] and other regulatory legal acts, materials of court practice, as well as sources of special literature on family law. The methodology of this study is based on the combination of different methods of scientific knowledge. Their

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

application has made it possible to establish that the implementation of spouses' joint property rights should be performed in accordance with the provisions of the FC of Ukraine, as a special legal act, and not in accordance with the CC of Ukraine, which contains general provisions on shared ownership. Thus, the historical method was used to find out the content of the marriage and family laws of the Code of Laws on Marriage and Family Law, which regulated the property rights of spouses and determined the procedure for appealing to the court for protection of the violated right, before the adoption of the CC of Ukraine. The comparative legal method was used to compare the norms of the CC of Ukraine and the FC of Ukraine governing alike or similar relations, in particular regarding shared ownership, invalidation of contracts and the like. This made it possible to conclude that the legislator unjustifiably not included in the grounds for acquiring the right to withhold the refusal of one spouse to financially support the other.

Methods of analysis and synthesis were used to identify the shortcomings and gaps in current family law and in the practice of its application. Thus, based on the analysis of Art. 76 of the FC of Ukraine, which established the right of a spouse to financially support the other after a divorce, it was found that the legislator did not foresee the possibility of concluding a contract of custody for them. Instead, the Principles of European Family Law stipulate that spouses should be able to enter into a post-divorce custody agreement, which may specify the amount of an allowance, the procedure, duration and conditions of termination of the maintenance obligation and the possible waiver. In view of this, the relevant changes to the FC of Ukraine were proposed.

On the basis of the formal-logical method, proposals are made to improve certain provisions of the family law of Ukraine, in particular, concerning: the right of one spouse to apply to court with a request for financial support from the other spouse; the right to the financial support of a spouse with whom a child with disability lives after a divorce; the right of the spouses to conclude a contract of custody not only during the marriage, but also after divorce.

2. RESULTS AND DISCUSSION

2.1 Recognition of invalid property contracts

One of the aspects that should be addressed is the invalidation of contracts for the disposal of property owned by q husband and wife on shared ownership, concluded by one spouse without the consent of the other. As established by Art. 63 of the FC[1], a wife and a husband have equal rights to own, use and dispose of property belonging to them according to the right of shared ownership, unless otherwise agreed by an agreement between them. In view of this Part 1 of Art. 65 of the Criminal Code of Ukraine establishes that a husband and a wife dispose of the property, which is the subject of shared ownership of the spouses, by mutual consent. Consequently, when concluding contracts, one of the spouses is considered to be acting with the consent of the other spouse (Part 2 of Article 65 of the FC of Ukraine). These norms almost exactly coincide with the provisions of Part 1 and 2 of Art. 369 of the CC of Ukraine on the exercise of the right of shared ownership, but the main difference is that, as set out in Part 2 of Art. 68 of the FC of Ukraine, the disposal of property that is the subject of the right of shared ownership, is carried out by the co-owners

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

only by mutual consent, in accordance with the Civil Code of Ukraine *after a divorce*. Thus, the provisions of Art. 369 of the Civil Code of Ukraine cannot be applied to relations concerning the exercise of the right of shared ownership of spouses.

On this basis, the FC of Ukraine and the CC of Ukraine establish different legal grounds for invalidation of contracts for disposal of property, which is the subject of shared ownership. Thus, if according to Part 4 of Art. 369 of the Civil Code of Ukraine a transaction concerning the disposal of joint property, made by one of the co-owners, may be declared invalid by the court upon the claim of the other co-owner in the absence of the co-owner who has performed the necessary powers, then according to Part 2 of Art. 65 UK of Ukraine, wife, husband has the right to go to court with a claim to declare the contract void as such, concluded by the other spouse without her, his consent, if this agreement goes beyond the limits of a small household. Thus, the ground for invalidation of a contract for the disposal of property that is the subject of shared ownership rights concluded by one spouse is the *absence of consent* of the other spouse.

This fact is not taken into account not only in jurisprudence but also in scientific research. Thus, N.A. Dyachkova and F.A. Tuchin consider that the provision that a transaction concluded by one spouse without the consent of the other cannot be challenged in court (since in Part 2 of Article 65 of the FC such the opportunity is given only for transactions that go beyond the limits of a small households), contrary to Part 2 of Art. 4 of the CPC of Ukraine (an obvious mistake here, since Article 4 of the CPC of Ukraine does not contain part 2). Accordingly, the authors believe that even a small household transaction made by one spouse without the consent of the other can also be challenged in court [7]. The author of this paper believes that this conclusion of the authors can be extended to small household contracts concluded by one spouse, but the reason for their invalidation will be not the absence of consent of the other spouse, but other grounds provided by the CC of Ukraine.

Without prejudice to the question of the form and notarisation of such consent (Part 3 of Article 65 of the Criminal Code of Ukraine), although they are important enough for the observance of property rights of spouses, it is worth noting that if the definition of small household contract can be used by analogy of law the concept of small household transactions, placed in Part 1 of Art. 31 of the CC of Ukraine, then the question what contract can be considered as an agreement on valuable property, are not answered by either the CC of Ukraine nor the FC of Ukraine. Case law, ignoring the direct reference in Part 2 of Art. 65 of the UK of Ukraine on the invalidation of a contract concluded by one spouse without the consent of the other, proceeds from the fact that "the disposal of joint property without the consent of the other spouse can be a ground for invalidation of such a contract only if the court finds that those of the spouse who entered into the joint property agreement and the third party contracting party under such agreement acted in bad faith, in particular that the third party knew or could not have known, under the circumstances of the case, that the property was owned by the spouse under the shared ownership right, and a spouse who concluded a contract, has not received the consent of the other spouse".

Thus, the appeal of the Supreme Court of Ukraine to the principle of integrity in considering cases of invalidation of contracts concluded without the consent of another spouse, is characteristic of a number of its resolutions (of 07.10.2015, of 30.03.2016, of 07.09.2016, of 22.02.2017 etc.).

The author believes that the reasons given by the court in these and other decrees are based on the statement made by Yu.S. Chervonyi about the possibility of invalidating a transaction, if it is proved that the other party to the transaction acted in bad faith, that is, knew or should have known of the absence of consent to the exercise such transaction by other co-owners or one of them [8], cannot be applied for recognition as invalid contracts concluded by one spouse without the consent of the other. It is quite clear that a spouse who concludes a contract without the consent of the other spouse can no longer act in good faith. Regarding the behaviour of a contractor under a contract, the legislator does not take it into account at all when determining the basis for the contract's invalidation in accordance with Art. 65 of the FC of Ukraine. It is only about relationships between spouses. Therefore, the court's reference to good faith, as one of the principles of civil law (although such a provision under Article 7 of the CC of Ukraine is also inherent in family law), according to which the parties to a contract should act, in this case is groundless.

Today, such erroneous practice has been altered by the legal opinion of the Grand Chamber of the Supreme Court of November 21, 2018 in case No. 372/504/17 [9], which was reflected in the following practice (Supreme Court's Order of 30 January 2019 in case no. 552/17826/16-c [10], of February 11, 2019 in Case No. 308/2205/16-c [11], etc.). Courts now proceed from the fact that the law does not link the presence or absence of consent of the co-owner to conclude a contract with good faith of the spouse who concluded the joint property contract or of the third contracting party under such agreement and does not raise the issue of the appeal of a contract in dependence on good faith of the parties to a contract. True, there is some doubt as to the reference of the courts in the above cases to Articles 369 and 215 of the Civil Code of Ukraine in the presence of a special provision established by Part 2 of Art. 65 IC of Ukraine.

2.2 Rights of a spouse for allowance

An important aspect in the context of problems in the exercise of property rights of spouses is the issue of legal regulation of maintenance. As Part 1 of Art. 75 of the FC of Ukraine established, wife, husband should financially support each other. Maintenance relations are regulated, in particular, by the rules of Chapter 9 of the FC of Ukraine, entitled "Rights and Obligations of Spouses", although in reality the provisions of this Chapter regulate not only the rights and duties of the spouse, but also the right of a person to be supported after a divorce (Article 76 of the FC of Ukraine) and the right to support women and men who are not married to each other (Article 91 of the Civil Code of Ukraine).

Given that the FC of Ukraine has for the first time settled the property relations of a woman and a man who live in the same family but are not married to each other or in any other marriage, the author considers it appropriate to supplement the FC of Ukraine with Chapter 9-1, to which, in particular, include Article 74, which, in author's view, is unreasonably set out in Chapter 8, "The right of shared ownership of spouses", and Article 91 of the FC of Ukraine on the right to retain these persons, as well as to better regulate property relations between these persons [12-14]. As the existing title of Chapter 9 of the FC of Ukraine contains different rights and obligations – "right to withhold" and "duty to withhold", and the chapter itself regulates the relationship of maintenance both between spouses and between former spouses, it seems that such corresponding to the content of the norms contained therein after the implementation of the above amendments (regarding

Chapter 8-1) would be another title of Chapter 9, namely: "Rights and Obligations of Spouses and Former Spouses".

It should be noted that the term " former spouses" is used in the Principles of European Family Law governing divorces and allowances between former spouses[1] (hereinafter referred to as "Principles"), and the very principles of retention between former spouses are enshrined in Part II. However, the Principles do not contain provisions governing the relationship between a spouse or a wife and husband who are not married.

The CC of Ukraine establishes *general* (Article 75) and *special* (Articles 84, 86, 88) grounds for the acquisition of the right of allowance and conditions for its implementation. Thus, according to Part 2 of Art. 75 of the FC of Ukraine the right to allowance (alimony) has those of the spouse who: a) is incapacitated, b) needs financial assistance, provided that the other spouse can provide financial assistance. In this case, a spouse who has reached the retirement age, established by law, or is a person with a disability of group I, II or III (Part 3 of Article 75 of the Insurance Code of Ukraine) is considered incapacitated. One spouse is in need of financial assistance if his salary, pension, income from the use of his property, other income do not provide him with the subsistence minimum required by law. For example, having considered a statement of PERSON_1 on the Supreme Court of Ukraine's review of the Supreme Specialised Court of Ukraine's decision on civil and criminal cases of October 15, 2015 in a case against PERSON_1 to PERSON_2 about recovering alimony from a disabled wife, the Court Chamber of Ukraine on the Resolution of April 13, 2016, in Case No. 6-3066ts15 stated, in particular, that the materials of the case indicate that the amount of the pension of the claimant as a disabled person of group I is 1 149 hryvnas 72 kopecks.

Article 7 of the Law of Ukraine "On the State Budget of Ukraine for 2015"[2] stipulates for 2015 the living wage for persons with disabilities from January 1, 2015 – UAH 949, from September 1 – UAH 1,074. Therefore, PERSON_1 receives a disability pension in the amount that provides its subsistence minimum, established by law for persons who have lost their ability to work, and therefore cannot be considered as a person in need of financial assistance in the sense of Article 75 Part 4 of the Criminal Code of Ukraine. Taking into account the established circumstances, the court of cassation in the case being reviewed reasonably agreed with the court of appeal of the refusal to satisfy the claims of PERSON_1 on the recovery of alimony for her allowance as a disabled wife[3].

Due to changes in the current legislation concerning the setting of minimum social standards for which the minimum wage exceeds the living wage per person (see, for example, Law of Ukraine of November 14, 2019 No. 294-IX "On The State Budget of Ukraine for 2020"[4]), obviously, one should expect a decrease in the number of people in need of financial assistance, but this does not solve other problems of support. For

[1] Principles of European Family Law regarding divorce and maintenance between former spouses. Retrieved from http://ceflonline.net/wp-content/uploads/Principles-English.pdf

[2] Law of Ukraine "On the State Budget of Ukraine for 2015". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/main/294-IX

[3] Resolution of the Supreme Court of Ukraine in Case No. 6-3066css15 (2016, April). Unified State Register of Judgments. Retrieved from http:// www.reyestr.court.gov.ua/

[4] Law of Ukraine "On the State Budget of Ukraine for 2020". (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/main/294-IX

example, a systematic analysis of the above provisions of Art. 75 of the FC of Ukraine[1] on the one hand, and Art. 55 of the Criminal Code of Ukraine (concerning the obligation of the wife and husband to jointly care for the financial support of the family), Art. 60 of the Criminal Code of Ukraine (concerning the right of shared ownership of property acquired by the couple during the marriage) and Art. 63 of the Civil Code of Ukraine (concerning the equality of the rights of the wife and the husband in the exercise of the spouses shared ownership rights) – on the other indicates that the legislator unjustifiably not included in the grounds for acquiring the right to withhold *the refusal of one spouse in material support of the other* (as it was established by Part 1 Art. 32 of the Code on Marriage and Family of Ukraine), since according to part 1 of Art. 75 of the FK of Ukraine, wife, husband should financially support each other.

The current Ukrainian Family Code does not contain a rule that a spouse who requires such maintenance has the right to go to court, although a similar provision was contained in Part 1 of Art. 32 of the Marriage and Family Code of Ukraine. On this basis, the author proposes to formulate part 2 of Art. 75 of the FC of Ukraine in the following wording: "2. In case of refusal of such support, the spouse who is incapacitated, needs financial assistance, has the right to allowance, provided that the other spouse can provide financial assistance, has the right to go to court to request allowance." Thus, in author's view, the spouses will be better informed about the possibility of protecting their violated right [15; 16]. The above grounds for the occurrence and conditions for the exercise of the right of spouses to allowance are established by law. At the same time, expanding the dispositive principles of regulation of family relations in general (Part 2 of Article 7, Part 1 of Article 9 of the FC of Ukraine), and relations of spouses, in particular (Article 64 of the FC of Ukraine), created the possibility of contractual regulation of the relationship of spouses on allowance both in the marriage contract and in the spousal contract. Thus, according to Art. 99 of the FC of Ukraine, the parties may agree to grant allowance to one spouse regardless of disability and the need for financial assistance on the terms stipulated in the marriage contract.

If the marriage contract specifies the terms, amount and terms of payment of alimony, then in case of failure of one of the spouses to fulfil their obligations under the contract, alimony may be charged on the basis of a notary's executive inscription. The marriage contract may stipulate the possibility of termination of the right to support one of the spouses in connection with the receipt of property (monetary) compensation. The marriage contract may stipulate the possibility of termination of the right to support one of the spouses in connection with the receipt of property (monetary) compensation. In addition, in accordance with Art. 78 of the FC of Ukraine spouses have the right to enter into an agreement for the maintenance of one of them, in which to determine the terms, amount and terms of payment of alimony. The contract is made in writing and notarised. In case of failure of one of the spouses to fulfil their obligations under the maintenance agreement, alimony may be charged on the basis of a notary's executive inscription. In this case, the execution of executive inscriptions by a notary shall be governed by the provisions of Chapter 14 of the Law of Ukraine of September 2, 1993 "On Notary"[2],

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

[2] Law of Ukraine "On Notary" of September 2, 1993. Retrieved from http://zakon3.rada.gov.ua/laws/show/3425-12

Chapter 16 of the Procedure for Notary Acts by Notaries of February 22, 2012[1], and Clause 1 of the List of Documents on which indebtedness is enforced indisputably on the basis of executive notaries dated June 29, 1999[2].

Having established the right to allowance after the dissolution of marriage (Article 76 of the Criminal Code of Ukraine)[3], the legislator did not foresee the possibility of concluding a contract of allowance between them. Instead, the Principles (Principle 2:10) stipulate that the spouses should be able to enter into a post-divorce custody agreement, which may specify the amount of the allowance, the order of exercise, the duration and conditions of termination of the allowance obligation and the possible waiver of the application for the allowance. Such an agreement must be in writing.

In view of this, the author considers it expedient to provide in the FC of Ukraine the right of spouses to conclude a contract for their maintenance not only during marriage but also after divorce, for which to exclude from the name of Art. 78 of the Criminal Code of Ukraine the word "spouses" and add part 1 after the first sentence with the sentence of the following content: "The former spouse has the right to enter into such a contract even after the divorce". In author's view, making the proposed changes will allow a claimant to meet his or her needs, at the expense of a person who has the ability to satisfy them, not only during marriage but also after divorce. It is also advisable to grant the right to conclude an allowance contract to a woman and a man who are not married (Article 91 of the Criminal Code of Ukraine). Some special features characterise the special grounds for acquiring the right to allowance and the conditions for its implementation.

1. Thus, according to Art. 84 of the FC of Ukraine, the wife has the right to be supported by her husband during pregnancy, and the wife with whom the child resides – from the husband-father of the child – until the child is three years old. However, if the child has a physical or mental disability, the term increases to six years.

2. The man with whom the child lives has, according to Art. 86 of the FC of Ukraine, the right to be supported by the wife-mother of the child until the child is three years old, and in the case of the child's physical or mental development – until the child is six years old.

3. If one of the spouses, including the able-bodied, lives with a child with a disability, who cannot cope without permanent care of a third party, he or she is entitled to allowance (Part 1 of Article 88 of the Criminal Code of Ukraine).

In spite of different subject composition and different grounds for holding the right to withhold, all three cases share the following characteristics:

a) a person has the right to allowance irrespective of his financial position;

b) the condition for the exercise of the right to allowance is the ability of a husband (wife, spouse) to provide financial assistance.

It should be noted that Art. 84 and Art.86 of the Criminal Code of Ukraine stipulate that a pregnant wife, the wife with whom the child resides, the husband with whom the

[1] Order of the Ministry of Justice of Ukraine "Procedure for Notary Acts by Notaries of Ukraine". (2012, February). Retrieved from http://zakon2.rada.gov.ua/laws/show/z0282-12

[2] List of documents on which indebtedness is enforced indisputably on the basis of executive notaries: Decree of the Cabinet of Ministers of Ukraine. (1999, June). Retrieved from http: //zakon3.rada.gov.ua/laws/show/1172-99-п/ed20150407

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

child resides, have the right to maintenance even after the divorce. Art. 88 of the Criminal Code of Ukraine does not contain such a rule, but some scholars suggest that the right to maintain the spouse with whom the disabled child lives: a) is not terminated in the event of divorce; b) may occur after divorce [17; 18]. Since this is merely an assumption that is not based on law, it would be advisable to supplement Art. 88 of the Criminal Code of Ukraine part 3 as follows: "3. The spouse with whom the child with a disability resides has the right to maintenance even after divorce."

2.3 Division of property of spouses

According to the general rule established by Part 3 of Art. 368 of the Civil Code of Ukraine[1], property acquired by spouses during marriage is their joint compatible property, unless otherwise stipulated by the contract or law. This provision of the CC of Ukraine was developed in Part 1 of Art. 60 of the FC of Ukraine[2], according to which the property acquired by the spouses during the marriage, belongs to the wife and husband on the right of shared ownership, regardless of the fact that one of them did not have for a valid reason (study, housekeeping, child care, illness, etc.) self-employment (income). In practice, often the question arises which rules of the codes – the CC of Ukraine, or the FC of Ukraine – should be used in deciding whether to divide the property of a former spouse? Relationships regarding the division of jointly owned property are regulated by Art. 372 of the CC of Ukraine, according to which: jointly owned property may be shared between co-owners by agreement between them, except in cases established by law (Part 1 of Article 372). In the case of division of jointly owned property, it is considered that the shares of the co-owners in the common joint ownership are equal, unless otherwise agreed by the agreement between them or the law (Part 2 of Article 372).

"Other", relating to the determination of the size of the shares of co-owners in the right of shared ownership, is established by Part 1 of Art. 70 of the FC of Ukraine, which regulates relations regarding the division of property of spouses. The author believes that this rule also applies to the division of property of a former spouses, since even after the divorce, the property acquired during the marriage is owned by the former spouse on the right of shared ownership. As noted in Part 1 of Art. 70 of the FC of Ukraine, in the case of division of property subject to shared ownership of the spouses, the shares of property of the wife and husband are equal, unless otherwise determined by the agreement between them or the marriage contract (note the incorrect use of the terms "agreement" in this case and "marriage contract" because the latter is also an agreement).

Thus, both civil and family law presuppose the equality of shares in the property of the spouse, which is joint property. Exceptions to this rule may be established by an agreement between the co-owners or the law (Part 2 of Article 372 of the Civil Code of Ukraine), or an agreement between the wife and the husband (including the marriage contract), as stipulated by Part 1 Art. 70 of the FC of Ukraine. Thus, the spouses can deviate from the principle of equality of shares in the right of shared ownership by entering into an agreement. However, in the case of a dispute over the division of property belonging to the co-owners of the shared ownership, the share of the co-owner may be increased or reduced by the court decision, taking into account the circumstances that are significant

[1] Civil Code of Ukraine. (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15
[2] Family Code of Ukraine. (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14

(par. 2 p. 2 Article 372 of the CC of Ukraine). However, the CC of Ukraine does not disclose the content of the concept of "circumstances that are of significant importance". Obviously, this shortcoming is appropriate to remedy in the process of updating civil law by defining in the code an approximate list of these circumstances.

Unlike the CC of Ukraine, Part 2 of Art. 70 of the FC of Ukraine, states that in resolving a dispute over the division of property, the court may deviate from the principle of equality of spouses in circumstances of significant importance, in particular if one of them did not care for the financial support of the family, evaded participation in child support (children), hiding, destroying or damaging common property, spending it to the detriment of the family. In other words, the norm of using the word "in particular" lists an approximate list of circumstances to reduce the share of one of the spouses in shared ownership. Thus, the court, when deciding the issue of separation of property, may take into account, in particular, the following circumstances, which are essential: the evasion of one spouse from the support of the child; fulfilment by one of the spouses of obligations to pay the loan under the loan agreement by transferring the money earned by it; failure to fulfil and/or improper performance by one of the spouses of the obligation to repay the funds obtained under the loan agreement, although in accordance with Part 4 of Art. 65 of the FC of Ukraine, a contract concluded by one of the spouses for the benefit of the family creates obligations for the other spouse if the property acquired under the contract is used for the benefit of the family. In addition to the grounds for reducing the share of one of the spouses, the FC of Ukraine (Part 3, Art. 70) provides that by the decision of the court the share of the property of the wife, the husband may be increased if the children, as well as the incapacitated adult son, daughter, reside with him/her, provided that the amount of alimony they receive is insufficient to support their physical, spiritual development and treatment [19]. In deciding which code – the Civil or Family Code – should be followed in the division of property of a former spouse, in author's view, it is necessary to take into account the jurisprudence, in particular, the practice of the Supreme Court.

Thus, in the decision of May 24, 2017, in the case No. 6-843ts17, the Supreme Court of Ukraine applied the rules of the FC of Ukraine regarding the division of property belonging to a former spouse on the right of shared ownership. The Supreme Court of Ukraine noted that in order to settle disputes arising from property relations between spouses, including the former, they are subject to the application of the rules of the Family Code of Ukraine. The position regarding the application the rules of the FC of Ukraine to the division of the former spouses' property belonging to them on the right of shared ownership is confirmed also by the content of the decision of the Supreme Court of January 31, 2019, in case No. 686/23104/17 [20]. It should be noted that according to the provisions of family law, only the following property is divided: a) acquired during the marriage; b) that is the subject of the shared ownership of spouses. Property which is the personal private property of a wife, a husband, is not subject to division between them.

Types of property, which is the personal private property of a wife, husband, defined by parts 1-5 of Art. 57 of the FC of Ukraine. The court may also recognise the private property of a wife, a husband acquired by her/him during their separate residence in connection with the actual termination of a marriage (Part 6 of Art. 57 of the FC of Ukraine). For the application of the provisions of Part 6 of Art. 57 of the FC of Ukraine presence of at least the following facts is required: 1) separate residence of husband and

wife; 2) acquisition of property by the wife during separate residence; 3) the actual termination of a marriage. These facts can be confirmed, in particular, by a court decision in another case. In case if in property was invested, in addition to common funds, funds belonging to one of the spouses, the share in this property, according to the size of his/her contribution, is its personal private property (Part 7 of Art. 57 of the FC of Ukraine).

CONCLUSIONS

Thus, the study allows to formulate some conclusions. The right of shared ownership of spouses should be implemented in accordance with the requirements of Art. 65 of the FC of Ukraine, not Art. 369 of the FC of Ukraine, and therefore case law in cases of invalidation of contracts concluded by one spouse without the consent of the other, requires compliance with the provisions of family law. This conclusion also applies to the exercise of right to shared ownership of property acquired during the cohabitation of a man and a woman who live in the same family but are not married to each other or to any other marriage. Husband and wife, though, are considered co-owners of property acquired by them during the marriage, in the sense of Part 2 of Art. 372 of the CC of Ukraine, however, the provisions of Art. 70 of FC of Ukraine should be applied to property division, considering that the legal regime of their property acquired during the marriage period has not changed after the termination of the said marriage. In general, the issues raised in this article require further in-depth research in order to formulate proposals to improve the existing civil and family law and to ensure consistent case law.

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ПІДСТАВИ ВИНИКНЕННЯ, ЗМІНИ ТА ПРИПИНЕННЯ КОРПОРАТИВНИХ ПРАВОВІДНОСИН

Анотація. *Корпоративні правовідносини досить швидко розвиваються, тим самим ускладнюються, і відповідно потребують належного врегулювання. Тому основна мета роботи полягає у визначенні кола підстав виникнення, зміни та припинення корпоративних правовідносин. Методологічно дослідження юридичних фактів у механізмі правового регулювання корпоративних правовідносин умовно поділено на три частини: правопороджуючі, правозмінюючі та правоприпиняючі підстави. Окремо виділено юридичний склад. У якості основного методу обрано метод дедукції. В роботі звертається увага, що останні зміни законодавства та судової практики, а разом з ними і доктрини права залишають без відповіді низку питань, одне з яких – окреслення кола підстав виникнення, зміни та припинення корпоративних правових зв'язків. Доведено, що такі підстави, у діяльності корпорацій за своїм складом і якістю можуть бути простими й складними. До перших віднесено підстави, що породжують правові наслідки лише при наявності одного юридичного факту, тоді як до других – підстави, в основі яких знаходяться кілька взаємозалежних юридичних фактів, а відповідно юридичні факти, що мають множинну правову спрямованість. Юридичні факти у механізмі правового регулювання корпоративних правовідносин мають усі ознаки традиційних видових диференціацій юридичних фактів, що існують у сучасній правовій доктрині та правозастосовній практиці цивільного права. Разом з тим вони мають і властиві їм особливості, характерні лише для корпоративних правових зв'язків. Проведений аналіз має теоретичне значення для подальших досліджень механізму правового регулювання корпоративних відносин, оскільки дозволяє за допомогою дедуктивного методу розширити уявлення про підстави виникнення, зміни та припинення корпоративних правовідносин. Це, у свою чергу, сприятиме формуванню чіткої та несуперечливої судової практики.*

Ключові слова: юридичний факт, корпорація, товариство, корпоративні правовідносини, учасник.

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REASONS FOR THE EMERGENCE, CHANGE AND TERMINATION OF CORPORATE LEGAL RELATIONS

Abstract. *Corporate relations are developing quite quickly, thus becoming more complicated and, accordingly, in need of proper settlement. Therefore, the main purpose of the work is to determine the range of grounds for the emergence, change and termination of corporate relations. Methodologically, the study of legal facts in the mechanism of legal regulation of corporate relations is conditionally divided into three parts: law-generating, enforcing and terminating grounds. The legal structure is singled out. The deduction method was chosen as the main method. The paper draws attention to the fact that recent changes in law and jurisprudence, as well as the doctrines of law, leave unanswered a number of questions, one of which is to define the circle of grounds for the emergence, change and termination of corporate legal relations. It is proved that such bases in the activities of corporations in their composition and quality can be simple and complex. The first are the grounds giving rise to legal consequences only in the presence of one legal fact, while the second is the basis on which there are several interrelated legal facts, and, accordingly, legal facts having multiple legal directions. Legal facts in the mechanism of legal regulation of corporate legal relations have all the signs of the traditional specific differentiation of legal facts that exist in the current legal doctrine and applicable law of civil law. At the same time, they have their own peculiarities, which are characteristic only of corporate legal relations. The conducted analysis is of theoretical importance for further research of the mechanism of legal regulation of corporate relations, as it allows to expand with the help of deductive method the idea of the grounds for the emergence, change and termination of corporate legal relations. This, in turn, will facilitate the formation of clear and consistent case law.*

Keywords: legal fact, corporation, partnership, corporate relation, party.

INTRODUCTION

The main purpose of law is to effectively regulate the most significant social relations, which undoubtedly include corporate ones. The normative regulation of social relations is achieved by the functioning of a certain instrumental system that embodies the rule of law in life, transforming it from the sphere of the proper into the sphere of being [1]. The rule of law is implemented through a mechanism of legal regulation, an element of which is

legal facts. It is from the latter that law from the sphere of the proper turns into the sphere of real. Therefore, their definition creates an opportunity not only to determine the moment from which the dynamics of corporate relations begin, but also the types of such dynamic processes.

It is obvious that European integration processes in Ukraine indicate the relevance of checking existing legal knowledge regarding their compliance with current trends in society, including knowledge about legal facts in the mechanism of legal regulation of corporate relations. However, domestic legal science, in authors' opinion, has not yet fully formed a unified view of the mechanism of legal regulation of corporate relations, and in particular, of such an element as a legal fact. As a result, domestic corporate legislation remains imperfect and haphazard, complicating the implementation of a nationwide program in terms of its adaptation to European Union law. Therefore, such adaptation occurs, in some places, haphazardly. This is indicated by the constant accumulation of the legislative array, the almost continuous introduction of changes, additions to existing regulations, the introduction of new legal concepts, which, sometimes, are not characteristic of the domestic legal system and traditions of constructing legal structures, etc. At the same time, the recodification of civil law has again raised the question of determining the place of corporate law in the civil law system of Ukraine. Some scholars believe that a separate area of corporate law should be formed, while others believe that it is only a civil law institute. In this regard, it justifies the feasibility or inappropriateness of allocating legal facts (legal sets of facts) into a separate group (special kind) – corporate legal facts. The lack of determination as to the existence of corporate facts, as a separate group, make the legislator face the problem of forming legislation designed to regulate corporate relations.

It should be noted that the grounds for the emergence, change and termination of corporate relations were the subject of scientific interest of such scientists as N.V. Kozlova [2], A.V. Kostruba [3], V.M. Kravchuk [4], D. V. Lomakin [5], M.D. Plenyuk [6], I.V. Spasibo-Fateeva [7] and others. At the same time, recent changes in law and case law (first and foremost the positions of the Supreme Court), and with them the doctrines of law, leave unanswered a number of questions related to the definition of: 1) the very subjective composition of corporate legal relations (through it expansion) and 2) the grounds for the emergence, change and termination of corporate relations.

Moreover, the resolution of corporate disputes in the courts is somehow related to the establishment of certain legal facts. After all, the emergence, change and termination of corporate rights, the conclusion about their violation or the existence of the threat of their violation, etc. depend on their existence. At the same time, the establishment of legal facts that give rise to corporate relations (rights and obligations) makes it possible to determine the jurisdiction of disputes between their parties. Therefore, determining the grounds for the emergence, change and termination of corporate relations allows to resolve the issue of jurisdiction of disputes between the parties to such relations, to choose the appropriate method of protection.

Given that these issues require separate study, the purpose of this study is a number of grounds that can be recognised as the basis for the emergence, change and termination of corporate relations.

1. MATERIALS AND METHODS

Legal facts as a scientific problem are sufficiently researched and developed in legal doctrine [3; 8]. Therefore, using the deductive method of research, it becomes possible to determine the number of grounds for the emergence, change and termination of corporate relations. Moreover, the concept of the latter is included in the concept of legal facts, which is why this method of logical thinking makes it possible to move from the general to the specific in the process of reasoning. So specific is not only the types (classification) of the grounds for the emergence, change and termination of corporate legal relations, but also the conditions of their validity, commission (occurrence), possible consequences, etc. It is known that methodology (Greek. methodos – the way of research, logos – doctrine) – the doctrine of general provisions, structure, logical organisation, forms and methods of scientific and cognitive activity that determine the best result of solving a chosen problem. The basis of any methodology is not only the choice of a method(s) of achieving a goal, but also following a chosen path of research.

Methodologically, the study of legal facts in the mechanism of legal regulation of corporate relations should be divided into three parts. Such division is based on their classification into law-generating, enforcing and terminating. At the same time, within each part, the classification of legal facts according to the will characteristics be used, proposed by O.A. Krasavchikov [9]. Such a combination is caused by the capacity and versatility of law itself as a phenomenon. And any one-factor legal model only partially reflects one or the other side of it [10]. The same applies to legal facts. Each of their classifications reflects only part of the essential features of the phenomenon being classified (part of the truth). Using the theory of additionality proposed by N. Bohr, and combining different classifications, it becomes possible to identify the specificity of such an element of a mechanism of legal regulation of corporate relations as a legal fact. At the same time, using the method of getting from general to specific, it is necessary to clarify the question of what life situations can be directed to one or another legal basis. Their purpose is to create legal consequences in the field of corporate relations. In order to achieve this goal, it is necessary to first create an abstract representation of the interests of the participants in corporate legal relations on the basis of generalising empirical material on legal facts, and then turn it into a conscious concrete one through its theoretical awareness.

Concepts and features of legal facts that create consequences in the field of corporate law will enable them to establish their place in the general system of legal facts and test the concepts through definitions. The latter problem will be solved by logical operations such as definition and division. For this purpose it will be necessary to bring the deduced notion of the bases of origin, change and termination of corporate legal relations to the closest generic concept to it and to establish speciation features. On the basis of synthesis, that is, the integration of related elements of the characteristics of these bases into one, it is necessary to describe their properties, to give a general description. Moreover, the use of such a method as synthesis creates the conditions for the identification of a group of law-makers, law-changers and law-enforcers. This will allow to check one of the opinions expressed in the legal literature, namely: the expediency of allocating legal facts (set of legal facts) into a separate group (a special kind) – corporate legal facts.

Using a systematic approach, the integrity of the legal facts in the mechanism of legal regulation of corporate relations will be disclosed, the multifaceted nature of their relations will be revealed and will be reduced to a common element of such mechanism. This will make it possible to determine the emergence, change and termination of rights and obligations between participants in the corporate relation, and between participants and a corporation itself.

The methods of analysis, induction, dialectics, formal logic, interpretation of legal norms by logical transformation, simplification of concept, teleological method, "golden rule", etc. will be used in the study of the grounds for the emergence, change and termination of corporate legal relations. In characterising legal facts and legal structures, in addition to the above methods, there is a need to apply the rules of dichotomy and tetratomy, categorical syllogism, hypothetical method, logical law of contradiction and logical interpretation by deriving the rule of law from the rule of law, etc.

2. RESULTS AND DISCUSSION

2.1 Characterisation of the grounds for the emergence of corporate legal relations

Considering the legal facts that mediate the dynamics (emergence, change, termination) of corporate relations it should be noted that they are not homogeneous. In this context, it is worth agreeing with the opinion of D.V. Lomakin, who states that their characteristics are determined by several basic circumstances:

1) the legal result that occurs due to legal facts (some legal facts lead to the emergence of corporate relations, others – are the basis of their movement);

2) the legal facts differ depending on the type of corporation and its legal status (some legal facts involve the emergence of corporate relations within the created legal entity, and others – in the already existing corporations);

3) the legal status of entities that acquire corporate rights (it is obvious that the grounds for acquiring such rights may be different for certain categories of individuals, legal entities and public entities);

4) the type of corporate legal relations (thus, one set of legal facts is required for the legal relation of participation; instead, the appearance of subordinated (dependent) corporate legal relations is conditioned by a complex legal structure, the main element of which will be legal relations of participation);

5) the legal facts will be affected by the manner of acquiring corporate rights (for example, the initial issue of shares can only be considered as the initial way of acquiring corporate rights, while the acquisition of already placed shares as a result of ordinary civil legal transactions can be attributed to derivative ways of acquiring corporate rights) [5].

Exploring the grounds for the emergence, change and termination of corporate legal relations, D.V. Lomakin argues that it is appropriate to distinguish them and even entire legal structures into a special form – corporate legal facts. Such isolation, in his opinion, is caused by the peculiarities of the corporate relations that are generated, changed and terminated by them [5]. Indeed, there is a whole group of reasons that causes dynamic processes of corporate relations. At the same time, it seems unconvincing to say that it is advisable to separate legal facts into a separate group (special kind) – corporate legal facts, because it is not entirely clear what manifests such a special kind.

First, if a feature is manifested in the construction of a legal fact, then there is probably no such feature. After all, any legal fact is a circumstance of reality, which the rule of law relates to the emergence, change or termination of civil rights and obligations. And if corporate relations are civil, there are no peculiarities in the design of the foundation itself. Only certain circumstances of reality differ, but they must not coincide or be only one such circumstance. Secondly, if the peculiarity manifests itself in the consequences they give rise to, then absolutely all legal facts constitute special varieties. For example, family, hereditary, binding legal facts, copyright law, property rights, and more. Determining the possibility of such a classification of the bases of the dynamics of civil legal relations, the selection of a special kind – corporate legal facts – appears to have poor decisive power. Moreover, there are a number of legal facts that can simultaneously produce a number of consequences. For example, the registration (creation) of a company, in addition to corporate legal relations, may give rise to ownership right, the right to a corporate name (intellectual property right) of a legal entity, the obligation of a participant to pay an acquired share in an unpaid part [4]. Another example, as a result of liquidation of a legal entity, not only corporate, but also personal non-property, obligations, property relations, etc. are terminated. In this regard, the attribution of the same legal fact to one particular variety becomes problematic. Accordingly, the question arises: Is it corporate, binding, real or intellectual property? Separation into a special group of corporate legal facts becomes even more problematic. For example, the conclusion of a contract of sale and purchase of shares (transaction) does not yet indicate the occurrence between their acquirer and a company of corporate legal relations, since action is needed to enter a record in the register of shareholders. Accordingly, both the fact of purchase and sale of shares and the fact of entry in the register of shareholders should be legal and only collectively they will form the basis for the emergence of corporate legal relations. But, in itself, the contract of sale and purchase of shares, in accordance with the proposed by D.V. Lomakin special kind, is not a corporate legal fact. So the logical question is, can corporate law be attributed to such a legal structure?

It is considered that a classification which is not capable of solving specific practical or even purely theoretical problems, not aimed at solving them is not only superfluous but also harmful, since according to the "Occam's razor" principle one should not multiply the essence unnecessarily. The classification proposed for the sake of classification itself, the creation of an artificial "special kind" will only create confusion in understanding the essence of legal facts, complicate law enforcement, legal implementation and law-making.

Among all the legal facts, a special place belongs to the facts that cause the relation. From the law-enforcement facts, so to speak, "it all starts": individuals are recognised as carriers of subjective rights and obligations, and this indicates that the mechanism of legal regulation has been put into effect. That is why the science of law, in the analysis of legal facts, pays particular attention to the "grounds for the emergence of legal relations", that is, to the generating legal facts [11]. The emergence of any subjective corporate law or obligation is impossible without the occurrence of such legal fact. O.O. Krasavchykov argued that law-creative legal facts is customary to be understood as the circumstances of the real reality with which the rules of law associate the emergence of a particular right in a particular entity [9]. Considering this concept as basic, it should be clarified that the emergence of a specific (subjective) right in one person necessarily gives rise to another

(others) correspondent to it obligation. Given that the rights and obligations that correspond to them constitute the content of any legal relation and cannot exist outside the latter, the concept is understood as follows. Law-creating legal facts are those circumstances of reality, with which the rules of law associate the emergence of a particular legal relation. This understanding of law-making grounds is nowadays generally accepted in the science of civil law, and on the basis of it, existing points of view regarding the range of law-making legal facts in the mechanism of legal regulation of corporate relations will be considered. Obviously, corporate relations arise from the moment of creation of the corporation (more precisely, from the moment of its state registration). And as noted in the legal literature, the legal fact of establishing a corporation through its foundation or as a result of reorganisation is the basis for the emergence of corporate relations [12]. From that moment on, the respective rights and obligations appear in the companies, the participants (shareholders) – the right to participate, the right to receive information about the activity of an organisation, the right to convene meetings, participate in them, etc. Thus, the state registration of a corporation is a law-creating fact. There is no doubt that this legal fact is a legitimate action, because it is done within the law, in accordance with the requirements of the legislation. Considering that all legitimate actions are divided into legal actions and legal acts, and legal actions are those actions of civil legal entities with which the law links the occurrence of certain legal consequences, regardless of whether the will of these subjects is aimed at achieving such legal consequences, and sometimes even contrary to an intent of persons, therefore, the state registration of a corporation should be referred to as legal acts. The registration bodies and persons who initiate the legalisation of a company seek certain legal consequences, expect them, which indicates the wilful action of the state registration. And, as rightly stated in the legal literature, it is not any legal act, but its kind as an administrative act [13; 14].

Obviously, the fact of registration should be preceded by an agreement of founders, if there are several, the drafting of constituent documents, the submission to a relevant body of an application for state registration, etc. Accordingly, in this case, it is necessary to talk about the legal structure, where a state registration of a company is the final circumstance and indicates at the time of a corporation occurrence [2]. In the domestic legal literature it is noted that at the stage of a corporation creation such "incomprehensible" corporate relations, such as founding, arise [15]. At the same time, if to take this position and acknowledge such relations, although not "understandable" but corporate, then it is necessary to give them participants and corporate rights. However, the scientist, who points to the existence of "confusing" corporate relations, itself denies the existence of the latter. Therefore, the authors believe that at the stage of creation of a legal entity and up to the moment of its state registration no corporate legal relations exist, and founders of a corporation acquire only rights of obligations. The acquiring by founders of corporate rights (responsibilities) artificially raises the question: what if they were denied state registration of a corporation? Corporate relations do not arise, corporations do not exist, and individuals (founders) are already vested with corporate rights. The answer to this question remains logically open.

In support of this, I.B. Sarakun is of the opinion that founders and members of companies are direct subjects of corporate relations [16]. After all, participants of companies are persons (natural or legal, other entities of civil law) who own corporate

rights in a company, including the right to a share or share in its authorised capital, as evidenced by the relevant documents. Founders should be considered those persons (natural or legal, other subjects of civil law) who carry out joint activity on creation of a business company and have made a decision on approval of its constituent documents, and also transferred certain property (property rights) to its authorised fund [16]. It should be noted that the legal status of founders and participants is different. The founders are the persons involved in the creation of a corporation, while members are persons involved in a management of a corporation. It is worth noting that not every founder can be a participant, and vice versa – not every participant was a founder of the corporation.

Attention should also be paid to the right to claim payment of a dividend (arising from the moment of its announcement). This makes it possible to attribute a declaration of a dividend to the law-creating facts. However, it should be noted that for the right to dividends to occur, there must be a number of prerequisites. In particular, a decision to hold a meeting, a convening of a general meeting of participants, notifying participants about a general meeting, a decision to declare a dividend. Each of these prerequisites is an independent legal fact and creates certain legal consequences, but only in their totality can they generate the right to pay dividends. Therefore, in this case, it is necessary to talk about the law-creating structure, not the legal fact. Moreover, each of the elements of the composition can be attributed to one or another group of legal facts. For example, a decision to hold a general meeting of a company board is an administrative act. It gives rise to the right to convene such meetings with an appropriate agenda and the obligation of a company to inform all participants (shareholders) of a place and date of a meeting, of issues to be discussed. Notifying participants about a general meeting is a factual wilful act, a fulfilment of obligations by a company and may be considered as a transaction.

Separate attention will be given to decisions of a general meeting and review of the points of view regarding their legal characteristics. The importance of corporate legal relations, which are the legal acts of the collegial governing bodies of a corporate organisation (first of all, it is a matter of resolving the general meeting and the supervisory board), draws attention. For more than ten years, the question of their nature and place in the system of legal facts and, in the context of the correlation of individual corporate acts with transactions, has remained debatable. This is dictated by the fact that these corporate acts, falling under a concept of a transaction (legitimate wilful actions of citizens and legal entities aimed at establishing, changing or termination of civil rights and obligations), have a serious specificity, compared to the "classic" understanding of the transaction, serious specificity mediated by the will-forming processes in a legal entity (a decision of collegial bodies is, first of all, an act of conciliation of wills of persons who are members of corporations) [17].

The number of views on this issue can be reduced to three main approaches:

1) all acts of corporations have the nature of a transaction (For example, N.V. Kozlova considers that an act… of one or more persons performing the functions of a sole or a member of a collegial body of a legal entity… aimed at establishing, changing or terminating corporate relations can be qualified as a one-sided or multilateral corporate transaction [2]);

2) not all, but only some decisions of corporations have transaction character (For example, G.V. Tsepov divides all decisions of the general meeting into decisions-

transactions (decisions on change of authorised capital, etc., which have independent legal force and do not require additional expression of will "outside" by other bodies) and decisions-non-transactions (decision approving annual reports) [18].);

3) acts of bodies of a legal entity are not transactions [19; 20].

The definition in the legal literature of many corporate acts as actions aimed at establishing, changing or terminating civil rights and obligations is not unreasonable. For example, a decision of a general meeting of shareholders to declare dividends undoubtedly has such a direction. Moreover, it is a sufficient legal fact for a shareholder to be able to claim payment of a dividend and corresponding to this right obligation of a company to pay the dividend; thus, the general meeting of shareholders in this case carries out not only the will-creation, but also the will expression (commitment of other actions by an executive body for development of legal relations is not required unlike, for example, from a situation of committing a significant transaction, which is pre-approved by a general meeting or a supervisory board [21]), and as a consequence, it is impossible to accept as universal an argument in favour of the position of unconditional denial of a character of a transaction by corporate acts [17].

Nowadays, it is noted that a decision of a meeting is not an unconditional legal fact that leads to a dynamic relation. If for a purpose of a transaction it is sufficient only not to be contrary to the law, then a decision of a meeting can give rise to civil rights and obligations only when it is expressly provided by law [22]. It is stated that the direction not characteristic of the dispositive method of civil law stems, first of all, from the fact that decisions of a meeting are on the border of civil law and branches of public law. The legislator is obviously very cautious and reserved about decisions of a meeting as legal facts. It is stated that now the legislation is undergoing a transitional phase, which will ultimately be completed by the fact that all decisions of a meeting, which are not contrary to the law, but not directly provided by the law, will be recognised as legal facts [23]. Sometimes the decisions of the general meeting of participants (shareholders) are regarded as a local normative act, since such decisions are binding on members of a company in which they are made. Duty and a wide range of actions allow people to attribute a decision of a meeting to local acts.

In authors' view, the complexity of assigning decisions of general meetings to a particular group of legal facts lies in the multiple character of a general meeting itself. The following is the explanation for this. First, since the participants (shareholders) are legally equal and property-independent among themselves, their decision-making at general meetings has all the characteristics of a transaction for them. These are both the lawfulness of actions, and the wilful orientation to the emergence of certain legal consequences for them, and the dispositiveness of a decision choice within given powers. Hence the obligation of this decision for all members (shareholders) of a company. Moreover, the fact that it is adopted by a majority of votes and is binding even for those who voted against such a decision does not at all refute signs of a transaction. After joining a circle of participants (shareholders), a person voluntarily agrees that a resolution of cases at a general meeting will be done in this way – by a majority vote. Therefore, a vote against does not indicate that a transaction is concluded (decided) at a will of a subject, since the latter voluntarily adopted such "rules of a game". By becoming a participant (shareholder), a person voluntarily undertakes to obey a majority's decision and there is nothing

extraordinary for civil law. For example, by granting an exclusive licence, an author voluntarily restricted his legal capacity regarding a work; by leasing a thing a landlord (an owner of a thing), within the scope of a contract, could not use it or take it away; having accepted a legacy burdened by a will, a heir is obliged to take certain actions in benefits of a transferee, even if he does not want it, that is, is obliged to obey a will of a testator. And there are many examples of such examples.

Secondly, since participants (shareholders) make decisions at general meetings and the latter is the highest body in a company, such decision for all other bodies and employees of the corporation is, in fact, a local regulatory act, that is, has all features of a local administrative act. This is a lawfulness, if they are done within the powers of a general meeting, and wilfulness, and the emergence of legal consequences provided by law, and the obligation to perform by subordinate bodies and persons. Third, general meetings is a corporation body, part of an organisation, part of whole. This body usually provides will-forming, and it forms the will to commit certain actions, both inside and outside an organisation. That is, essentially, the will of a legal entity is formed. Therefore, an internal corporate decision of a meeting has a quality that leads to the emergence of legal relations between a legal entity (forming its will) and its participants [23] or other persons. For example, a decision to pay dividends gives rise to a relation between participants and a corporation; instead, a decision to introduce the deceased participant's heir to the participants constitutes the basis for such heirs (third parties) to have corporate rights (obligations).

Fourth, a decision of a general meeting may, in certain circumstances, be considered a prerequisite for other future legally significant actions. For example, the decision to re-elect a chairman of a board is ground for termination of a contract with one person and conclusion with the other. Thus, termination of employment with one subject and occurrence with another will take place. Approving the possibility of entering into a significant transaction or transaction interest in commitment of which creates an opportunity for a company to conclude such transactions.

Thus, the decision of a general meeting of participants is a multidimensional phenomenon. Depending on its direction, it acquires a different legal meaning. As a legal phenomenon, a decision of a general meeting may acquire a legal regime of a transaction, an administrative act, an act of willing, prerequisites for committing other legally significant actions. However, different legal regimes, depending on a focus, can produce different legal consequences. It is not only the emergence, alteration or termination of corporate relations only, but also of administrative, binding, labour, etc. Accordingly, when different legal consequences arise, it is necessary to talk about different subject composition. For corporate relations, these are participants themselves and participants and a corporation, for the administrative entities –authorities and subordinate entities, for obligations – a creditor and a debtor, for labour – an employer and an employee. Moreover, in addition to corporate, on each of the parties of given and not given legal relations there may be persons who are at the same time are or are not parties to corporate legal relations, but their status (participant, non-participant) has no legal significance.

Given that the authors of this work distinguish protective (defence) legal relations, along with regulatory, into a separate independent group of civil relations [24-26], it is logical to attribute the violation of corporate rights (creating a threat of such violation) to

law-creating legal facts. In this case, violation (threat of violation) of subjective corporate law is the basis for a person to have the right to protection (elimination of a threat). The other party to the corporate relation, therefore, has an obligation to restore the infringed right (for example, to provide information (in the case of its failure to provide or provide incomplete, unreliable), termination of unlawful behaviour, elimination of threats, etc.) And if to proceed from a two-member structure of subjective law, then the right to protection and an obligation that corresponds to it, which constitutes the content of the protective legal relation, arise from the moment of an offence committed by a party of corporate legal relations. And the above applies to both individuals and legal entities.

This position is fully in line with the general doctrine of civil law. For example, there is no doubt that a breach of property right can give rise to obligations in tort. Obviously, the latter is independent civil relations and, since a moment of an offence, arise for the first time. A similar situation arises in case of violation of intellectual property rights, personal non-property rights, etc. At the same time, this approach does not at all reject the point of view on which the same violation is capable of being considered simultaneously and as a factual fact, since the violated right is in a state of violation. Another example is that a threat to a life, health or property of a natural or legal person gives rise to a certain group of non-contractual obligations. The latter also occurs for the first time. Regarding the sphere of corporate legal relations, for example, a decision of a governing body, made in violation of requirements of the law, actions of members of a supervisory board, sole executive body, members of a collegial executive body that harmed a company [17] or its members can be considered such illegal actions. Periodically in the legal literature, the issue of recognition of the next issue of shares, acquisition of shares, purchase and sale of shares is actualised.

First, the authors believe that the next issue of shares, their acquisition and terms of payment are conditioned by purchase and sale agreements, and therefore the payment of shares is a proper performance not of a corporate duty, but of an obligation that is included in the content of the legal relation. Instead, each participant of a limited liability company (hereinafter referred to as LLC) must fully contribute within six months from a date of state registration of a company, unless otherwise provided by a charter (Article 14 of the Law of Ukraine "On Limited and Additional Liability Companies")[1]. The relevant provisions may be added to a charter, amended or removed from it by unanimous decision of a general meeting of participants, in which all members of the company participated.

Secondly, the authors believe that the next issue, the acquisition of shares, the fulfilment of terms of a contract of sale, a decision of a general meeting, after an occurrence of certain conditions, although they give rise to corporate rights that acquire new members of a corporation, but should be attributed to changing legal facts. However, such a statement requires some clarification of the very concept of the law-changing fact.

2.2 Features of the grounds for change and termination of corporate relations

The authors of this article assume that the law-changing legal facts are understood as such circumstances of reality, with which the rules of law associate a change in civil relations. Moreover, since in addition to the content (of rights and obligations), obligatory elements

[1] Law of Ukraine "On Limited and Additional Liability Companies". (2020, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2275-19

of any civil legal relation are the subject composition and their objects, it must be recognised that the change in an object or subject composition also have to be considered as a change in civil relations [13]. Therefore, changing and replacing relations must be distinguished. Change occurs when the legal relation as a whole changes its elements. Replacement occurs when another (instead of) one legal relation occurs. This view makes it possible to fully and consistently understand why in some cases the termination (emergence) of rights (obligations) in certain persons is the result of a law-altering fact, and in others - a law-enforcer (enforcer) [8]. For this reason, in the theory of civil law, this group of legal facts is one of the debatable reasons.

Analysis of the legal literature allows to distinguish a number of theoretical views on the change of legal relations as a legal phenomenon. Thus, Ya. M. Magaziner, considering the very possibility of changing the legal relation, argued that a legal relation can change while remaining the same legal relation, that is, without becoming a new one [27]. In turn, S.B. Kultyshev completely denies the possibility of such a change, since the category "change of legal relation" cannot be recognised as one-line by value with the categories "occurrence" and "termination". Its use, according to the scientist, has a conventional character, is a stable terminological tradition. The basis of this position is that the change of any element of the legal relation must be considered as its termination and the emergence of a relatively independent new legal relation [28].

Obviously, based on S.B. Kultyshev's position, the authors would certainly have to conclude that there are no changing legal facts in the mechanism of legal regulation of corporate legal relations, and in civil as a whole. In such a case, they are not at all in the mechanism of legal regulation of civil relations. However, such a scientist's reasoning is difficult to doubt, since they will inevitably lead to the denial of the existence of a civil right of succession, the derivative means of acquiring rights and obligations, the possibility of changing the rights and obligations (content) in a contractual obligation, etc. As is rightly stated in domestic legal literature, this is inadmissible. Therefore, the authors fully share the approach by which the legal relation can change while remaining, that is, not becoming new [29]. Based on the above, the purchase and sale of shares and subsequent registration changes the subjective composition of members of a corporation. The following issue may result not only in the volume of rights of a participant (shareholder) but also in a subject composition, for example, an increase in a number of participants (shareholders). A decision of a general meeting to introduce the deceased participant's heir into a company changes a subject composition (one participant becomes another). The law-changing legal facts include bankruptcy or liquidation of a legal entity. After all, there is no doubt that by the time the bankruptcy or liquidation procedure is initiated, it significantly changes the possibility of exercising corporate rights. However, corporate relations themselves still exist. In the theory of law, law-terminating legal facts are considered to be those with which rules of law associate the termination of certain relations.

O.A. Krasavchikov proposed their division into two groups: absolutely terminating and relatively terminating. The first group includes those which terminate existence of a legal relation as a whole, the second group – those which terminate existence only partially [9]. Accepting the proposed classification, it can be noted that, indeed, there are some facts in the circle of legal facts, which the rule of law relates to the absolute termination of civil

relations. These include, for example, the loss of property in property relations, the death of a child in alimony, a combination of a creditor and a debtor in a contractual obligation, and the like.

However, there are some that terminate a relation only partially. These include, for example, the death of an author of a work that terminates copyright in part of personal non-property rights, but does not terminate the existence of property rights, the death of an artist performing similar effects, the death of a person depicted in a photo or other work of art also terminates personal non-property relations in the part of personal non-property rights, but does not terminate them in the part of property rights, withdrawal of one of three or more co-owners from the subjective composition of joint property relations and more. However, the use of such a classification, according to V.B. Isaev, will cause certain theoretical difficulties, which are to differentiate and determine the circle of law-changing and law-terminating legal facts that have different legal value [30]. This classification, as noted earlier, also calls into question the existence of succession, since it compels some researchers to regard it as a termination or creation, but not a change of legal relation [31; 32]. Therefore, for further investigation of law-terminating legal facts, it is necessary to define the concept of "legal termination".

In the legal literature there is no established understanding of the term "legal termination". In particular, law termination is the termination of legal relations, rights, obligations, powers or legal personality of subjects of civil law [3]. The above definition is noteworthy because it does not require proof that the termination of powers ceases the existence of a subjective right which they exercise. Termination of a subjective right terminates the obligation corresponding to it. Since terminated rights and obligations constitute the substance of a legal relation, the latter is consequently terminated. The termination of a legal personality of subjects of civil law may also indicate the occurrence of such consequences, but only if rights of such entities are not transferable to others. Thus, it must be acknowledged that the only absolute sign of termination in the above definition is termination of rights and obligations. Other features either repeat the above or are optional. In the legal literature, it is also argued that the termination of a legal relation is a break of a relation between its parties [33]. In agreement with the proposed concept, it should be noted that it needs some clarification. There are two reasons for the legal relation between parties to a relation being broken. The first is the termination of the subjective rights and obligations that exist between them. The second is the transfer of rights or responsibilities from one person to another (change of subject composition). As noted, the termination of the rights and obligations that make up the content of the legal relation really indicates the termination of the latter. Changing a subject composition by terminating the legal relation between the subjects does not terminate the legal relation itself, since a new person is appearing at the place of a person who left them, and therefore there is a succession.

Some researchers understand termination of legal relations as the absolute and irreversible loss of legal connection between a subject and its object [34]. Considering this approach, it should be noted that this can be caused by different circumstances of reality, such as alienation, destruction (loss) of an object, waiver of the right or deprivation of the right, etc. At the same time, the analysis of the above grounds allows to assert that alienation, by breaking the legal connection between a subject and an object belonging to

him, does not terminate a legal relation itself. This relation occurs with a purchaser, to whom the rights of a transferor are transferred. Therefore, the alienation of an object is not a termination but a change of legal relation. The latter are terminated only for a transferor, that is, there is a relative (partial) termination, or more precisely, succession.

Based on the foregoing conclusions regarding the termination of a legal relation, it can be argued that law-terminating legal facts are only those circumstances of reality, which the rules of law associate with the absolute termination of the legal relation. According to this theoretical understanding of law-terminating legal facts, the existing ones in the mechanism of legal regulation of corporate relations will be considered. When starting the study of the grounds for termination of corporate legal relations, it should be noted that the analysis of the legislation of Ukraine and the legal literature makes it possible to agree that the most obvious such legal fact is the termination of the legal entity itself. From that moment on (the exclusion of the organisation from the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Formations) all corporate legal relations cease.

Some researchers may object pointing to such a right as a liquidation quota that occurs after a corporation is terminated. Therefore, in their view, some corporate rights can exist beyond the existence of a company. At the same time, the authors of this paper are convinced that the corporate legal relation does not include the right to a liquidation share, but the right to determine the legal fate of a liquidation share. The latter exists and is carried out within the framework of corporate legal relations. The right to a liquidation quota arises after the termination of a corporation and, accordingly, the corporate legal relations. It should be noted that although the terms "legal entity termination" and "exclusion of an organisation from the Unified State Register" are often identical in the legal literature, their meanings are not the same. The exclusion of an organisation from such a register is the final stage of termination of a legal entity. Its onset defines a moment from which it is believed that an organisation no longer exists. The exclusion act itself is an act of administrative law, that is, an administrative act. At the same time, the termination of a legal entity is a legal entity. Moreover, in each case it may be different. For example, a decision of a general meeting on liquidation, the establishment of a liquidation commission, the procedure of liquidation and exclusion of an organisation from the Unified State Register of legal entities, natural persons-entrepreneurs and public entities. Another example. Filing a claim for the termination of a legal entity, a court decision to terminate an organisation, the procedure for liquidation and its exclusion from the specified state register. The termination may also take place in the bankruptcy process and the like.

A law-terminating legal fact for the right to obtain such information about the activities of the corporation is giving such information. Obviously, fulfilling an obligation to provide properly certain information to a participant is a legitimate wilful act. Considering that the authors of this article refer to corporative relations not only regulatory but also protective relations, it is fair that for the latter a legal fact is also eliminating a threat of infringement (for example, voluntarily or by court order), protection, that is, the restoration of a violation of a right (for example, voluntarily or by a court decision), or even an agreement of parties (for example, a settlement agreement or a transaction). It is obvious that apart from an agreement, other actions mentioned are indicative of legal actions, because regardless of a direction of a will of a person who commits them, they

create certain legal consequences and are legitimate. The right to participate in a company that is part of a corporate relation, sometimes, and the right to information about the activities of a corporation, always refer to personal non-property rights [35], and the latter are inseparable from the identity of a bearer. Therefore, it can be assumed that the death of a participant of a partnership of an individual may also be considered a law-terminating ground for these rights. However, such an assumption would be wrong. After all, they are part of corporate relations. The latter, as noted above, are capable of change, including by changing the subject composition. Therefore, for example, the death of a shareholder, as an event, gives rise to the succession of all corporate rights (obligations), which include both the right to participate and the right to information about the activities of a corporation. Of course, such consequences take place when a shareholder's heir accepts an inheritance. In the case, for example, of LLCs, in addition to an inheritance, a decision of a general meeting to accept a heir to participants is necessary, and in the absence of such consent, these rights are transferred to a company itself, unless otherwise provided by a general meeting of participants. Thus, the death of a corporation member is not a law-terminating act, but a law-changing fact.

2.3 Features of the legal structure in the mechanism of legal regulation of corporate relations

Completing the study of legal facts as the basis for the dynamics of corporate legal relations, the authors conclude that a certain set of circumstances of reality, with which the rules of law link such dynamics, in the legal literature is divided into: 1) a group of legal facts and 2) a legal (factual) set. Accordingly, a group of legal facts are several factual circumstances, each of which causes or can cause the same consequence, is fixed in the same norm and is a phenomenon of the same order [6]. V.B. Isakov referred to the legal (factual) population as a system of legal facts connected in such a way that legal consequences come only in the presence of all elements of this population. According to the author, the legal body encompasses interdependent elements, which alone may have no legal significance at all, or produce the consequences that the subjects of law sought [36]. For reasons of adherence to the principle of legal accuracy, the phrase "legal composition" is more successful, since different approaches to understanding the totality of legal facts, such as "legal entity", "legal composition", "actual composition", etc., serve only to indicate a certain set of legal facts, which are necessary for the emergence of civil legal relations. If to consider that the legal facts are interconnected in such a way that the legal consequences come only in the presence of all elements of this set and it is such a composition that produces the legal consequences, then it is appropriate to call it "legal structure" [6]. Art. 11 of the Civil Code of Ukraine provides a list of legal acts that are grounds for the emergence of civil rights and obligations.

The first impression of reading this article leads to the fact that the legal facts enshrined in it can give rise to any civil rights and obligations. However, this is not true. For example, the conclusion of a contract of sale of shares does not speak about the occurrence between their acquirer and a company of corporate legal relations, since it is necessary either to make a decision by a general meeting of participants on the acceptance to a company, or to act on entry in the register of shareholders. Accordingly, both the fact of purchase and sale of shares and the fact of entry in the register of shareholders should

be legal and only collectively will form the basis for the emergence of corporate relations. Most of the legal consequences in corporate relations are not established as a result of a separate legal fact, but arise from legal structures. This situation is not accidental, which is explained by the specifics of the corporate relations themselves and the requirements of the current legislation to regulate them. O.A. Krasavchikov pointed out that until the legal structure is complete in its scope and content, the elements that make up it remain only facts. These facts become legal only when quantitative changes (accumulations) in the composition end and qualitative changes occur. Only the completed composition is legal [9]. Therefore, the legal composition is a set of independent legal facts that have desired final legal consequences. This approach is supported by the view that legal composition is a system of legal facts (heterogeneous, independent circumstances of life, each of which may have the value of a separate legal fact), which is determined by the unity of elements that, by their totality, make it impossible to exclude any of legal facts of this composition [6].

CONCLUSIONS

Therefore, it should be noted that the reasons for the emergence, change and termination of corporate relations in the activities of corporations in their composition and quality can be simple and complex. The grounds that produce legal consequences only in the presence of one legal fact (for example, a transaction that does not require additional approval) can be attributed to the first. Whereas the second is based on several interdependent legal facts (entry in the register of shareholders, corporate agreement, etc.), and accordingly legal facts that have multiple legal directions (for example, a decision of a meeting of participants (shareholders)). Legal facts in the mechanism of legal regulation of corporate legal relations have all the signs of the traditional specific differentiation of legal facts that exist in the current legal doctrine and applicable law of civil law. At the same time, they have their own peculiarities, which are characteristic only of corporate legal relations.

The conclusions drawn are of theoretical importance for further investigations of the mechanism of legal regulation of corporate relations, as they allow to extend, through a deductive method, an idea of reasons for the emergence, change and termination of corporate legal relations. This, in turn, will contribute to the formation of a clear and consistent case law: establishing the grounds for the emergence, change and termination of corporate relations; identification of signs and necessary elements of such grounds; differentiating them from the grounds of occurrence of other legal consequences, etc.

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ФОРМУВАННЯ ПРАВОВОЇ КУЛЬТУРИ ФАХІВЦІВ ТУРИСТСЬКОЇ СФЕРИ

Анотація. *У статті проведено аналіз стану проблем закордонної та вітчизняної системи підготовки фахівців туристської сфери, роль правової культури в підготовці туристських кадрів. Метою даної статті є формування правової культури через організацію навчального процесу для майбутніх фахівців туризму. Визначена динаміка підходів до підготовки фахівців туристської сфери та чинників сучасної перспективної, інноваційної та творчої діяльності. Розглянуто особливості туристської сфери та туристської освіти. Досліджено досвід підготовки фахівців у провідних туристських школах світу, вивчення зарубіжних програм і основних моделей навчання та доцільність його використання у практиці вітчизняних освітніх закладів туристського профілю. Обгрунтовано ідеї та системи забезпечення неперервності туристської освіти від початку до завершення службової кар'єри. Окрему увагу приділено трьом основним принципам реалізації вищої освіти (доступність, рівність можливостей, врахування різноманітності). Проаналізовано специфіку ефективності професійної діяльності туристського сектору та його взаємозв'язок з туристською професійною підготовкою висококваліфікованих фахівців, здатних конкурувати на ринку сфери послуг. Проаналізовано основні підходи до формування та етапів розвитку туристської освіти як в Україні так і в інших європейських країнах. Опрацьовані наукові праці з проблем туристської справи, зроблені висновки для використання вищезазначеного досвіду. Окреслено пріоритетні сучасні завдання організаційно-педагогічної роботи в туризмі. Проаналізовано специфіку ефективності професійної діяльності туристського сектору та його взаємозв'язок з туристською правовою культурою. Доведено важливість формування правової культури в освітній системі, в контексті провадження туристської діяльності. Обгрунтовані підстави для підтвердження актуальності завдання з розвитку правової культури працівників туристської сфери.*

Ключові слова: туризм, освіта, правова культура, якість підготовки, педагогічні інновації.

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FOSTERING LEGAL CULTURE IN TOURISM SPECIALISTS

Abstract. *The paper analyses the situation in the foreign and domestic systems of training specialists in the tourism sector, the role of legal culture in the training of tourism personnel. The purpose of this paper is to form a legal culture by means of the organization of a training process for future tourism professionals. The dynamics of approaches to the training of specialists in the tourism industry and the factors of modern perspective, innovative, and creative activity were determined. The features of tourism and tourism education are considered. The experience of training specialists in leading tourist schools in the world, studying foreign programs and basic models of training and the expediency of its use in the practice of domestic educational institutions of the tourist profile are investigated. Ideas and systems for ensuring the continuity of tourist education from the beginning to the end of a career are substantiated. Particular attention is given to the three basic principles of higher education (accessibility, equality of opportunity, diversity). The specificity of the efficiency of professional activity in the tourism sector and its interrelation with the tourism professional training of highly qualified specialists, who are able to compete in the market of the service industry, are analyzed. The basic approaches to the formation and stages of development of tourist education in Ukraine and in other European countries are analysed. The scientific works on the problems of tourism are examined, the conclusions are drawn for the use of the above experience. Priorities of modern tasks of organizational and pedagogical work in tourism are outlined. The specificity of the efficiency of the professional activity of the tourism sector and its interrelation with the tourism legal culture are analysed. The importance of forming a legal culture in the educational system, in the context of tourist activity, was proved. Reasons for confirming the relevance of the task of developing the legal culture of employees of the tourism industry are substantiated.*

Keywords: tourism, education, legal culture, quality of training, pedagogical innovations.

INTRODUCTION

Fostering legal culture in the structure of training of tourist staff as a component of the general personality culture is provided by education. The basis of the legal culture is the system of knowledge of law as the main mechanism for the implementation of interrelations between the individual, society, and the state, which are aimed at practical implementation. The problem of fostering legal culture of specialists in the tourism sector is inextricably linked to the legal culture of society. It affects the state of development of the system of law, justice, legislation, legality, legal practice, and professional training, covers the totality of all legal values.

Both Ukrainian and foreign researchers addressed issues of fostering legal,

professional legal, social legal competences, legal culture, legal consciousness of students. The research of the theoretical and methodological foundations of the philosophy of modern education is covered in the scientific works of V. Andrushchenko [1], I. Ziaziun [2], N. Nichkalo [3], L. Panchenko [4], V. Fedorchenko [5], H. Mizell [6], G. Almond, S. Verba [7] and others. The issue of fostering legal culture in the tourist training system, whose activity is connected relations with people of various categories, is particularly relevant.

Probably, it has become a truism in the social sciences and humanities to confirm that we exist under the conditions of a global information society. But such statement of the situation in the society is particularly relevant to the tourism industry. Firstly, transformation societies suffer from the weakness of formal institutions, including legal ones. Therefore, we shall note the weakness of the external (in particular, not very efficient, state institutions) control over the observance of law-abiding behavior. This verdict applies to both everyday behavior and business practices. Therefore, relying solely on external oversight of regulatory compliance is unrealistic. External control must be supplemented by internal self-control, which is precisely the internal regulating function of the legal culture. Therefore, content is important, that is, culture, in other words values and attitudes that affect the real behavior of citizens and business entities. Secondly, in the context of an information society, the amount of personal data that a tourist business client must provide to a service provider is unprecedented. Most of these data are sensitive and could potentially be used in a way that would harm the privacy and interests of the individual. Therefore, there is an urgent need for a high level of legal culture in the tourism industry to ensure that clients' rights are respected and protected. We shall also note that a large number of travel agencies are quite small firms, and such organizations are unable to create efficient security services for oversight (as is the case in large financial institutions, such as banks). Therefore, to reduce the probability of misuse of sensitive personal and financial data of clients, it is very important for tourism managers to have legal culture, which would act as an internal control and motivator of law-abiding behavior.

Last but not least, the top management of the tourism industry interacts with the fiscal/tax authorities of the state and the existence of a well-established legal culture is an important factor in the fair compliance of tax and civil legislation.

Therefore, there are strong reasons to confirm the objective need to conceptualize the process of fostering legal culture in tourism professionals, since we capture the need for such academic reflection in the face of a lack of research on this subject matterч.

1. MATERIALS AND METHODS

A set of complementary research methods were used to solve certain tasks, achieve the goal, test the hypothesis, including:

- theoretical – methods of systematic analysis, which were used to study tourism as a socio-pedagogical system, consideration of the genesis of the didactic system; methods of causal and historical analysis, applied to identify the features of tourism development in Ukraine and training specialists for the industry at different historical stages and in the conditions of different didactic systems, appropriate for the state of modern development of the industry; methods of comparative analysis – to justify didactic systems of tourist education in foreign countries; methods of direct structural analysis – to consider the

structure and features of tourism education as a system and substantiate the model of competence of tourism specialist, model of degree tourism education; methods of theoretical analysis – upon determining the connection between the principles of training specialists in tourism and general didactic principles, including didactic justification of tourist education standards; the Aristotelian method was used in the analysis of the current state of scientific developments and legislation in the system of training of tourist personnel and proposals for improvement of legislation in this field;

- empirical – observation, modeling, pedagogical experiment.

Developing this idea, it should be noted that the leading scientists of the world, including the brilliant German thinker Max Weber, vigorously advocated rationality as an essential feature of modern society [8]. Late modern societies [9] are highly mobile in every respect, including high tourist mobility. At the same time, modernity is a society where the institution of law (as one of the main incarnations of rationality) and the orientation on the rule of law as a value, i.e. a high level of legal culture, play a key part. We are interested in the manifestations of these two social forces in the tourism field. The combination of two factors – tourism mobility and the legal culture of tourism professionals – can become a powerful impetus for the tourism industry, as clients are aware that industry representatives are guided by regulatory modus operandi and law-abiding behavior (precisely this type of behavior is the result of an entrenched/embedded legal culture), will be more motivated and will actively industry services.

Theoretical and methodological underpinnings are ideas that are associated with an updated research program of modernization, namely the concept of multiple moderns. This research program, initiated by V. Schluchter and S. Eisenstadt, [10] emphasizes the nonlinearity of social change and the presence of transformative modernization potential in a society outside the Western civilization area. In the context of our thinking, fosterin legal culture in tourism professionals is not only a modernization element for the tourism industry, but modernization for the society at large, as the legal culture is closely linked to the rational alignment of society.

But the use of purely theoretical and methodological constructions of representatives of the modernization (albeit updated) discourse as a basis will not be sufficient, considering the not too high position of Ukraine in the hierarchy of states within the modern world system. Therefore, the methodology of modernization analysis needs to be supplemented and dependency theory will be a useful addition [11]. Selection and synthesis of productive theoretical and methodological ideas of both the modernization approach (in formulating the program of multiple moderns) and the theory of dependence makes us avoid apologetics. We shall note that noncritical capture is counterproductive to both national/local and western/global.

Therefore, our approach avoids extremes in explaining the phenomenon of legal culture and its importance for the tourism industry.

2. RESULTS AND DISCUSSION

The paper formulates a conceptual approach to understanding the process of training specialists in the tourism industry, which is closely related to working with people of different nature, age, education, religion, psychological stereotype, financial, and other capabilities. Therefore, it is crucial that all employees have a deep understanding of the

unity of goals, form a coherent team, are able to express friendliness, high tolerance, and professionalism towards customers, clear perform the moral obligation in practice, mastering the achievements of jurisprudence.

Theoretical and methodological understanding of tourism, the formation of modern "tourist consciousness", which must be inherent in all subjects of the tourism process is an urgent demand of time, because this phenomenon, which in the 20th-21st centuries has become global, is one of the powerful factors that significantly affect modern civilization. What will be the consequences of this influence, positive or devastating? Social philosophers, economists, historians, geographers, historians, country scientists, political scientists, cultural scientists, environmentalists all of whom are directly or indirectly involved in tourism, are called upon to answer this question [12].

To date, tourism is one of the most labour-intensive sectors of the economy, the most dynamic type of recreational activity. The development of tourism, as a key factor in the development of the country's economy, involves not only the creation of new jobs, but also the optimization of the wide variety of interrelated processes that require a thorough review of the situation in terms of quantitative and qualitative composition. Establishment of the system of human resources and highly professional training of tourist personnel occurs in difficult conditions of development of market relations, destruction (in many directions) of the public procurement for specialists of different educational and qualification levels, significant expansion of educational institutions of different forms of ownership. The entire spectrum of globalization processes, with consideration of the dynamics of changes in the economies of developing countries, adjusts the contrast of the processes that directly influence the formation of views on the promotion of further development of tourism education [13].

Tourism, as an extremely important socio-economic factor in world economic relations and international relations, a powerful channel of "national diplomacy", a public multicultural institution, being developed in the dialectical unity of all its constituents, forms its own social space, within which thrive interaction and competition, coherence and discrepancies, conflicts and consensus of the tourist life. Having taken a prominent place in the world economy and the international system of free communication of people, the development of popular diplomacy, tourism has become a significant indicator of the world cultural and historical heritage, which will remain important economic and cultural leverage only until we realize its intangible value, since it is impossible to solve the problems of preserving cultural and natural monuments without violating fundamental issues related to the development of tourism. The main in tourism is its cultural significance and humanistic value, which emphasizes the need to search for a "middle ground" between the economic, and socio-cultural and cognitive functions of tourism, between the protection of historical monuments from the destruction caused by the flow of unconscious tourists, and the expansion of access by civilians to cultural and natural heritage sites.

Tourist education forms specialists responsible for the holistic and civilized development of the tourist movement, capable of organizing it at the level of both individuals and communities, districts, regions, states and communities of countries and

peoples. This was reflected in the Law of Ukraine "On Tourism"[1]. Diversity of tourist ties and tourism activities, the complexity of the tourism economy, its extraordinary complexity as a socio-cultural phenomenon determine the system of tourism education in the world in general and in Ukraine in particular, actualize the task of generalizing the experience of domestic and foreign tourism schools; comprehension, first of all, of achievements of professional educational technologies which carry out transfer of tourist education to the modern level of professional training of personnel for tourism.

An important theoretical, methodological, and didactic issue is to substantiate the idea and system of ensuring life-long tourist education. This necessity is conditioned upon not only a wide network of multilevel tourism educational institutions, but also upon the desire to create the basis for a more sophisticated basic tourist education system for all interested people and for a radical renewal of its subsystems, effective functioning throughout the life cycle of a professional employee of this field. There is an urgent need to create a continuous, constantly updated network of structures, as well as to develop a system of programs and methods of tourism education to achieve the main purpose – "Tourism education for every specialist throughout their tourism activity". This will allow to focus on consolidating achievements, taking further steps towards eliminating the main barriers to accessing tourism education and adapting its content and methods to meet the challenges posed by current tourism practice.

For Ukraine, the issue of improving the training system for tourism professionals is of particular importance because the development of tourism is recognized as a priority of the state and society. Ukraine has good, objective prerequisites for joining the most developed tourist countries of the world in a brief time. Having a favourable geopolitical location, it has long been an intersection of transport and human flows from North to South and from West to East. At the same time, Ukraine has great tourism and recreational potential, namely: favourable climatic conditions, rich flora and fauna, an extensive network of transport connections, unique cultural and historical monuments, a well-developed travel industry and hospitality system.

Ukraine is one of the first countries to launch National Tourism Day, and several of its organizations, including the Kyiv University of Tourism, Economics and Law (KUTEL), are members of the World Tourism Organization Business Council (WTO BC). Speaking of which, KUTEL specialists took part in the preparation of the State Program for Tourism Development for 2002-2010, the drafting of the Law of Ukraine "On Tourism"[2] and other regulations, which are intended to stimulate the further development of the tourism sphere. Tourism can significantly influence the acceleration of economic and social development of the state. After all, over 50 branches of the national economy belong to the tourism sphere – agro-industrial complex, transport, industry, etc.

Tourism is a priority area of economy and culture, where services play a key part. In the context of tourism development, the success of tourism companies and hotel companies depends on how well their services meet the quality standards [14]. The dynamic development of tourism in Ukraine necessitates the improvement of the quality of training, provision of hospitality by specialists who would meet international standards in the field

[1] Law of Ukraine "On Tourism". (2018, November). Retrieved from https://zakon.rada.gov.ua/laws/show/324/95-%D0%B2%D1%80

[2] *Ibidem*, 2018.

of services. Therefore, content formation according to the requirements of education is an important scientific problem of professional training of specialists in tourism. Positive tendencies in the diversification of professional tourism education are aimed at overcoming contradictions, among which are: lack of scientific and theoretical substantiation of the specificity of training of specialists for the tourism industry in a particular professional direction; orientation of the modern content of professional tourism education mainly on the conventional concept, the priority of which is knowledge instead of focusing it on personal and professional orientations, insecurity of system connection between the problems of modern pedagogical science and theory and practice of tourism.

The study of the experience of training specialists in the leading tourist schools in the world, studying foreign programs and basic models of study convincingly proves the feasibility of its use in the practice of domestic educational institutions of the tourist specialization [15]. In education, same as in the country in general, there are significant changes. While retaining the best achievements of national pedagogy, Ukrainian education continues to acquire new features. Its development, in fact, and of society at large, is not without its contradictions and difficulties. The key to this process is the tendency towards dynamism and modernization. Significant steps have been taken to build a national education and democratization system. These include the development of a new legislative framework for the industry; creation of national textbooks and pedagogical press, updating of the content of education, first of all in the social and humanitarian field, variability of the network of educational institutions and educational and professional programs. Much has also been done to promote the humanistic values of education, its focus on personality development.

Both Western and domestic hotels that are opened in Ukraine, representative offices of foreign airlines and travel companies need qualified staff, mainly with Western standard of education and experience abroad. Swiss education is a standard in hospitality and tourism management. In little Switzerland run dozens of hotel and tourism management schools. All of them are private. Government permission to open a school is not required. Theoretically, to work, the school does not need special accreditation: the owner determines the program, level, and quality of teaching. In practice, the school just needs to have recognition and a solid reputation. In Switzerland, tourism and hospitality associations often open professional schools, although there are many old schools with traditions and history, which are highly respected and highly rated. For every school, it is vital that its diplomas receive certification from reputable organizations for this purpose to be accredited. A federal or cantonal state commission on education, including a public or private university, can inspect and accredit a school [15].

Most top-level executives working in the hotel industry of the world are alumni of Swiss schools. Manager is a remarkably prominent position. After graduation, the graduate may apply for the position of Assistant Manager in a particular sector of the travel industry. Assistant Manager is also a high, honorable, and well-paid position, and one can become a manager only after a few years of work. More than a hundred years ago, the first hotel management school – The Ecole hôtelière de Lausanne (EHL) – was launched in Switzerland (Lausanne). It is one of the most renowned and respected hotel management schools in the world. Its mission is to educate students seeking to reach the pinnacle of a career in the international tourism industry, especially in leading hotels, restaurants, and

hotel chains [16]. Lausanne educators are looking for mature, able-bodied, and hard-working students who demonstrate a desire for leadership and the ability to work as a team. The Lausanne School requires real student motivation and arduous work. It helps students to develop interchangeable skills that will facilitate their adaptation to new conditions. Continuous attention to academic and practical training enables Swiss teachers to ensure that graduates are competent in their work and bring immediate economic impact to the workplace. They also take care to foster in students an open and tolerant attitude towards diverse cultures, the ability to appreciate the traditions, values, and art of different civilizations [15].

Characteristic features of the system of training of tourist personnel in view of foreign experience are as follows:

- orientation towards the type of personality, open, energetic, and outgoing, which feels at ease in any social environment;
- development of leadership talents and ability of the graduate to work well in a team;
- planning the career of a graduate student in the learning process;
- fulfilment of the international status of training programs in the field and specialties of hospitality management and strategic management;
- compulsory bilingual teaching of professional and specialized courses and disciplines;
- formation of interchangeable management skills adapted to the specific conditions of future professional employment;
- parallel acquisition of management skills and acquisition of applied knowledge in hospitality;
- development of professional training in the workplace based on pre-university training, using foreign internships integrated into the educational process;
- introduction of a professional module of education, i.e. improvement of the multicultural character of specialized training of a specialist who chooses one of the types of academic program in the course of study or undergoes a two-stage procedure of admission and enrollment for training [15].

An analysis of the practice of training tourism workers in Western European countries leads to the conclusion that in most developed countries there is a "binary" system of higher education, where, alongside the university sector, there are numerous specialized institutions. Among European countries, the "binary" higher education system is in Belgium, the United Kingdom, Greece, Denmark, Ireland, the Netherlands, Norway, Germany, France, Switzerland, and several countries. In contrast to the "binary" there is a "unitary" system of higher education, consisting only of universities (Italy, Spain, Finland, Sweden) [16]. The priorities of organizational and pedagogical work in tourism are outlined, including: modernization of the management system; intensive transfer of pedagogical functions and powers to all levels of tourism education, openness, accessibility, and competent organization of the pedagogical process and tourism business; discussion-problematic method of considering training programs; determination of the personal responsibility of each teacher in the specialty and profile of specialist training; enhancement of pedagogical and managerial culture of specialists; in-depth educational practice of employees and functionaries in tourist and public teams; linking the staff to the tourist community based on high professionalism, hard work, accessibility, and respect for

education [15]. Priorities in the training of tourism personnel in Ukraine were identified in the context of European integration, because the socio-economic development of the world requires continuous specialist training.

The methodological basis of the study was a provision substantiated by Academician I.A. Ziaziun concerning the “relation of continuous professional education to the individual, to the educational process, to programs, to organizational structures. In the first case, this concept means that a person learns constantly, without relatively long breaks, or in educational institutions, or is engaged in self-education". As for the organizational structure, continuity implies the existence of a network of educational institutions offering educational services, ensuring the connection and continuity of programs designed to meet the demands and requirements of the population [17; 18].

The essence of the principle of continuous tourism education is to understand the educational system as a holistic one, covering all the links at various stages of life of a person's professional growth. Scientists identify the following main areas of work with personnel: professional orientation of youth, professional selection, recruitment, adaptation of employees, placement and retraining of staff, professional development, professional work ethics, stabilization of personnel, enhancement of moral and material labour incentives, understanding the specificity of competitiveness, development of tourist activity of employees, psychological readiness for such difficult business as customer service, formation of high legal culture [17]. This global issues is addressed by researchers at the Kyiv University of Tourism, Economics and Law, where the educational process is subordinated to the main purpose – to form a new generation of tourism professionals based on systematization and understanding of existing tourism practices [17].

The professional culture of the future tourism manager is reflected in the behavior of the specialist, in communication, technology of conflict resolution, organization of activity, compliance with management requirements. One of the main aspects of the activity of tourism manager is communication, which acts as the main tool, method, and content of the activities of future tourism managers. The personality and creative component of fostering professional culture is manifested in variability, initiative, ingenuity, unconventional decisions and behavior in professional interaction. In their interaction, the structural components form the system of professional culture of the future tourism manager [5]. In the modern educational space, higher education is used not only for the transfer of special knowledge, but also for the development of the student's personality as a future specialist, characterized by completeness of knowledge, skills and certain outlook, life attitudes, values and characteristics of professional behavior. Therefore, the main task of a teacher of a higher education institution is to provide the student with knowledge, to develop professional skills and to involve them in communication [18; 19].

Regarding the general concept of legal culture, American scientist David Nelken gives the following definition: it is "a way of describing relatively stable models of legal-oriented social behavior and attitudes... Legal culture is about who we are, not just about what we do." [20]. In our view, it is appropriate to compare legal culture and political culture. Studies of the classics of political and social science in the second half of the 20th century (especially of those who worked within the framework of a modernization research program, such as G. Almond and S. Verba), have shown that in modernizing/developing

countries, attention paid exclusively to formal political and state institutions is insufficient to understand the modus operandi of these political systems [21; 22]. Content, i.e. culture is important, or, in other words, values and attitudes that affect the real behavior of citizens and politicians. We shall provide an illustrative example. In Britain, there is no formal legislation that would prohibit a monarch from appointing a prime minister according to their subjective desire. That is, formally, a British monarch can appoint any person to the liking of a king/queen as prime minister. However, British democratic political culture contributed to the elaboration of an informal convention, under which the monarch instructs the government to form the leader of the winning party in parliamentary elections. Instead of this, we see how in the territory of post-Soviet Ukraine persons who lead the anticorruption bodies may be in the Unified State Register of persons who committed corruption or corruption-related offenses [23].

That is, anti-corruption officials commit corruption, and this does not have any consequences for them, since the political culture of politicians in Ukraine is low. Thus, we see that a culture that is inherent in a particular social sphere and professional activity (as a policy in our example) has a very serious impact on the behavior of individuals and groups involved in the field. In tourism management, the presence legal culture in subjects of this sector, which for our purposes can be defined as awareness of the legislation and law-abiding behaviour, is extremely important. Tour operators, in the process of providing their services, gain unprecedented access to their customers' personal and financial data (passport data, telephone numbers, customers' home addresses, including their credit card and bank account numbers, etc.). Considering the fact that a large number of tourist operators are quite small firms, it should be understood that such organizations do not have the capacity to create large-scale and effective security services to control the actions of their employees (as is the case in large financial institutions, such as banks). Therefore, to reduce the probability of abuse of sensitive personal and financial data of clients, it is especially important that legal culture managers have the role of internal control and motivator of law-abiding behavior. Future tourism managers must shape the legal culture while studying in higher education institutions.

The same conclusion can be extended to hospitality management representatives who also have unprecedented access to information about their customers. It is useful to have an elevated level of legal culture in tourism managers and to advise clients before arranging a trip. Each country has its own legislative characteristics, neglecting which can lead to dire consequences. For example, in Thailand, drawing on local currency notes is a crime (maximum punishment is imprisonment of up to 5 years), because it is regarded as disrespect for the monarch whose portrait is in Thai money. In Singapore, for some offenses, such as hooliganism, flogging is stipulated. Only with the presence of legal culture tourism managers will they be motivated to get acquainted with the legal systems of the countries to which their clients travel, and will be able to provide tourists with advice on what would be the appropriate behaviour of travelers so as to not violate the law of the country they travel to.

CONCLUSIONS

Summarizing the above, we have reasonable grounds to confirm the relevance of the task of fostering legal culture of employees of the tourism industry. Having a legal culture will

enhance the quality of services rendered and the safety of clients. Analyzing the scientific literature on fostering legal culture in tourism and hotel professionals, we conclude that this should be dominated by a practical and applied approach aimed at deep legal training of future tourism and hospitality workers. Emphasis is placed on shaping the legal culture of tourism industry employees and using it in practice to communicate with clients.

In a globalized educational space, focus should be placed on the development of the student's personality as a future specialist, who must possess the necessary amount of knowledge, skills, abilities, modern outlook and values and characteristics of professional behavior to successfully perform their professional responsibilities.

Certainly effective methods in the system of training of tourist personnel, apart from the conventional disciplines of legal nature ("Professional and corporate ethics", "Legal regulation of tourist activity", "Legal regulation of tourism and hotel business"), is to include the following disciplines in the curricula training of future specialists in tourism: "Legal Culture of Tourism Specialists", "Fundamentals of the Diplomatic Protocol", and "Consular Service Fundamentals".

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ДЕЯКІ АСПЕКТИ СУДОВОГО ЗАХИСТУ СІМЕЙНИХ ПРАВ ТА ІНТЕРЕСІВ

Анотація. *Наукова стаття присвячена деяким аспектам судового захисту сімейних прав та інтересів. На сучасному етапі розвитку суспільства одним із пріоритетних напрямів державної політики в Україні є захист сімейних прав та інтересів. Досягнення цієї мети забезпечується за допомогою різних правових засобів, серед яких особливе місце посідає судовий захист. У зв'язку із дублюванням переліку способів судового захисту у сімейному та цивільному законодавстві України, однією із проблем, яка привертає увагу, є співвідношення способів цивільно-правового і сімейно-правового захисту, а також з'ясування можливості застосування актів цивільного законодавства до регулювання сімейних відносин. Відтак, метою цієї наукової статті є аналіз проблемних аспектів сімейно-правового та цивільно-правового регулювання способів судового захисту сімейних прав та інтересів. В результаті проведеного дослідження обґрунтовано, що єдиною обов'язковою передумовою встановлення правовідношення за рішенням суду є попереднє встановлення судом відповідного юридичного факту як підстави виникнення, зміни чи припинення правовідношення. З огляду на це, суд, за винятком справ про усиновлення, а також про встановлення режиму окремого проживання за заявою подружжя, здійснює захист сімейних прав та інтересів у порядку окремого провадження не шляхом встановлення правовідношення, а у спосіб підтвердження наявності або відсутності юридичних фактів, які є підставою його виникнення, зміни чи припинення. Встановлено, що регламентація законодавцем таких особливих способів судового захисту сімейних прав та інтересів, як встановлення правовідношення та його анулювання, зумовлена особливою юридичною природою сімейних правовідносин, що водночас не виключає можливості «субсидіарного застосування» для захисту прав та інтересів їх суб'єктів нерегламентованих сімейним законодавством способів цивільно-правового захисту (визнання права та визнання правочину недійсним).*

Ключові слова: судовий захист, сімейні правовідносини, майнова шкода, сімейно-правовий захист, факт батьківства.

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SOME ASPECTS OF THE COURT PROTECTION OF FAMILY RIGHTS AND INTERESTS

Abstract. *The scientific article is devoted to some aspects of judicial protection of family rights and interests. At the present stage of development of society, one of the priority areas of public policy in Ukraine is the protection of family rights and interests. Achieving this goal is ensured through various legal means, among which a special place is occupied by judicial protection. In connection with the duplication of the list of methods of judicial protection in family and civil legislation of Ukraine, one of the problems that attracts attention is the ratio of methods of civil and family protection, as well as clarifying the possibility of applying civil legislation to regulate family relations. Therefore, the purpose of this scientific article is to analyse the problematic aspects of family law and civil law regulation of judicial protection of family rights and interests. As a result of the study, it is substantiated that the only mandatory prerequisite for establishing a legal relation by a court decision is the prior establishment by a court of a relevant legal fact as a basis for the emergence, change or termination of the legal relationship. In view of this, the court, except for cases of adoption, as well as the establishment of a separate residence on the application of spouses, protects family rights and interests in a separate proceeding not by establishing a legal relationship, but by confirming the presence or absence of legal facts, which are the basis for its occurrence, change or termination. It is established that the legislator's regulation of such special methods of judicial protection of family rights and interests as establishing a legal relationship and its annulment is due to the special legal nature of family legal relations, which does not exclude the possibility of "subsidiary application" to protect the rights and interests of their subjects using civil protection methods (recognition of the right and invalidation of a transaction).*

Keywords: judicial protection, family legal relations, property damage, family legal protection, fact of paternity.

INTRODUCTION

The strategic course for the accession of the Ukrainian state to the European Union requires the further development of the judiciary, which should be characterised by independence, fairness, transparency and efficiency [1]. It should be noted that the important role and authority of international norms for the protection of citizens' rights are due to the positive results of their implementation in the legislation of the most developed countries of the world, their rich history, to the fact that these acts express unchanging universal values [2].

In the legal literature, judicial protection, self-defence is regarded as the legal protection of a person and other persons, as well as the interests of society and the state against socially dangerous encroachments [3]. At the present stage of society development,

one of the priority directions of state policy in Ukraine is the protection of family rights and interests. According to scientists, the solution of family problems should be given priority [4]. The protection of family rights and interests is ensured through a variety of legal means, among which judicial protection is of particular importance, as the court itself has the broadest powers conferred by the legislator in the field in question by comparison with other jurisdictions. The task of judicial protection of family rights and interests is to restore the violated, unrecognised or contested rights, freedoms or interests of individuals, rights and interests of legal entities, interests of the state. Appropriate tasks are being pursued by the court, including for the purpose of strengthening the family, affirming a sense of duty to parents, children and other family members, building family relations on a parity basis, on feelings of mutual love and respect, mutual assistance and support, and also providing each child with family upbringing, opportunities for spiritual and physical development [5-7].

The list of methods of judicial protection of family rights and interests is set out in Part 2 of Art. 18 of the Family Code of Ukraine (hereinafter referred to as the FC of Ukraine)[1]. In particular, in accordance with this provision, the court has the right to protect family rights and interests by: 1) establishing legal relations (paragraph 1 of Part 2 of Article 18 of the FC of Ukraine); 2) compulsory performance of voluntarily unfulfilled duty (paragraph 2 of Part 2 of Article 18 of the FC of Ukraine); 3) termination of legal relation, as well as its cancellation (paragraph 3 of Part 2 of Article 18 of the FC of Ukraine); 4) termination of actions that violate family rights (paragraph 4 of Part 2 of Article 18 of the FC of Ukraine); 5) restoration of the legal relation that existed before the violation of law (paragraph 5 of Part 2 of Article 18 of the FC of Ukraine); 6) compensation of material and non-pecuniary damage, if stipulated by the FC of Ukraine or by the agreement (paragraph 6 of Part 2 of Article 18 of the FC of Ukraine); 7) changes in legal relations (paragraph 7 of Part 2 of Article 18 of the FC of Ukraine); 8) recognition of illegal decisions, acts or omissions of a state authority, CAR authority or a local government body, their officials (paragraph 8 of Part 2 of Article 18 of the FC of Ukraine).

At the same time, almost the same list of remedies, but already civil rights and interests, contains part 2 of Art. 16 of the Civil Code of Ukraine (hereinafter – the CC of Ukraine)[2], according to which such methods are: 1) recognition of the right (paragraph 1 of Part 2 of Article 16 of the CC of Ukraine); 2) recognition the transaction invalid (paragraph 2 of Part 2 of Article 16 of the CC of Ukraine); 3) termination of the infringing action (paragraph 3 of Part 2 of Article 16 of the CC of Ukraine); 4) restoration of the situation that existed before the violation (paragraph 4 of Part 2 of Article 16 of the CC of Ukraine); 5) compulsory performance of duty in kind (paragraph 5 of Part 2 of Article 16 of the CC of Ukraine); 6) change of legal relation (paragraph 6 of Part 2 of Article 16 of the CC of Ukraine); 7) termination of legal relation (paragraph 7 of Part 2 of Article 16 of the CC of Ukraine); 8) compensation for losses and other methods of compensation for property damage (paragraph 8 of Part 2 of Article 16 of the CC of Ukraine); 9) compensation for moral (non-pecuniary) damage (paragraph 9 of Part 2 of Article 16 of

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

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

the CC of Ukraine); 10) recognition of decisions, actions or omissions of a state authority, CAR authority or a local government body, their officials as illegal (paragraph 10 of Part 2 of Article 16 of the CC of Ukraine). The list of methods of protection provided in Part 2 of Art. 16 of the CC of Ukraine is not exhaustive.

In this respect, the opinion of N.S. Kuznetsova, which emphasises that the court has the right to allow such a method of protection, which, although not provided for by law or contract, nevertheless corresponds to the essence of the relations between the parties, deserves attention [8].

Thus, the rules of the CC of Ukraine define the ways of protection of rights, specify the powers of the courts in the consideration of legal relations, but allow the courts to go beyond the limits determined by law, to regulate and specify the legal relations by analogy of right or law [8]. Due to the duplication of the list of judicial remedies in the family and civil law of Ukraine, as well as the exhaustive nature of the first and inexhaustible nature of the last list, one of the problems that attracts attention is the correlation between the civil and family legal remedies, as well as the possibility of applying acts of civil law to the regulation of family relations.

Therefore, the purpose of this scientific exploration is to analyse the problematic aspects of family law and civil law regulation of the methods of judicial protection of family rights and interests.

1. MATERIALS AND METHODS

In accordance with this goal, the basis of methodology for the study of problematic aspects of the judicial protection of family rights and interests became general scientific and special methods of knowledge of legal phenomena. In particular, the comparative legal method was used when comparing scientific views on the possibility of subsidiary application of civil law rules to regulate family relations in the context of the protection of the rights and interests of their subjects. Methods of induction and deduction made it possible to classify ways of protecting family rights and interests by the courts and to conduct their comparative analysis. The systematic method enabled the relation between a particular family relation and applied by the court way to protect the rights and interests of its subjects. The dogmatic method was applied in the interpretation of legal categories, as a result of which the conceptual and categorical apparatus of the respective legal institute was deepened and clarified, the character of the law was clarified and definitions were given to such legal categories as: “annulment of legal relation”, “recognition of right”, “establishment of legal relation” and some others. Formal-logical method was used as a universal means of argumentation of scientific conclusions. In particular, through the formal-logical method, the author has come to the conclusion that the annulment of a legal relation can be applied by a court solely for the purpose of protecting family rights and interests arising from marital relations, as well as the legal relation of adoption, while at the same time declaring a transaction invalid is a civil legal way of protection of rights and interests of parties to the transaction as grounds for the emergence, change or termination of the relevant legal relation. Based on the method of systematic analysis, a gap was found in the legal regulation of the list of ways of protecting family rights and interests by a court, in connection with which it was proposed to amend paragraph 1 p. 2 of Art. 18 of the FC of Ukraine, stating the stated legal norm in the following wording: “1) establishment of

legal relation and (or) legal fact, which is the basis for the emergence, change or termination of legal relation".

Regarding the methodological basis of the research, its foundations were the fundamental works of civil scientists, as well as experts in the field of family law. The systematic analysis of the scientific positions of the said representatives of the scientific doctrine, as well as the relevant norms of the current civil and family legislation of Ukraine allowed to reveal gaps in the legal regulation of the ways of protecting family rights and interests by a court, as well as to conclude on the feasibility of subsidiary application of the rules of the civil legislation to regulate the relevant legislation.

The legal basis for the study was codified legal acts – sources of family and civil legislation of Ukraine, namely: the Civil Code of Ukraine and the Family Code of Ukraine. In addition, a series of court decisions have been analysed to illustrate the enforcement of the relevant rules, which have been reflected in the Unified State Register of Judgments.

2. RESULTS AND DISCUSSION

2.1 Correlation between the methods of civil and family law protection of family rights and interests

As already noted, in connection with the duplication of the list of judicial remedies in the family and civil law of Ukraine, as well as the exhaustive nature of the first and inexhaustible nature of the last list, one of the problems that attracts attention is the correlation of civil and family legal remedies. A comparative analysis of the relevant norms (Part 2 of Article 18 of the FC of Ukraine and Part 2 of Article 16 of the CC of Ukraine)[1] gives grounds to conclude that the list of methods of judicial protection of family and civil rights and interests is identical, with the following exceptions: 1) the family law of Ukraine provides the possibility of compensation for material and non-pecuniary damage, if it is provided by the FC of Ukraine or by an agreement (paragraph 6 of Part 2 of Article 18 of the FC of Ukraine). At the same time, the Civil Code of Ukraine does not contain such a condition and regulates the possibility of compensation for material and moral damages in all cases of its task (paragraphs 8, 9 p. 2, Art. 16 of the CC of Ukraine); 2) In addition to the termination of legal relations, the FC of Ukraine regulates such a way of judicial protection of family rights and interests as its annulment. At the same time, the CC of Ukraine does not provide for an adequate way of protecting civil rights and interests. Instead, it regulates an almost identical in legal nature method – the recognition of a transaction invalid (paragraph 2 of Part 2 of Article 16 of the CC of Ukraine); 3) FC of Ukraine, unlike the CC of Ukraine, in paragraph 1 of Part 2 of Art. 18 provides for such a method of judicial protection as the establishment of a legal relation. In the CC of Ukraine (paragraph 1, Part 2, Article 16), a similar legal method of protection has another name – recognition of the right.

The analysis makes it possible to state that the FC of Ukraine significantly expands the possibilities of judicial protection of family rights and interests and for the first time

[1] Family Code of Ukraine: Law of Ukraine. (2002, January). Retrieved from: https://zakon.rada.gov.ua/laws/show/2947-14.
Civil Code of Ukraine: Law of Ukraine. (2003, January). Retrieved from: https://zakon.rada.gov.ua/laws/show/435-15.

introduces such traditional civil rights remedies as compensation for material and non-pecuniary damage. Family law has always held that one of the main civil remedies – compensation for damages – cannot be used to protect family rights and interests, because by their very character they are not repaid. Recently, the view on this issue has changed significantly. Family relations, especially property, can be protected by way of compensation for the loss of a victim. However, given the specific nature of their legal nature, this can only be done in cases provided for by law or contract [9]. Thus, persons who have applied for marriage registration are considered to be bride and groom. In this case, according to Part 3 of Art. 31 of the FC of Ukraine, the person who refused a marriage is obliged to compensate the other party for the expenses incurred in connection with the preparation for a wedding and marriage registration.

Regarding the ratio of such methods of protection of family and civil rights and interests as the cancellation of a legal relation(paragraph 3 of Part 2 of Article 18 of the CC of Ukraine) and the invalidation of a transaction (paragraph 2 of Part 2 of Article 16 of the CC of Ukraine), family law is characterised by the presence of legal relations with a special legal nature, such as marriage and adoption, the rights and interests of which are protected by the court in a special way – the cancellation of a legal relation.

A large explanatory dictionary of the modern Ukrainian language defines "cancellation" as abolition, recognition of something invalid [10]. In this case, despite the identical lexical construction used by the legislator, talking about the consequences of violating the law at the time of marriage, during the transaction or court decision on adoption (it is about "invalidation of marriage", "invalidity of a transaction", as well as "invalidation of adoption"), the invalidation of a transaction and the cancellation of the legal relations are different in their legal consequences ways to protect the rights and interests. Thus, a transaction is a legal fact that entails the emergence, change or termination of legal relations. Recognition of a transaction as invalid has the consequence of invalidity of the respective legal relation. At the same time, marriage and adoption by their legal nature are already legal relations, the legal basis of which is not a transaction, but a legal fact of law-establishing nature (a fact of state registration of marriage, a fact that a court decides on adoption). Given law-establishing nature, family law does not regulate the possibility of invalidating a fact of state registration of marriage, as well as a fact that a court decides on adoption, but provides for the possibility of cancellation of legal relations arising on their basis.

Based on the above considerations, it can be argued that the cancellation of a legal relation can be used by a court only to protect family rights and interests arising from marriage and adoption, while invalidating a transaction is a civil way to protect the rights and interests of parties as grounds for the emergence, change or termination of a relevant legal relation. Nevertheless, such a conclusion does not negate the possibility of subsidiary application of such a method of protection as the invalidation of a transaction in order to protect the rights and interests of participants in family relations arising from the transaction. Then – the recognition of law as a way to protect civil rights and interests (paragraph 1 of Part 2 of Article 16 of the CC of Ukraine) and the establishment of legal relations as a way to protect the rights and interests of family law (paragraph 1 of Part 2 of Article 18 of the Civil Code)). It should be emphasised at once that recognition of the right is one of the most common means of protection. The theory of recognition in the civil

procedural aspect was developed in the pre-revolutionary period by the famous Soviet lawyer V.M. Gordon. “The court decision on the recognition of law”, the scientist wrote, “does not establish anything new, but only adds strength to existing legal relations, confirms their existence with such force that subsequent litigation was inadmissible. In this case, the main object of recognition is a subjective right” [11]. Therefore, in response to the question, whether a court can recognise the existence of facts that have legal significance, V.M. Gordon answered no, believing that until a fact led to the emergence of a legal relation, a court could not begin to discuss its existence [11].

Analysing the recognition of the right as a way to protect family rights and interests, Z.V. Romovskaya draws attention to the fact that in judicial practice the term “recognition of the right” is used in three different cases. First, to confirm an existing subjective right in order to eliminate a dispute or to prevent future disputes (for example, the requirement of one of the spouses to recognise his right to housing, which arose from the moment of moving into the apartment and exists at the time trial). Second, the recognition of a right is the restoration of a pre-existing subjective right that has ceased due to the expiration of its exercise (for example, the restoration of a missed limitation period). Third, the recognition of the right is the satisfaction of the requirements of persons seeking to establish the desired legal relation (for example, the recognition of copyright). In addition, Z.V. Romovskaya emphasises that in family law there is no recognition of the right as a way of protection, but it is necessary to address many issues related to property rights. Thus, in case a husband does not recognise the independent right of a wife to housing, a court on a claim of the latter recognises this right for her [12].

The above views lead to the conclusion that the necessity for recognition of the right arises when a person has a certain subjective right is in doubt, the subjective right is challenged, it is not recognised whether there is a real threat of such actions. Thus, the uncertainty of the subjective right leads to the impossibility of its implementation or, at least, complicates it [13]. Unlike the recognition of the right, which is regulated as a method of protection in the Central Committee of Ukraine, the establishment of a legal relation is a way to protect subjective rights and legally protected interests in family law.

Quite successfully and fully, in author’s opinion, the establishment of legal relations in family law was analysed by O.M. Ponomarenko, who noted that this method of protection corresponds to the essence of some family relations, because one of the specific features of the latter is the possibility of family relations emergence outside a will of a subject . This is due to the need to protect the most vulnerable, “weak” family member, usually a child. The need for it arises when a certain legal fact necessary for the emergence of a legal relation is not recognised by a subject and a person concerned applies to a court to establish it. In such cases, the court's decision to recognise a legal fact is the basis for the emergence of a legal relation (i.e. is a legal fact) [14].

Z.V. Romovskaya, considering the establishment of a legal relation as a way to protect family rights and interests on the example of establishing paternity, writes, “Satisfying the claim for paternity, the court thus confirms the existence between the child and the defendant of biological connection – origin, which is one the of the grounds for the emergence of a legal relation between them. Having endowed the defendant with the legally significant quality of a father, the court decision is one of the links in the general chain of legal facts that give rise to the legal relation between the child and his father” [15].

From the point of view of O.V. Dzera and I.O. Dzera, the establishment of a legal relation is associated with the adoption of certain measures aimed at restoring the violated subjective right of a person in the state in which it existed before its violation. That is, to file a lawsuit, it is necessary that the subjective right is not terminated and can be restored by eliminating the consequences of an offence [16]. The fact that the establishment of a legal relation is the basis for the emergence of rights leads some scholars to the conclusion that in essence this method of protection is identical to the recognition of the right. Thus, Y.F. Bespalov notes that as a way to protect the rights of a child establishing the origin (legal relation) is a measure aimed at restoring (recognising) the violated (disputed) rights of a child [17]. At the same time, there is an opposite position in scientific doctrine, the supporters of which insist that the establishment of legal relations and recognition of law are different ways of protecting family rights [18]. Their arguments are as follows: the need for recognition of a right arises when a subject's existing subjective right is challenged or not recognised. Thus, the role of a court is limited to confirming an existing right. When establishing a legal relation, a subjective right arises on the basis of a court decision. Proof of this, for example, is the fact that a child's right to alimony is linked to a court decision recognising paternity [14].

Regarding the legal nature of such a way of protecting family rights and interests as establishing a legal relation, it is necessary to emphasise this. According to the provisions of the general theory of law, the legal relation arises, changes or terminates on the basis of a legal fact. A legal fact in family law is a specific life circumstance, the legal construction of which is provided or permissible by family law, the occurrence of which causes legal consequences for family relations (emergence, change, termination, suspension, impediment or restoration) and (or) for family law legal capacity (emergence, expansion, termination or restriction) [19]. Hence, the only obligatory precondition for establishing a legal relation, with certain exceptions, is the prior establishment by a court of a relevant legal fact as a ground for the emergence, change or termination of the legal relation. In view of this, a court, with certain exceptions, may not establish a legal relation, but may establish only legal facts that are the basis for its occurrence, change or termination. For example, the establishment by a court of a fact of paternity results in the emergence of a legal relation between a father and a child.

Here is an example from case law. In March 2016 the applicant applied to the court to establish the fact of paternity in respect of her son, citing the fact that her son had been born during her cohabitation with the husband who was suited. However, since the parties lived without marriage, on the instructions of the mother in the child's birth certificate in the column “father” the civil registry office made an entry in accordance with Part 1 of Art. 135 of the FC of Ukraine. The child's father died at the home of the applicant's parents. The establishment of the fact is important for the implementation of her personal non-property and property rights, in particular, the right to financial assistance in connection with the loss of a provider. After hearing the explanations of the applicant and his representative, the representative of the interested person, the testimony of witnesses, examining and evaluating the evidence in their entirety, the court concluded that the application was satisfied because the deceased had acknowledged his paternity to the applicant's son. Thus, the court obtained sufficient evidence to reliably confirm the fact of the applicant's son's origin, which was also confirmed by the documents available in the

case file. Establishing the fact of paternity has legal significance for the applicant, as it is necessary to obtain the right to financial assistance in connection with the loss of a provider. It is impossible to establish the fact of paternity in another order, so the application is subject to satisfaction [20].

Thus, the way to protect family rights and interests by the court in this case was not to establish a legal relation, but the fact of paternity, which, in turn, is the basis for the emergence of a legal relation between father and child. In the legal literature, scholars also argue that the court, acting in the manner prescribed by law, directly determines the legal consequences of established facts and situations, requiring a legal response [21]. Nevertheless, it should be emphasised that there are two exceptions to this general rule: the court can protect family rights and interests by establishing a legal relation, deciding on adoption (Part 1 of Article 207, Article 232 of the FC of Ukraine), and on the establishment of a regime of separate residence at the request of spouses (Article 119 of the IC of Ukraine).

Given the above, the authors consider unfounded the position of the legislator, who among the ways to protect family rights and interests does not call the establishment of a legal fact that is the basis for the emergence, change or termination of the relation [22-25]. As proved above, the legal relation, with the exception of legal relations of adoption, as well as the establishment of separate residence at the request of the spouses, arises solely on the basis of legal fact, the establishment of which, along with the establishment of a legal relation, should be qualified as one of the ways of judicial protection of family rights and interests. In this regard, the author proposes to make appropriate changes to paragraph 1 of Part 2 of Art. 18 of the FC of Ukraine, setting out the specified legal norm in the following wording: "1) the establishment of a legal relation and (or) a legal fact that is the basis for the emergence, change or termination of the legal relation."

And the last thing to pay attention to – how do the recognition of the law and the establishment of the legal relation and (or) legal fact, which is the basis for the emergence, change or termination of the relation, as ways to protect family rights and interests? As emphasised above, the need for recognition of a right arises when a person has a certain subjective right in doubt, the subjective right is challenged, it is not recognised whether there is a real threat of such actions. The characteristic feature of the recognition of the right is that this method does not create new substantive legal relations: the court recognises the presence or absence of the relevant subjective right of its holder. At the same time, the establishment by a court of a legal relation and (or) a legal fact, which is the basis for the emergence, change or termination of a legal relation, has the consequence of "creating a new legal relation" that did not exist before. In view of this, it can be argued that the recognition of the right and the establishment of a legal relation and (or) legal fact, which is the basis for the emergence, change or termination of the legal relation, are independent ways to protect family rights and interests.

2.2 Application of acts of civil legislation to the regulation of family relations in the context of protection of the rights and interests of their subjects

The second aspect that deserves attention in the study of problematic aspects of family law and civil law regulation of ways to protect family rights and interests by the court is the possibility of applying in the appropriate context of civil law to regulate family relations.

It should be noted that this dispute has a long history, its beginning is associated with a separate codification of civil and family law. It should be noted that no one has ever questioned the possibility of applying civil law to regulate family relations. This is due to the fact that the FC of Ukraine, operating with many civil law terms, does not disclose their content [14]. Thus, O.M. Ponomarenko notes that the purpose of family law regulation is to consolidate a special regulation of family relations, which corresponds to the specifics of the latter. And at times when the regulation of relations between family members does not differ from the regulation of relations between other subjects of civil relations, it should be attributed to the parish of the CC of Ukraine [14].

In the appropriate context, O.V. Nekrasova even identifies forms of subsidiary application of civil law to family relations, such as: a) conditionally subsidiary application provided by Art. 8 of the FC of Ukraine, without defining specific categories of family relations to which the norms of the CC of Ukraine may apply; b) direct subsidiary application, enshrined in the FC of Ukraine, to regulate the norms of the CC of Ukraine of specific types of family relations, for example, the exercise of the right of joint ownership after divorce. In addition, the author considers it appropriate to apply the basic principles of civil law to regulate family relations by analogy with the law [18]. Proponents of another point of view point out that family law is historically separated from civil law, so some family law remedies repeat the content and procedure for their application of the relevant civil law remedies, but the direct application of the CC, which provides for the protection of civil rights, to ways to protect family rights is impossible due to the substantive features of family relations, which are characterised by lack of payment, special subject composition, duration in time, the presence of a close family communication and personal trust [26]. For example, Yu.F. Bespalov writes in this regard, “Some family law methods coincide with civil law. But both the first and the second are independent legal phenomena and have features determined by the subject, method of legal regulation, as well as the functions of the branches of family and civil law” [17].

In author’s opinion, the use of those methods of protection that are regulated by the CC of Ukraine to protect family rights and interests is not only possible, but also directly regulated by the FC of Ukraine. Thus, according to Art. 8 of the FC of Ukraine, if personal non-property and property relations between spouses, parents and children, other family members and relatives are not regulated by the FC of Ukraine, they are regulated by the relevant norms of the CC of Ukraine, unless it contradicts the essence of family relations. It seems that the relevant norm also applies to the ways of protection of civil rights and interests, which can be used to protect family rights and interests, if it does not contradict the essence of family relations. Thus, there is a “subsidiary application” of the methods of judicial protection of the rights and interests defined by the CC of Ukraine to protect the rights and interests of the subjects of family relations.

Concluding the study of methods of judicial protection of civil and family rights and interests in the comparative aspect, as a result, the author notes that the legislator's regulation of special methods of judicial protection of family rights and interests, such as establishing a legal relation and its annulment, due to the special legal nature of family relations excludes the possibility of “subsidiary application” to protect the rights and interests of their subjects using civil legal protection methods unregulated by family legislation (recognition of the right and invalidation of the transaction).

CONCLUSIONS

The only obligatory precondition for establishing a legal relation by a court decision is the prior establishment by the court of the relevant legal fact as a ground for the emergence, change or termination of the legal relation. In view of this, the court, except for cases of adoption, as well as the establishment of a separate residence on the application of the spouses, protects family rights and interests in a separate proceeding not by establishing a legal relation, but by confirming the presence or absence of legal facts. is the basis for its occurrence, change or termination.

The legislator's regulation of such special methods of judicial protection of family rights and interests as the establishment of legal relations and its annulment is due to the special legal nature of family legal relations, which does not exclude the possibility of "subsidiary application" to protect the rights and interests of their subjects using civil legal protection methods unregulated by family legislation (recognition of the right and invalidation of the transaction). In order to optimise the family legislation of Ukraine in the context of legal regulation of ways to protect family rights and interests, the author proposes to set out in the new version of paragraph 1 of Part 2 of Art. 18 of the FC of Ukraine: "1) the establishment of a legal relation and (or) a legal fact that is the basis for the emergence, change or termination of the legal relation."

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НАПРЯМКИ ОНОВЛЕННЯ СПАДКОВОГО ЗАКОНОДАВСТВА УКРАЇНИ

Анотація. *Стаття присвячена проблемам оновлення спадкового законодавства. Метою роботи є обґрунтування перших кроків на шляху створення наукової концепції реформування спадкового права. Необхідність вдосконалення спадкового законодавства зумовлена низкою обставин: новими напрацюваннями доктрини спадкового права; правозастосовною практикою і проблемами, які виникають у судах при розгляді спадкових спорів; потребою адаптації вітчизняного законодавства до законодавства країн ЄС; врахуванням прагнень України до європейської спільноти. Домінуючими методами дослідження є компаративістський метод і метод моделювання, використання яких дозволило здійснити порівняльно-правовий аналіз спадкового законодавства зарубіжних країн і України та з'ясувати тенденції розвитку спадкового права, осмислити методи подолання проблем, які виникають. Виявлені особливості заповідальної дієздатності неповнолітніх. Висловлена думка, що правове регулювання відносин за участі постмортальних дітей та дітей, народжених за допомогою репродуктивних технологій, може вийти за межі спадкових. З урахуванням історичного досвіду визначено місце спадкового права в системі цивільного права. Обґрунтовано висновок про необхідність розширення свободи заповіту шляхом впровадження спрощених його форм: легалізації простої письмової форми заповіту, а за надзвичайних обставин – допустимість оголошення заповідального розпорядження в усній формі. З'ясовано правову природу секретного заповіту; змодельована норма заповіту з умовою. Запропоновано додаткові способи захисту прав заповідача, серед яких і звернення з позовом до суду про усунення від спадкування особи, яка має право на обов'язкову частку спадщини. Аргументовано положення, що підстави зменшення розміру обов'язкової частки спадкоємця необхідно конкретизувати в законі. Прийняття пропозицій, спрямованих на вдосконалення законодавства, сприятиме здійсненню та захисту спадкових прав. Загальний підсумок дослідження полягає у необхідності рекодифікації спадкового законодавства України з урахування позитивного досвіду країн континентальної Європи.*

Ключові слова: система цивільного права, заповідальна дієздатність, форма заповіту, свобода заповіту, секретний заповіт, заповіт з умовою.

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DIRECTIONS OF UPDATING THE INHERITANCE LEGISLATION OF UKRAINE

Abstract. *The paper investigates the issues of updating the inheritance legislation. The purpose of this paper is to substantiate the first steps towards the creation of a scientific concept for the reform of inheritance law. The need to improve inheritance legislation is conditioned by a number of circumstances: new developments in the doctrine of inheritance law; law enforcement practices and problems that arise in courts upon considering hereditary disputes; the need to adapt domestic legislation to that of EU countries; consideration of Ukraine's aspirations for the European community. The dominant research methods are the comparative method and the modeling method, the use of which allowed to carry out comparative law analysis of the hereditary legislation of foreign countries and Ukraine and to identify the tendencies of development of the inheritance law, to understand the methods of overcoming the arising issues. Features of testamentary capacity of minors are revealed. An opinion was expressed that the legal regulation of relations involving post-mortem children and children born with the help of reproductive technologies may go beyond hereditary. Given the historical experience, the place of inheritance law in the civil law system was determined. The conclusion on the necessity of extending the freedom of testation by introducing simplified forms of it is justified: legalization of a simple written form of thetestament, and in extraordinary circumstances – the admissibility of announcement of the testamentary disposition in oral form. The legal nature of the secret covenant was identified; the norm of the testament with condition was modelled. Supplementary ways of protecting the rights of the testator are proposed, including appeal to the court for the removal of a person entitled to a compulsory share of inheritance from succession. The provision that the grounds for reducing the size of the obligatory share of the heir should be specified in the law is substantiated. Adoption of proposals aimed at improving legislation will facilitate the implementation and protection of inheritance rights. The overall result of the study lies in the need to recodify the inheritance legislation of Ukraine with consideration of the positive experience of continental Europe.*

Keywords: civil law system, testamentary capacity, form of testament, freedom of testation, secret testament, testament with condition.

INTRODUCTION

Inheritance law has a special place in the civil law system. The ability to determine the fate of property acquired during a person's life is one of the most important guarantees for the stability of property relations in any society. Analysing the earlier codification experience,

it should be emphasized that the systematic improvement of legislation, including civil, was conducted based on wide discussions, which were the subject of both general directions of codification and discussion of the content of individual civil law institutions [1; 2]. Inheritance law is one of the most popular practices of the branches of civil law and is the most conservative. The reform of domestic civil legislation in 2003[1] took its toll on almost all institutions of inheritance law (inheritance by testament, inheritance by law, acceptance of inheritance, etc.); however, the revision of the economic foundations of the state, close cooperation with the European Union and Ukraine's aspiration to become a member of the EU, as well as the study of the civil legislation of the continental European countries, necessitate the reform of certain institutions of the inherintance legislation of Ukraine.

Among the general reasons that necessitate the recodification of inheritance legislation in Ukraine are the socio-economic transformations in society, the emergence of new property rights and, accordingly, the objects of hereditary succession [3], the unjustified static nature of certain conventional legislative provisions. In the modern era, the rules of inheritance law lose their dogmatic content, must become mobile, respond to economic changes in the state and in society at large. A number of problems that arise both in theory and in practice require solving, namely: determinatino of the circle of heirs by law and by testament; establishment of the composition of hereditary property; the procedure for exercising inheritance rights, their protection and security; recognition of the testament as invalid or partially invalid because the testator has deprived the heir of a compulsory share of the inheritance; division of hereditary property; inheritance of property undergoing privatization; recognition of ownership of part of the property which the testator has left as theirs; establishment of legal facts (being in family relations with the testator, residing with them as one family, being supported by testator, permanence of residence with the testator); the recognition of the inheritance certificate as invalid and the extension of the inheritance period; invalidation of mutually exclusive testaments; execution and termination of the hereditary agreement, etc.

Legislation modernization should consider the following: the development of the doctrine of inheritance law in recent years; law enforcement practices and problems that arise in courts when considering hereditary disputes; the pursuit of the implementation in the national private law system of European standards enshrined in the civil codes of continental Europe; the need for further development of private law principles of civil law regulation. At the same time, it should be borne in mind that national legislation at the conceptual level reflects the national mentality, legal awareness, legal understanding, etc. and the adaptation of national legislation to EU legislation is notably resisted [4]. The recodification results should reflect new tendencies that exist in regulation of hereditary relations. Despite attempts to develop a new concept of inheritance law, some of its provisions are ambiguous and remain quite vulnerable (category of subjects of inheritance law, grounds for removal from inheritance, inheritance priorities, heritage objects, form of will and its types, right to an obligatory share of inheritance, will of spouses, secret will, testament with condition, institution of inheritance agreement, etc.). This creates certain obstacles for the choice of ways of translating the concept into practice and is the subject

[1] The Civil Code of Ukraine. (2003, January). Retrieved from http://zakon0.rada.gov.ua/laws/show/435-15.

of lively scientific discussions, in the process of which sometimes different opinions are expressed. The purpose of the paper is to investigate individual institutions of inheritance law and to provide proposals aimed at updating inheritance legislation.

1. MATERIALS AND METHODS

To analyze the prospects of further development of the inheritance legislation, the latest developments of the national doctrine of inheritance law were studied, the hereditary legislation of Ukraine and of the countries of the European Union was investigated, the main tendencies of its development were observed, the judicial practice related to the exercise and protection of inheritance rights was investigated, which allows to identify practical issues. The steps taken by Ukraine towards adapting domestic civil legislation to the civil legislation of the EU countries were considered. The structure of scientific research in the field of inheritance law contains the conventional elements: formulation of the problem, proposing baselines and their theoretical development, collection and analysis of empirical data, substantiation of the conclusion, formulation of issues that need to be resolved in the future [5]. Currently, the main tasks in the study of hereditary relations are as follows: to find out the concept and place of hereditary law in the system of Ukrainian law; identification of attributes and features of social relations that arise in inheritance, as well as structural elements of hereditary relations; determination of the optimal ratio of public and private regulatory frameworks in the field of inheritance; investigation of the subjective composition of hereditary legal relations, the grounds for their occurrence, dynamics, and termination; the study of the object of hereditary succession, anomalous types of inheritance, the procedure and conditions of exercise and protection of hereditary rights. Such sequence of research facilitates a comprehensive analysis of the legal categories and phenomena, allowing to achieve the purpose of the study.

Inheritance law is the most conservative branch of civil law, since it is based on the national traditions of the country, a special mentality of society that has been formed for centuries, which necessitates the study of the history of the development of individual institutions of inheritance law and the specifics of methodological approach and methods of researching problems. World experience testifies to the objective nature of the unity of the optimum balance of private and public interests, which is why the main institutions of inheritance law were considered in this aspect. At the same time, the legal regulation of hereditary relations is carried out not only from the standpoint of the interests of the subjects of these legal relations, but also from the standpoint of how these legal relations affect the interests of the subjects of the adjacent legal relations.

Scientific knowledge of legal phenomena should be based on the principles of scientific objectivity, unity of theory and practice, which excludes the bias of the conclusions and results of the study, their dependence on ideology or politics, temporal situationality, and other subjective factors. Since the science of inheritance law does not have its own methods, the methods of formal logic are used in the study. One of the dominant methodological approaches is the comparative law approach, which formed the basis for determining the content of such legal categories as "testament", "private testament", "secret testament", "testament with condition" and allowed to identify their specific features and differences. The normative-dogmatic method is applied for the analysis of the content of the provisions of the current domestic inheritance legislation, and

the system-structural analysis method – for determining the place of the inheritance law in the civil law system. The deep historical roots of inheritance led to the use of the historical method for revealing the evolutionary patterns of the development of legal relations in the field of inheritance, in particular, upon the analysis of the norms of historical monuments of Ukrainian law and the creation of a general theoretical base of problematics and scientific approaches to their study. The comparative method allowed to carry out a comparative-analytical review of the rules of the Civil Code of Ukraine (hereinafter referred to as the CC) governing hereditary relations, and the rules of the civil legislation of the countries of the continental system of law (Germany, France, Switzerland) and of individual post-Soviet countries (Georgia), to identify existing conflicts and identify the most optimal ways of attracting foreign experience to improve the legal regulation of public relations in the said branch.

The method of legal forecasting allowed to identify possible directions for the harmonization of national inheritance legislation with that of the European Union. Modelling method allowed to design the future structure of the object in the development of proposals and recommendations aimed at improving the civil legislation and practice of its application in the field of hereditary succession.

2. RESULTS AND DISCUSSION

2.1 The place of inheritance law in the civil law system

The system of law must act as a consequence of legal realities, reflecting the logical unity of the elements that make up its constitution, their hierarchy and interconnection. The system of law that is built on the subject of legal regulation, fulfils its purpose and acts as a source of knowledge of the law itself. The civil law system aims at knowing the rules of the law and serving the needs of practice, it is based on the uniformity of the content of legal rules, their unity and coherence, as well as on the objective division of legal rules into sub-sectors and institutions, depending on the purpose and objectives. The purpose of legal provisions is to consolidate and preserve the relations that arise in society. Inheritance law, including property law, mediates the dynamics of property relations and primarily includes the elements of property law. The phenomenon of inheritance lies in its dual nature. Inheritance is an independent property right that takes its place along with property, obligations, and other property rights. On the other hand, the inheritance right serves to acquire each of these rights [6].

The analysis of the sources of the formation of civil legislation in the territory of modern Ukraine allows to conclude that there are systems of civil law that are different from the modern ones. Thus, in the Civil Code of Galicia of 1797, built on the institutional principle, the second part covered legal relations in the field of real rights. This part included rules regarding things and their legal classification, ownership, property rights, liens, easements, and the right to use other people's things. The final sections of this part were the sections on inheritance law (the last will and succession agreements, the legates and commissures, the inheritance, and mandatory shares) [7].

Against this background, in the early 1960s, some domestic scholars attempted to structure civil law somewhat differently from what was envisaged by the legislation in force at the time. Thus, on the eve of the second codification of civil legislation, S.N.

Landkoff suggested that the institution of inheritance of personal property of citizens should be placed directly after the section "The right of personal private property" [8]. Other researchers have supported this idea [9]. A similar scientific position is shared among researchers of the V.M. Koretskyi Institute of State and Law of the National Academy of Sciences of Ukraine who, in the textbook "Civil Law of Ukraine", placed section IV "Inheritance law" immediately after section III "Real rights and ownership" [10]. The composition of the inheritance, its core, above all, underlie the real rights of the testator. At the same time, inheritance law is not, by its nature, an independent branch of law. It acts as a kind of intermediary, a necessary prerequisite and legal basis for the acquisition of absolute ownership by the heirs. Property relations and hereditary relations are one and indivisible. In the Civil Code of Ukraine, it is more natural to place the book "Inheritance Law" after the book "Ownership".

The structure of the book "Inheritance Law" also needs changes. It is controversial to place the institution of the inheritance agreement here since the legislator defines only inheritance by testament and inheritance by law as the types of inheritance. The chapter "Inheritance Agreement" uses the terms "acquirer" and "alienator", that is, the terminology of agreements for the transfer of property into ownership. The content of the inheritance agreement provides for the acquisition of certain rights and obligations during the life of the alienator, which is contrary to the legal nature of inheritance, since the acquisition and exercise of inheritance rights is possible only under the indispensable condition – the death of the antecessor. Legal regulation of the relations between the owner of the property and their successor on a binding basis, the occurrence of negative consequences for counterparties in case of non-performance of obligations, goes beyond inheritance relations, which eliminates the possibility of considering the institution of inheritance agreement as an institution of inheritance law. The subject of the inheritance agreement, "alienator's property", does not correspond to the concept of "composition of inheritance". Since the inheritance agreement is not about the inheritance, but about the property of the counterparty under the agreement, in view of statutory regulation, it is advisable to place this agreement structurally after the life care contract in Section III of the CC of Ukraine "Certain types of obligations".

2.2 Testamentary capacity and freedom of testation

A key component of inheritance law is a testament, which is a legal instrument by which a person can determine the fate of their property in the event of death. Full legal capacity under Ukrainian law is granted to a person from the age of 18. Age, as an objective stage in the process of physical and psychological development of a person, exists as an absolute quantitative category, with which is connected the possibility of conscious acquisition of civil rights and performance of obligations. In determining the scope of the capacity, the legislator considers the intellectual and mental abilities of the person. Inheritance capacity is one of the constituent elements of civil capacity. The granting of a legal capacity to a minor in the presence of the grounds established in the legislation is conditioned by the need to exercise and protect its civil rights. The concepts of "disposal of property" and "disposal of property in case of death", despite some similarity, do not coincide in content. Regulation, as one of the constituent elements of the content of property rights, provides the opportunity to determine the legal or factual fate of things. The disposition "in case of

death" is not a disposition in itself, because it does not oblige the owner and does not prevent them from using whatever property owed to them, despite the existence of a testament.

Testamentary capacity is special and constitutes a legally defined opportunity for an individual to express their will to dispose of property owned by them in case of death. The testamentary capacity of a person does not create rights, therefore, with consideration of the specifics of their legal nature, it must be related solely to the age of majority. Testament is a special transaction and its conclusion requires a certain social maturity. D.I. Meyer, who first began to systematically teach the course of civil law in Russia, commenting on the legislation in force at the time, noted that the testator must be in a "normal state of intellectual power", so the minor cannot be ready to make a testament [11]. A similar position was defended in due time by O.V. Kunitsyn, who emphasized that a law that defers the right to testify to legal maturity may appear unfair in some exceptional cases, but that exclusivity only requires an exception to the general rule, not the destruction of the latter, which contains reasonable prohibitions on making a testament in age, in which the law recognizes a minor as incapable of independent disposal of their property [12-13].

The minor has not yet acquired the life experience and maturity that would allow them to determine the fate of their property in the event of death. It is no coincidence that there is no known notarial practice of making testaments by minors. Precisely this position is reflected in the legislation of individual countries. Thus, Art. 1345 of the Civil Code of the Republic of Georgia stipulates that the testator can be an adult, capable person who at the time of making the testament could reasonably judge their actions and clearly express their will[1]. Of course, a single universal formula cannot solve all the circumstances of life that may arise in different cases, and here, in our view, the opinion of Z.V. Romovska makes sense, who believes that in an exceptional situation where, for example, a minor does not have heirs by law, it is possible to go to court with a claim for granting the right to a testament [14]. When recoding Ukraine's legislation, it is necessary to avoid the "inferiority complex", as some national institutions are also entitled to exist, including those concerning the testamentary capacity of minors. As for the right of testation of persons with disabilities, the following should be noted. The opinion according to which the exercise of such a right is possible subject to the consent of the curator [15] requires additional argumentation. The specifics of the testament as a transaction is that it is so closely connected with the personality of the testator that its drawing up with the involvement of a representative or a curator is excluded, as is the agreement of conditions of the testament with the testator's curator. This would violate the testator's right to secrecy and would contravene such principle of inheritance law as the freedom of testation.

The advances in modern medicine, the ability to use reproductive technologies at birth, necessitate the resolution of problems concerning the establishment of the legal origin of a child born long after the death of the antecessor by in vitro fertilization. The current legislation of Ukraine does not envisage such cases, since the presumption of paternity is valid only for ten months after the death of the husband, so the fact that there are family ties between such a child and its father must be established in court. Contemporary researchers have reasoned fears that reproductive technologies, going

[1] Civil Code of Georgia. Retrieved from https://matsne.gov.ge/ru/document/view/31702?publication=105.

beyond the strict canons of civilization, can give rise to several issues, including the determination of the circle of heirs under a testament. Proposals to grant special status to so-called *post-mortem* children and children born with the help of reproductive technologies should be treated especially carefully, since the legal regulation of such relations may go beyond hereditary, as the acquisition of property rights by such persons will not be directly related to the day of inheritance release. Perhaps this issue can be partly solved by legalizing specially created *inheritance trust funds*, which would be used to manage the assets of a person after their death. With the help of such a fund, the testator could provide financial assistance to a certain number of people after his or hers death or do charity, but such relations should no longer be considered hereditary. A relevant example here is the creation of the Alfred Nobel Foundation, from which the Nobel Prizes are paid annually, as well as the fund of the German math enthusiast Wolfskel, created to reward the person who will prove the Fermat theorem [16].

Insufficiency of legal regulation, a certain ambiguity of the legal regime of hereditary property and the need to protect it from the moment of inheritance release to its transition to heirs necessitate creation of a special section in the CC of Ukraine, the rules of which would regulate the specific features of *inheritance of certain objects of hereditary property* (enterprises, land plots, intellectual property objects, etc.), which are currently "scattered" across separate laws and sub-legislative regulations. It is advisable to discuss the *empowerment* of the heir *to sell* the heritage, which has not yet been registered in accordance with the established procedure, at the doctrinal level. Legal regulation of such relations could be carried out according to a kind of assignment of the right of claim.

Freedom of testation envisages the right of the person to draw up a testament for all property or for a certain part of it at any time, to change, cancel, or not to draw up a testament at all, and to appoint any person as heir. However, the principle of freedom of testation is limited by the right of individuals to have a compulsory inheritance. The law stipulates that the size of the compulsory share in the inheritance may be reduced by the court, with consideration of the relationship between the heirs and the testator, including other significant circumstances. The circumstances that may form the basis for reducing the size of the mandatory share must be specified in the law. This could be, for example, deliberately false testimony in court against the testator; false accusation of testator committing a crime; failure to report that an attempt on the life of the testator is being prepared; failure to provide assistance in the case of a real threat to testator's life, etc. Restriction of freedom of testation should not restrict the right of a person to dispose of their property, but act as an objective necessity to protect the interests of the closest incapacitated relatives and incapable spouses whom the testator is legally obliged to support. The testator must be able to defend their subjective right to dispose of property until death. It is proposed to give the testator, as the most interested person, *the right* to request, through a court procedure, the reduction of the size of a mandatory share of a certain heir *while alive*, and in the circumstances stipulated by law, to demand the removal of the heir from succession.

2.3 Form of testamentary disposition

The next step in the reform of the hereditary legislation should be the legalization of simple written testaments (the so-called, *home-made testaments*) and oral testamentary

dispositions made in extraordinary circumstances. In accordance with the current civil legislation, the testament must be certified by a notary or other officials to whom such a right is granted. The imperative nature of the testament is conditioned by the need to secure the testator's right to the last will and to exclude the possibility of challenging this transaction in court by interested persons.

The home-made testaments are made by the testator on their own, and if the text is typed or made by another person on behalf of the testator, each sheet of testament shall be signed separately, stating the date. The legislation of Italy, France, and Spain permit the drafting of such testaments [17]. The *olographic will* has several practical advantages. The last will of the individual is expressed in the simplest, most formal, cheapest legally permissible way. The simplified form of the testament will allow citizens to actually exercise their right to make it, since the considerable material costs associated with its notarization are one of the obstacles to the spread of this institution. And it is no coincidence that, for example, in Hungary, a member state of the European Union, the share of such testaments is about 30% [18]. Of course, the legalization of "home-made" testaments also entails certain dangers related to both the unawareness of citizens on the requirements for the contents of the will and the conditions of its storage, and just fraudulent forgeries of the testament. The former of the named threats can be avoided by developing a sample "home-made" testament with all the necessary details and placing it on the website of the Ministry of Justice of Ukraine. As for other issues, according to foreign researchers, examinations using modern technologies in most cases can confirm whether the testator actually wrote the testament [19].

Legislation of several European countries supports the possibility of making an oral will. The oral form of the testament is admitted as an exception in the circumstances when, for objective reasons, the testator is unable to notarize their will. For example, the preparation of an oral testation in extraordinary circumstances in the presence of two witnesses is allowed by the laws of Austria, Israel, Norway, Hungary, Croatia, Switzerland, Sweden [18]. The validity period of such a testament differs. Thus, according to the laws of Austria, Denmark, Norway, Hungary, Sweden, if the special circumstances when the will was announced verbally disappeared, it will expire within three months provided that the testator stays alive [20; 21]. The legislation of Switzerland establishes the validity of such a will within 14 days from the moment when the testator has the opportunity to complete all the usual formalities[1].

It makes sense to use both the experience of foreign countries and historical domestic experience (the Civil Code of Galicia) and to enshrine in the legislation both a simple written form of a testament and the possibility to declare the last will in oral form in extraordinary circumstances. In case of extraordinary, exceptional circumstances, when the citizen is in such a state that threatens their life and is deprived of the opportunity to make and certify the testament in accordance with the established requirements, such person should be empowered to express their last will orally in the presence of two witnesses. The legal consequences of such a testamentary disposition will depend on the fate of the testator himself. If the person is still alive, such a disposition shall be forfeited

[1] Civil Code of Switzerland. (2017, September). Retrieved from https://www.admin.ch/opc/en/classified-compilation/19070042/201709010000/210.pdf

if, within seven days, circumstances, which prevented its drafting and certification in accordance with the established procedure, have ceased. The three-month statutory period of validity of such a disposition appears unjustified, in our opinion. If the testator dies as a result of extraordinary circumstances, the testament made by them can serve as the basis of inheritance, provided that the court, at the request of the person concerned, recognizes the fact of creating such a testament. The court must establish the existence of extraordinary circumstances, the inability of the testator to properly certify the testament, the presence of impartial witnesses who can certify the free expression of the testator's will and the contents of his or hers disposition.

The benefit of the relevance of the simplified form of the testament is also evidenced by the experience of those countries whose courts have validated the oral wills concluded with the use of modern electronic equipment. The judgment of the Supreme Court of New South Wales (Australia) is noteworthy. The testator decided to make changes to the testament, but for reasons of ill health he was unable to contact the lawyer's office and therefore recorded his will on video in the presence of his wife and witnesses. The video was accompanied by a transcription in Chinese and an English translation by a translator certified in accordance with the established procedure. The court ruled that the deceased person made the video voluntarily and knowingly, the statement made by him was well thought out, calm, clear, and the intentions were not in doubt and supported by external evidence of the circumstances and the absence of objections in any other persons. Although the video does not meet the requirements of the formality of the testament, it falls within the legal definition of the term "document" and can therefore be recognized as an informal testament [22].

2.4 Secret (closed) testament

A secret testament is a testament that is notarized without reading its contents. The specific feature of such a testament lies in the procedure of its certification and disclosure. The legislation does not prohibit the preparation of a common secret testament of spouses. Thus, in a Supreme Court ruling dated April 12, 2018, it was stated that "the content of the principle of the permissive orientation of civil law regulation derives from the general principle of private law: "everything which is not explicitly forbidden by law is allowed" [23]. However, the procedure for concluding a *secret testament* does not meet the legal requirements for its notarial form, since the notary certifies not the fact of entering into a transaction, but the fact of the person storing the envelope, which allegedly contains their written disposition in case of death. Preservation of "secret testaments" in the legislation necessitates the legalization of so-called *"home-made" testaments* as well, since it is essentially a matter of making a testament in a simple written form and transferring it to a notary. There are no known cases of domestic judicial practice, where an interested person would apply to a notary to disclose the secret of the testament, therefore it is not necessary to overestimate the importance of "secret testaments". Witnesses present at the transfer of a “secret testament” to the notary certify only the fact that the testator truly transferred a closed envelope to the notary on a certain date, which possibly contained a testament.

Testament is a transaction that requires a binding notarial form under threat of invalidity. The notary must ascertain whether:

–the person truly wants to draw up a disposition in case of their death, rather than, for example, concluding a life care agreement or a deed of gift;

–this personal disposition can be considered a testament and not, for example, an assignment agreement;

– persons who are heirs and property that they must inherit are unambiguously identified;

– the rights of the compulsory heirs, which are entitled to a compulsory share of inheritance, regardless of the will of the testator, are limited;

– the testamentary disposition does not contain such conditions for the acceptance of an inheritance, which in essence are unlawful or immoral;

–the terms of the will are feasible;

– the testator signed the testament at all.

Notary's signature on the envelope does not constitute a certification of the transaction. The notary has no idea in which language the testator wrote the secret testament, since there is not legislative requirement to use the state language upon creating the secret testament. In our opinion, this case refers to committing such a notarial act as receiving documents for storage. As for the form of the will, it would be concluded in a simple written form, since the testator himself made it and personally signed it. Thus, the legislator simplifies the process of certifying a testament by essentially legalizing its simple written form.

The imperfect wording of the article that stipulates the creation of a "secret" testament, will result in a variety of notarial practices, "programmability" for copious court disputes, and most importantly, it will not reach the purpose set by the legislator: to exclude possible abuse by the persons who certify the testament. There should be a careful treatment of proposal to consider a text variant of the testament or a video of a testamentary disposition posted on the website or the web page of the testator as a secret testament and the possibility to make changes and cancel them without undue appeal to a notary [24]. The uncertainty of the term of making such a testament may create certain obstacles to the exercise of the rights by the heirs, does not exclude the existence of several wills, raises the question as to the capacity of the testator at the time of introducing changes. A testament is a special transaction, the legal consequences of which can ensue only after many years. In the digital age, it is important to be cautious about implementation of an *electronic form of testament*. It is necessary not only to record the commission of the transaction, but also to make sure that the testator's will was real and freely expressed.

2.5 Testament with condition

An individual may exercise their right to dispose of property in case of death by making a testament only if their will is minimally restricted by the legislator. Freedom of testation includes not only the right of the testator to make a testament at any time, to determine the objects of hereditary succession, to appoint any person as heir, etc., but also to define the conditions of succession by heirs, which is justified and fair, since after the inheritance release the testator, by virtue of natural causes, will no longer be able to adjust their last will. According to Art. 1242 of the CC of Ukraine "Testament with condition", the testator may cause the right of inheritance of the person appointed in the testament to emerge under a certain condition, both related and unrelated to their behaviour (presence of other heirs,

residence in a certain place, child birth, education, etc.)[1]. The condition in the testament is a legal fact, an element of the set of facts, which, together with other legal facts, gives rise to the legal relations of inheritance under the testament [25].

The testament with condition is well-known in the legislation of continental European countries [26; 27]. Thus, allowing the creation of a testament with condition, the French legislator in Art. 899 of the Civil Code states that testamentary conditions that cannot be performed because they contradict the laws or good practice shall be rendered null and void[2]. In Spain, testamentary dispositions can be made conditional irrespectively of their universal or particular nature, that is, whether they are made with respect to all hereditary property or concern only part of the inheritance. Conditions of a testament that contradict the law or good practices are considered to be unwritten, so that they cannot harm the heirs[3]. Paragraph 2075 of the German Civil Code states that if the testator provided for the inheritance in the testament under the condition that a person is required to perform a certain action or to refrain from performing such action for a certain period, then in case the non-performance or performance depends solely on the will of the specified person, it must be considered that inheritance will depend solely on the resolutory condition associated with the performance or non-performance of the action by this person [28]. That is, this innovation contains an important rule: if the heir does everything on their part, then the condition of the will shall be considered as such that was performed.

In all domestic codifications, the general provisions on transactions contained rules that allowed the parties to conclude them on condition. The specific feature of the will lies in that it is a unilateral transaction, and therefore the provisions of the General part of the CC of Ukraine, the rules of which regulate the procedure for concluding bilateral transactions, do not apply to it. The condition in the will differs in its essence from the condition in the bilateral transaction. If the fact that is stipulated in the transaction with condition may or may not occur in the future, then the fact that allows to acquire the inheritance by testament with the condition must exist at the time of opening the inheritance, and the occurrence of such a legal fact may not only not depend on the will of any person, but also be objectively inevitable.

The legislator not only explicitly stipulated that the testator could cause the right to inherit in a person subject to the existence of a certain condition, but also provided an indicative list of such conditions. The condition must exist at the time of inheritance release. The necessity of imperative provisions of Art. 1242 of the CC of Ukraine raises no doubt among researchers who consider it as the evidence of the extension of freedom of testation. We cannot unconditionally agree with the conclusion on the extension of the freedom of testation, provided the mandatory existence of condition at the time of inheritance release. The heir, in accordance with the last will of the testator, can conscientiously begin to perform their obligations, but, being limited in time, may not achieve the result determined by the testator (get a higher education, build a house, etc.). In such circumstances, the heir does not acquire a testamentary inheritance. Such certainty

[1] The Civil Code of Ukraine. (2003, January). Retrieved from http://zakon0.rada.gov.ua/laws/show/435-15.
[2] Civil Code of France (2013, July). Retrieved from http:// www.wipo. int/wipolex /ru/text. jsp?file_id=450531
[3] Civil Code of Spain. (1889, July). Retrieved from http://derechocivil-ugr.es/attachments/article/45/spanish-civil-code.pdf

of the existence of condition in time testifies not to the extension of the freedom of testation, but to the contrary, to its restriction, to the possibility of distortion of the actual testator's will, who did not wish to deprive the heir of the inheritance, and whose purpose was to induce the latter to take actions that are useful for the heir in the first place. To protect the interests of the heir in such cases, it is proposed not to limit the testament to the requirement to the heir – "to have a diploma of graduation", but to allow as a condition – "to be a student of a higher education institution" at the moment of the testator's death [29].

Citizens are granted the right to dispose of their property not only while alive, but also in case of death. The testator wishes their successors only good. The fulfilment of the testamentary conditions may be connected with the actions committed in favour of the public associations, the territorial community, and the entire society at large. The legislator shall be guided by this presumption. The condition cannot limit a person's legal capacity, but in some cases it will not satisfy their desires. For example, they may not "welcome" the condition of obtaining higher education in a specific, one-of-a-kind institution. The heirs always have the right to choose: to perform the condition of the will, if it does not contradict the requirements of the legislation, or not to accept inheritance. Making a testament with condition in the current wording assigns the heir the role of a passive observer. If the actions taken by him are not related to the achievement of the result specified in the testament, they have no legal value. The testamentary conditions which enable the heirs to inherit should not be limited to the day of inheritance release. They must be allowed to run within a certain period. In this case, the will must determine the fate of the property during the time when the condition of inheritance may occur (period of study, pregnancy, military service, etc.), the procedure for storage of hereditary property, the possibility of signing a contract of notary management or appointment of persons who should care for it during this period. The legal fate of the hereditary property will depend on the heir's performance of the conditions of the testament within a specified or reasonable time. The legal regime of hereditary property will, to some extent, resemble the legal regime of discovery, since its fate also depends on whether the person will take certain actions or not.

The testator cannot oblige the heirs not only to commit acts that are unlawful or restrictive of their rights, but also to acts, the commission of which is contrary to universal human rules of conduct or established customs. For example, it would be immoral require terminating any relationship with certain relatives, restrict aid and care, and so on. The very condition of the testament must not contradict the current legislation, the rules of public morality and should not limit the legal capacity of the heir. The condition must be determined by the content, determined in time or such, the performance of which requires the reasonable period. The performance of the condition must be related only to those benefits which the heir can dispose of on their own. Finally, the condition must be factually and legally enforceable [30], which will protect the heir's interests against the possible arbitrariness of the testator. The above criteria are a matter of judgement and in each individual case in the event of a dispute between the heirs, it is the prerogative of the court to interpret them. First of all, the literal meaning of the words and concepts and the essence of the testator's intentions are considered. If, however, the interpretation does not allow to figure out what the condition of the testament is and how it should be performed, then the condition is declared null and void.

CONCLUSIONS

1. The civil law system aims to understand civil law provisions and serve the pragmatic needs; it must be based on homogeneity of the content of the legal provisions, their unity and coherence, as well as on the principle of an objective separation of legal provisions into sub-branches and institutions, depending on the purpose and tasks set before them. Therefore, the placement of legal provisions governing the grounds and procedure for inheritance in the Civil Code of Ukraine after the institution of real rights appears quite natural.

2. The full provision of legal capacity to a minor person, subject to the grounds established in legislation, is determined by the need to exercise and protect their civil rights. The concepts of "disposal of property" and "disposal of property in case of death", despite their similarity, have different meanings. Disposition, as one of the constituent elements of the content of property rights, provides the opportunity to determine the legal or factual fate of things. The disposition "in case of death" is not a disposition in itself, because it does not oblige the owner and does not prevent them from using their property in any way, despite having a drawn up testament. *Testamentary capacity* is special and constitutes a statutory opportunity for an individual to express their will to dispose of property owned by them in case of death. The testamentary capacity of the person does not create rights, therefore, with consideration of the specific features of its legal nature, it must be linked to the coming of age.

3. The testator must be able to protect their subjective right to dispose of property before death. It is proposed to empower the testator, as the most interested person, with the *right* to demand, *while alive*, a reduction in the size of a mandatory share of a certain heir through a court procedure, and in the circumstances provided for by law, to require the removal of the heir from succession.

4. Considering the experience of foreign countries and historical domestic experience, there are grounds for enshrining in the legislation both the possibility of making a testament in a simple written form and to orally pronounce testamentary disposition in exceptional cases.

5. The current procedure for concluding a *secret testament* does not meet the legal requirements for the notarial form of the testament, since the notary certifies not the fact of making a testament, but the fact of the person depositing the envelope, which contains their written disposition in case of death.

6. Making a *testament with condition* that must exist at the time of inheritance release limits the right of the testator to the free disposal of property in case of death and the principle of freedom of testation. The testamentary condition may exist not only *at the time of inheritance release*, but also ensue *within a certain period* or during the usual period necessary for the heir to perform the testamentary condition. During this time, the testamentary executor or the notary must take measures necessary to protect the hereditary property.

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СКАСУВАННЯ ГОСПОДАРСЬКОГО КОДЕКСУ УКРАЇНИ: ПОТЕНЦІЙНІ НАСЛІДКИ ТА НЕОБХІДНІ ПЕРЕДУМОВИ

Анотація. *У статті здійснено аналіз положень Господарського кодексу України, співставлення їх з окремими положеннями Цивільного кодексу України та окремими законами, іншими нормативно-правовими актами. Враховуючи потребу у приведенні до відповідності українського законодавства до законодавства країн Європейського Союзу у сферах законодавства щодо заснування та діяльності компаній, корпоративного управління, з питань захисту прав акціонерів, кредиторів та інших заінтересованих сторін, з питань подальшого розвитку політики корпоративного управління відповідно до міжнародних стандартів, а також поступового наближення до правил та рекомендацій Європейського Союзу у цій сфері, зроблено висновок про доцільність скасування Господарського кодексу України шляхом ухвалення відповідного закону, в якому передбачити усі необхідні заходи із забезпечення належного правового регулювання відносин на період підготовки відповідних системних змін до Цивільного кодексу України. Доведено, що більшість норм ГК України є відсилочними або бланкетними, а відтак мають мінімальний регуляторний вплив та здебільшого дублюють положення, закріплені в інших нормативно-правових актах. На підставі аналізу положень Господарського кодексу України зроблено висновок, що його норми з огляду на їх мінімальний*

регуляторний вплив на підприємницькі відносини та з урахуванням детальної регламентації цих відносин у Цивільному кодексі України можуть скасовуватися без жодних застережень. За таких умов та з метою спрощення правового регулювання підприємницької діяльності, а також з огляду на обов'язки нашої держави (зокрема, привести у відповідність українське законодавство до законодавства країн ЄС у сферах законодавства щодо заснування та діяльності компаній, корпоративного управління, з питань захисту прав акціонерів, кредиторів та інших заінтересованих сторін, з питань подальшого розвитку політики корпоративного управління відповідно до міжнародних стандартів, а також поступового наближення до правил та рекомендацій ЄС у цій сфері) доцільність скасування Господарського кодексу України не викликає жодних сумнів.

Ключові слова: Цивільний кодекс України, правові принципи, приватноправові відносини, кодифікація, рекодифікація, підприємницькі відносини.

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ABOLITION OF THE COMMERCIAL CODE OF UKRAINE: POTENTIAL CONSEQUENCES AND NECESSARY PREREQUISITES

Abstract. *The paper analyses the provisions of the Commercial Code of Ukraine, comparing them with certain provisions of the Civil Code of Ukraine and separate laws and other regulations. Considering the need to align Ukrainian legislation with the legislation of the European Union countries in legislation regarding the establishment and operation of partnerships, corporate governance, protection of shareholders, creditors and other interested parties, regarding the*

further development of corporate governance policy in accordance with international standards, including the gradual approximation to the rules and recommendations of the European Union in this area, it is concluded that it is advisable to abolish the Commercial Code of Ukraine by adopting the relevant law, which stipulates all necessary measures to ensure proper legal regulation of relations for the period of preparation of the relevant systemic changes to the Civil Code of Ukraine. It is proved that most of the provisions of the Civil Code of Ukraine are reference or blanket, and therefore have minimal regulatory impact and mostly duplicate the provisions enshrined in other regulations. Based on the analysis of the provisions of the Commercial Code of Ukraine, it is concluded that its provisions, given their minimal regulatory impact on business relations and considering the detailed regulation of these relations in the Civil Code of Ukraine, can be repealed without any reservations. In such settings and in order to simplify the legal regulation of business activity, as well as in view of the obligations of our country (in particular, to bring the Ukrainian legislation in conformity with the legislation of the EU countries in legislation regarding the establishment and activity of partnerships, corporate governance, protection of rights of shareholders, creditors, and other stakeholders, regarding further development of corporate governance policy in line with international standards, as well as the progressive approximation to EU rules and recommendations in this area), the expediency of abolishing the Commercial Code of Ukraine is beyond doubt.

Keywords: Civil Code of Ukraine, legal principles, private law relations, codification, recodification, entrepreneurial relations.

INTRODUCTION

The adoption of the Civil Code of Ukraine and the Commercial Code of Ukraine in 2003[1], which came into force on January 1, 2004, marked a new era of development of the national legal system under the conditions of artificially created dualism of private law. An analysis of the fifteen years of experience of applying the provisions of the Civil Code of Ukraine and the Commercial Code of Ukraine, as well as the scientific discussions that have been ongoing since the very beginning of the draft of the Civil Code of Ukraine, the judicial practice of dispute resolution, give grounds to conclude that there are systematic contradictions between the provisions of these codified acts, in particular concerning the basic principles of regulation of business activity, legal entities, substantive and binding legal relations, etc., which significantly impede the economic development of our country, in particular the development of legislation in line with the provisions of the Association Agreement between Ukraine and the European Union.

In view of its fundamental principles, the Commercial Code of Ukraine substantially limits the development and functioning of market relations in Ukraine, since the very nature and methods of regulating business law have historically been aimed at ensuring the functioning of the planned economy of the Soviet state. From a formal legal standpoint, the existence of general provisions in the Commercial Code of Ukraine makes it impossible to qualify this code, in accordance with Part 2 of Art. 4 of the Civil Code of Ukraine, as an act of civil legislation that regulates entrepreneurial (in the terminology of the Commercial Code of Ukraine – the so-called "business") relations.

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

It should be Individually noted that most of the provisions of the Commercial Code of Ukraine (as will be proved below) are blanket or referential at best, which reason to argue about the insignificant effect of the Commercial Code of Ukraine (as against the rules contained in special laws) on regulation of public relations, in particular entrepreneurial ones.

The depth and extent of the contradictions between the Civil Code of Ukraine and the Commercial Code of Ukraine suggests that these conflicts can only be eliminated by abolishing the Commercial Code of Ukraine. Under the abolition of the Commercial Code, the authors of the paper understand the recognition of it as invalid. The corresponding draft law No. 2635 was registered in the Verkhovna Rada of Ukraine on December 19, 2019.

Considering the above, the purpose of this paper is to identify potential consequences and to establish the necessary prerequisites for the abolition of the Commercial Code of Ukraine in pursuance of the Resolution of the Cabinet of Ministers of Ukraine No. 650 dated 17.07.2019 "On Creation of a Task Force on the Recodification (Updating) of the Civil Legislation of Ukraine".

1. MATERIALS AND METHODS

The research methodology is conditioned by its purpose and lies in the analysis of the corresponding provisions of the Commercial Code of Ukraine (its structural parts – sections, chapters, paragraphs, separate articles, etc.) for the occurrence of negative consequences or legal vacuum in the regulation of entrepreneurial relations in case of abolition of the Commercial Code of Ukraine. For the purpose of writing this paper, the legal and regulatory framework included the Civil Code of Ukraine, the Commercial Code of Ukraine, the Land Code of Ukraine, the Water Code of Ukraine, the Forest Code of Ukraine, and the Subsoil Code of Ukraine, as well as other regulations, including the Law of Ukraine "On Joint Stock Companies"[1], the Law of Ukraine "On Securities and Stock Market"[2], the Law of Ukraine "On Environmental Protection"[3] etc. The paper uses general scientific and special legal methods of scientific knowledge. The main method is comparative law, which allowed to identify and analyse the duplication of legal provisions by the Commercial Code of Ukraine, which are contained in other regulations, including the Civil Code of Ukraine.

The historical law method allowed to investigate the stages of the establishment, adoption, and development of regulations. Philosophical and functional methods allowed to outline the prerequisites for developing an effective mechanism for the legal regulation of relations and to identify the interrelation between the preconditions for their emergence. The dialectical method of cognition accompanied the entire process of scientific research and allowed to consider the tendencies of development and improvement of the Ukrainian civil legislation in the context of European integration. Formal law method is applied in the analysis of legal rules governing legal relations and practices of their application.

[1] Law of Ukraine "On Joint Stock Companies". (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/514-17

[2] Law of Ukraine "On Securities and Stock Market". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3480-15

[3] Law of Ukraine "On Environmental Protection". (1991, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1264-12

Among other methods of researching the aforementioned issues, a simulation method was used, which provided an opportunity to consider the scientific and legislative problem of improving the civil legislation and, accordingly, the abolition of the Commercial Code, as an organized and purposeful goal that serves to improve the Ukrainian legislation. The presented scientific ideas of the authors in the context of the modern development of civil relations include targeted, methodological, substantive, institutional, and resultative components.

2. RESULTS AND DISCUSSION

2.1 General characteristics of the Commercial Code of Ukraine and its main drawbacks

The debate over the ways in which the legal rules governing relations in economic turnover should be organized have been ongoing for more than a decade and its fiery has not diminished over time. It received a new impetus during the last large-scale codification in Ukraine. Back in 2002, the authors of the textbook "Commercial Law" stated with unprecedented optimism that the main branch-related codification act in economic relations should be the commercial code, which would consolidate the unity of the subject, the general principles and directions of business and legal regulation and thus should become a backbone act [1].

Representatives of commercial law science had high hopes for the Commercial Code, because they viewed it as a pivotal act that would determine the basic "rules of the game" for all participants of economic turnover [2]. At the same time, even before the entry into force of simultaneously adopted and inharmonius Civil Code and Commercial Code, civilists had warned of probable issues that awaited not only lawyers but also the entire entrepreneurial environment [3].

Even then, the Commercial Code of Ukraine caused an avalanche of criticism from opponents: "The pillars of the code and many other "components" were made during the first five-year plans (economic competence, forms of property, branch management of the national economy) and in the 1960s (the right of economic management, the right of operational management, forms of ownership, enterprise funds, the owner of the enterprise, industrial goods, consumer goods). The "youth" is represented by the monstrosities that saw the light in the early 1990s as a result of desperate attempts to oppose the old Soviet instruments of managing the administrative economy by the new economic realities of semi- and quarter-market Ukrainian reforms (state, communal, private, leased enterprises).

The developers of the Commercial Code gripped the legacy of the socialist past with a bulldog determination, either intentionally or otherwise trying to squeeze the Ukrainian economy into a Procrustean bed of bankrupt concepts [4]. We shall note that the developers of the Commercial Code of Ukraine and its supporters have largely manipulated the unawareness of most Ukrainian entrepreneurs at the time and the assurance that in civilized Europe, along with the conventional Civil Code, there is another one, which governs the stream of commerce – the Commercial Code, for example, in Germany, France..

I.V. Spasybo-Fatieieva fairly points out that the comparison of the adoption of the Civil Code and the Commercial Code in Ukraine with the codification experience of other countries, which our codified acts attempt to emulate, is not always appropriate. This applies to the statement that in many countries there are commercial or trade codes and

therefore the adoption of the Commercial Code of Ukraine is a natural step in the European legal framework. Apart from being untrue, this statement contains a misrepresentation of the Commercial Code of Ukraine as something similar to commercial or trade legislation of other countries [5]. Analysing the experience of legislative development of Eastern European countries, Ye.O. Sukhanov points out some important general tendencies which, among other things, extend to Western European states. Firstly, this refers to a substantial reduction of legal systems that maintain a separate regulation of civil and commercial law. Secondly, in reducing the scope of agreement-based regulation that is enforced by trade law (in those countries where it is preserved as a national feature of their rule of law), its "corporate part" comes to the fore. Thirdly, the commercial codes that are in force in European states (both the classic codes of the 19th century and the modern codifications of Bulgaria, Lithuania, or the draft Slovak Trade Code) remain private law acts, which systematize a certain (rather small) part of private law institutions and represent commercial law as "special private law", which is generally subordinated to the action of civil law as "general private law" [6].

Despite the fact that over the years since the Commercial Code of Ukraine came into force it has been massively ousted by acts of special legislation, its proponents do not give up the hope of delaying its complete disintegration, making every effort to demonstrate its ability to “survive” in the legislative orbit". At the same time, the experiment, which began in Ukraine in 2003-2004, not only did not reveal any advantages of the implemented codification of economic legislation, but quite the contrary – confirmed that the only correct and logically consistent way is the incorporation of commercial legislation according to its main areas: stock, investment, competition, banking, insurance, corporate, bankruptcy, etc. [7].

One of the developers of the Civil Code of Ukraine, A.S. Dovhert points out that civil law codification has become a significant achievement of national legal thought in Ukraine and, undoubtedly, the most significant step towards democratic transformation in the country. The Code confidently steers relations towards the market and civil society, even though it was doomed to act in the environment of the non-market and opposing Commercial Code of Ukraine [8-10]. Therefore, it is no coincidence that the updating of the Civil Code of Ukraine and its recodification cannot be a complete, logical, effective tool without abolishing this "vestige" of the administrative-totalitarian system – the Commercial Code of Ukraine. To assess the consequences and identify potential risks of cancellation of the Commercial Code of Ukraine, the provisions of the Commercial Code of Ukraine were consistently analysed and compared with the corresponding provisions of the Civil Code of Ukraine, other codes and laws of Ukraine. Considering the limited volume of the scientific article, only the main conclusions and results of the study are given.

Thus, the analysis of Section I of the Commercial Code of Ukraine[1] *"Basic Principles of Business Activity"*, which includes 4 chapters and 54 articles, gives reason to believe that its provisions by their nature create a certain attribute of the Commercial Code as a codified regulation, which should include certain general provisions. However, the analysis of articles included, for example, in Chapter 1 of the Commercial Code of

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

Ukraine, suggests that they do not substantially comply with the principles of free entrepreneurial activity, market principles of economic development of Ukraine, in particular those enshrined in Art. 42 of the Constitution of Ukraine[1]. The same applies to the provisions of Chapter 2, *"Main Directions and Forms of State and Local Government Participation in the Economic Sector"*, which are purely declarative in nature and are intended to outline the potential fields of influence of the state and local governments on entrepreneurial relations. At the same time, in view of the fact that according to Part 2 of Art. 19 of the Constitution of Ukraine, the said influence of state and local self-government bodies is exercised solely on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine, the respective regulatory powers, as a rule, are stipulated by special legislation – Laws of Ukraine "On the Cabinet of Ministers of Ukraine", "On the Antimonopoly Committee of Ukraine", "On the State Property Fund of Ukraine", etc. Accordingly, the provisions of Chapter 2 of the Commercial Code of Ukraine are purely declaratory or referential and have no considerable regulatory effect on entrepreneurial relations.

A detailed analysis of Chapter 3 of the Commercial Code of Ukraine[2] *"Restriction of Monopoly and Protection of Business Entities and Consumers from Unfair Competition"* also confirms the conclusion that this chapter is unable to ensure even a minimal level of regulatory influence on respective relations in competition law. This function is performed in full by specific laws. These are, above all, the Laws of Ukraine "On the Antimonopoly Committee of Ukraine"[3], "On Protection of Economic Competition"[4], "On Protection against Unfair Competition"[5], etc.

A similar conclusion is reached in the analysis of Chapters 4 and 5 of the Commercial Code of Ukraine[6], which lack the truly meaningful principles of regulation of entrepreneurship in Ukraine. Instead, the provisions of these chapters are either declaratory or refer to an indefinite scope of legislative acts that should regulate the so-called "commercial business" and "non-commercial business" activities. Art. 49 of the Commercial Code of Ukraine deserves special mention, it introduces the term "foreign entrepreneurs" into Ukrainian legislation, and at the same time fails to define it.

Against this background, and given the minimum substantive and regulatory load of articles included in Section I "*General Provisions*" of the Commercial Code of Ukraine, it is reasonable to conclude that there are no adverse effects in the abolition of the articles included in this section (Articles 1-54 of the Commercial Code of Ukraine). Furthermore, the abolition of Section I of the Commercial Code of Ukraine can take place without significant risks to the legal regulation of economic relations, given their minimal

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

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

[3] Law of Ukraine "On the Antimonopoly Committee of Ukraine". (1993, November). Retrieved from https://zakon.rada.gov.ua/laws/show/3659-12

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

[5] Law of Ukraine "On Protection against Unfair Competition". (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/236/96-%D0%B2%D1%80

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

regulatory impact on entrepreneurial relations and considering the detailed regulation of these relations in the Civil Code of Ukraine.

Section II *"Business entities"* also incites serious remarks. It is known that in the Civil Code of Ukraine[1] the concept of legal entities originally proceeded from the approaches existing in the European private law concerning the types and legal forms of legal entities. As Professor A.S. Dovhert points out on this matter, "maintaining an existing system of" enterprises" in Ukraine (identifying an enterprise with a legal entity is a fatal error) will only prolong economic stagnation".

The concept of legal entities enshrined in the Civil Code of Ukraine is as follows. Legal entities are the subjects of relations, these legal structures provide for the separation of property, which may occur with or without the unification of persons (Art. 81 of the Civil Code of Ukraine). Approaches to differentiation of legal forms in Civil Code of Ukraine are quite simple and clear:

– if the property is separated with the association of persons, this refers to companies (entrepreneurial and non-entrepreneurial);

– if property is separated without an association of persons, these are institutions and their founders do not take part in the management of these institutions (Art. 83 of the Civil Code of Ukraine).

In turn, entrepreneurial companies can be set up as business partnerships (joint stock partnerships; limited or additional liability partnerships; unlimited partnerships; limited partnerships) or as production cooperatives (Art. 84 of the Civil Code of Ukraine). In its draft prepared by the developers, the Civil Code of Ukraine did not envisage the possibility of other legal forms [11]. However, given the simultaneous adoption of the Civil Code of Ukraine and the Commercial Code of Ukraine in 2003, Art. 83 of the Civil Code of Ukraine defined the list of legal forms of legal entities as open. In the doctrine of civil law prevails the position that separated property can be held by a legal entity only on an ownership basis. Such subject as a non-owner legal entity should not exist in the economic environment. The retention of such organizations in Ukraine contradicts the nature and designation of legal entities in society [12]. And this is quite logical since legal entities in property turnover are responsible for their obligations with their own property.

Management of any legal entity is carried out in accordance with the rules established by Articles 97-103 of the Civil Code of Ukraine. Such transparency in relation to the management of a legal entity, according to the developers of the draft of the Civil Code of Ukraine is one of the main guarantees of protecting the rights of all subjects of economic turnover.

The Civil Code of Ukraine also regulates the issue of state involvement in civil relations. As these relations in the conditions of a market economy with the participation of the state are relations of private law, the state therefore must act in these relations not with the combination of its political and economic functions or as some special subject of law, as it was in times of a planned administrative system of management, but in legal forms that are adequate to these relations. The state (as well as territorial communities, the Autonomous Republic of Crimea) takes part in these relations as a legal entity governed by public law (Articles 81-82 of the Civil Code of Ukraine). Unlike other public law

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

entities, important aspects of the legal status of the state, the Autonomous Republic of Crimea, territorial communities are directly defined in articles 167-176 of the Civil Code of Ukraine [12]. Considering the commitments made by Ukraine pursuant to the Association Agreement with the European Union (hereinafter referred to as the EU) in the areas of legislation on the establishment and operation of partnerships, corporate governance, with a view to creating a fully functioning market economy and stimulating trade, Ukraine and the EU have agreed to cooperate in particular to protect the rights of shareholders, creditors, and other interested parties in line with EU requirements in this area; on the further development of corporate governance policy in line with international standards, as well as the progressive approximation of EU rules and recommendations in this area.

At the same time, the regulation of legal entities (so-called "business entities") in the Commercial Code of Ukraine corresponds neither to the concept of legal entities reflected in the Civil Code of Ukraine nor to the common EU practices and standards in this field. In such circumstances, it is advisable to harmonize the legislation of Ukraine in this respect with the European approaches to the regulation of the institution of a legal entity, with consideration of the general provisions of the Civil Code of Ukraine and certain special laws adopted by the Verkhovna Rada of Ukraine after their entry into force, in particular the Laws of Ukraine "On Joint Stock Partnerships"[1], "On Limited Liability and Additional Liability Partnerships"[2], etc.

The issue of the fate of legal entities that currently operate in legal forms that are not stipulated by the Civil Code of Ukraine is fully justified in this situation – this refers, above all, to enterprises as subjects of law (state and municipal enterprises, so-called "collective ownership enterprises", private enterprises, enterprises with foreign investments, etc.) and their unions (associations, corporations, consortia, groups, etc.). Back in the day, the Ukrainian legal system has already faced a similar issue. With the adoption of the Law of Ukraine “On Joint Stock Partnerships” in 2008, the types of joint stock partnerships were changed – at the time, the law separated public joint stock partnerships and private joint stock partnerships. Pursuant to the transitional provisions of this law, a period of 2 years was established for companies created before its adoption to bring their articles of association into conformity with the provisions of the law. It should be reminded that there were more than 30 thousand joint stock partnerships at the time.

According to the State Statistics Service of Ukraine, as of October 1, 2019, there are 1,354,069 registered legal entities in Ukraine, of which 3,745 are state-owned enterprises, 32 are public enterprises for operational management of public property, and 14,018 are municipal enterprises. The figures for the unions of enterprises are similar: 553 associations, 79 corporations, 185 consortia, 317 concerns, 741 unions of consumer cooperatives. There are, according to the State Statistics Service, "other" unnamed unions of legal entities, of which there are 619 more units [13]. It is considered that a mechanism for establishing a certain transitional period for the harmonization of legal forms of legal

[1] Law of Ukraine “On Joint Stock Partnerships”. (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/514-17

[2] Law of Ukraine “On Limited and Additional Liability Partnerships”. (2018, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2275-19

entities in accordance with the Civil Code of Ukraine should also be proposed in case of abolition of the Commercial Code of Ukraine.

In terms of the structure of Section II "Business Entities" of the Commercial Code of Ukraine[1], it consists of 7 chapters and at the time of adoption there were 88 articles, a wide array of which was eliminated over time. Obviously, the provisions contained in these articles are declaratory provisions devoid of any regulatory influence. This, in particular, can be exemplified by Art. 59 of the Commercial Code of Ukraine "Termination of a Business Entity", which consists of one sentence: "Termination of a business entity is carried out in accordance with the law". It is clear that the abolition of this rule, as well as of other provisions of this section, will have no negative consequences for the legal regulation of activity and termination of legal entities.

We cannot ignore Chapter 7 of the Commercial Code of Ukraine (Articles 62-72 of the Commercial Code of Ukraine), which covers the enterprise as a subject of law and has caused many conflicts in domestic legal regulation. As mentioned earlier, the existence of an enterprise as a subject of law contradicts not only the provisions of the Civil Code, but also the obligations assumed by our state under the Association Agreement between Ukraine and the EU. The parallel existence of the category "enterprise" in the Ukrainian legal framework both as a subject of law and as an object of law (see, in particular, Art. 191 of the Civil Code of Ukraine) has created ambiguity and confusion in the legal regulation of entrepreneurial relations. Obviously, the enterprise as a subject of law entered into the Commercial Code of Ukraine precisely to justify the possibility of existence of state, municipal, and other types of enterprises. These are, in particular, state and municipal unitary enterprises, state commercial enterprises, public enterprises for operational management of public property (Chapter 8 Commercial Code of Ukraine, Articles 73-78), the so-called "collective ownerhsip enterprises" (Articles 93-112 of the Commercial Code of Ukraine). The Commercial Code of Ukraine includes in this concept production cooperatives, consumer cooperatives, enterprises of public and religious organizations, other enterprises envisaged by law. The Commercial Code of Ukraine also mentions private enterprises and other types of enterprises (Articles 113-117 of the Commercial Code of Ukraine).

In addition, Chapter 12 (Articles 118-127 of the Commercial Code of Ukraine) establishes the right of enterprises to unite with other enterprises to coordinate their industrial, scientific, and other activities in order to solve common economic and social problems. However, instead of determining that the union of enterprises as legal entities is excercised by means of creating of a certain business partnership, Articles 119-120 of the Commercial Code of Ukraine state that, depending on the procedure of establishment, the business unions may be formed as economic unions or as a state or municipal economic unions. With that, business unions are formed as associations, corporations, consortia, concerns, and other unions of enterprises envisaged by law. Art. 127 of the Commercial Code of Ukraine goes further and states that the law may determine other forms of joining the interests of enterprises (alliances, unions, associations of entrepreneurs, etc.), not stipulated in Art. 120 of the Commercial Code of Ukraine. We shall draw attention to the fact that it is no longer a matter of uniting enterprises, but of "joining the interests of

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

enterprises".

Particularly noteworthy is the regulation of the creation and operation of business partnerships in the Commercial Code of Ukraine – this issue is addressed in 12 articles of the Code (Chapter 8 of the Commercial Code of Ukraine, Articles 79-90 of the Commercial Code of Ukraine). As already noted, the Commercial Code is characterized by a blanket method of regulation, when the text of the Commercial Code of Ukraine includes declaratory provisions devoid of regulatory influence, which do not even refer to a specific regulation, but simply indicate that the issue is regulated (or should be regulated) by law. The provisions of Chapter 8 of the Commercial Code of Ukraine are no exception. Thus, Part 1 of Art. 79 states that the procedure of creation and the order of activity of certain types of business partnerships is regulated by law. The rest of the provisions duplicate the corresponding provisions of the Civil Code of Ukraine and special laws – "On Joint Stock Partnerships", "On Limited and Additional Liability Partnerships". The lion's share of this chapter is occupied by Art. 90 of the Commercial Code of Ukraine "Accounting and Reporting of a Business Partnership". It should be reminded that the Law of Ukraine "On Accounting and Financial Reporting in Ukraine"[1] covers the issues of accounting and reporting of legal entities. In such circumstances, an attempt to regulate these relations with a single Art. of the Commercial Code of Ukraine is undoubtedly not the best solution from the standpoint of lawmaking technique.

Thus, the analysis of the provisions of Section II of the Commercial Code of Ukraine, which deals with the regulation of the legal position of economic entities, gives reason to conclude that there is a wide arrat of systematic contradictions between the provisions of the Commercial Code of Ukraine and the Civil Code of Ukraine, and the EU-Ukraine Association Agreement. In such circumstances, it is considered appropriate to eliminate these contradictions by abolishing the corresponding provisions of the Commercial Code and at the same time defining a transition period to bring the legal forms of existing legal entities in conformity with the provisions of the Civil Code of Ukraine.

2.2 Features of regulation of property fundamentals of management in accordance with the Economic Code of Ukraine

Section III of the Commercial Code of Ukraine[2], which begins with Chapter 14, "Property of Business Entities", covers the regulation of the property fundamentals of business. It is based on an understanding of property rights that is enshrined in Book 3, "*Property Rights and Other Real Rights*" of the Civil Code of Ukraine. However, the provisions of Art. 136 ("Right of Economic Management") and Art. 137 ("Right of Operational Management") of the Commercial Code of Ukraine in fact reflect the regulation of property relations, which was inherent in a controlled economy, when the property was transferred to the legal entity (as a rule, state-owned or municipal enterprise) not into ownership, but on titles, which constituted some kind of a substitute, an ersatz. A legal entity to which property was provided under the right of economic management or the right of operational management could not freely manage it or operate it under its obligations.

[1] Law of Ukraine "On Accounting and Financial Reporting in Ukraine". (1999, July). Retrieved from https://zakon.rada.gov.ua/laws/show/996-14

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

As stated in one of the comments to the Commercial Code of Ukraine, "the right of economic management is one of the legal forms of exercising ownership. The right of economic management is remarkably similar to ownerhsip, but it cannot be equated with ownership... the right of economic management is a right that is dependent on ownership and is its derivative. The right of economic management is limited not only by law, but also by the prescriptions of the certificate of title, approved by the owner... The right of economic management... is understood as the real right of the business entity that owns, uses, and disposes of the property assigned to it by the owner (their authorized body), with limitation of the competence to dispose of certain types of property with the consent of the owner in cases stipulated by the Commercial Code of Ukraine and other laws" [13]. A similar approach is defined in the above commentary to the right of operational management, which is "a derivative, secondary right. It is even more restricted than the right of economic management, for example, by the purposes of the activity of the subject of this right, by the tasks of the owner, by the purpose of the property owned by it uner the right of operational management, the authority to dispose of the said property [13].

Considering the contemporary realities, it should be noted that the Ukrainian economy, in accordance with our commitments to the international community, must objectively comply with established global approaches not only regarding the legal forms of legal entities, but also regarding property relations. Thus, the provisions of the Civil Code of Ukraine not only regulate the property rights in detail (consolidating concepts, warranties, grounds for acquisition, transfer, termination, etc.), but also establish common approaches to the use of the property of another – this primarily refers to rent and trust management. It should be emphasized that the institution of property management, which has become one of the innovations of the Civil Code of Ukraine[1], is completely understandable for the developed economies and can fully perform the functions of the instrument of transfer of property by the owner (including the state) to legal entities of public law so as to exercise their respective functions. In other words, the institution of property management is capable of completely replacing the outdated Soviet vestiges, such as "right of economic management" and "right of operational management" [14-16].

If we analyse entrepreneurial companies, first of all, joint-stock partnerships and limited liability partnerships whose shares and corporate rights belong to the state – such companies should own the property right on the title understandable to all participants in the trade turnover. For these reasons, Art. 141 of the Commercial Code of Ukraine[2] "Features of the Legal Regime of State Property in the Field of Business" can be abolished. The rest of the articles in Chapter 14 of the Commercial Code of Ukraine are either blanket or declarative, or they duplicate legal rules contained in special legislation and can therefore be abolished without any adverse effect on the legal regulation of property (real) relations in entrepreneurial activity.

A similar conclusion is reached upon the analysis of Chapter 15 *"Use of Natural Resources in Management"* of the Commercial Code of Ukraine, the provisions of which completely duplicate the provisions of the Constitution of Ukraine[3], in particular of Art.

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15.
[2] Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436-15
[3] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

13, Part 3 of Art. 14, paragraph 5 of Part 1 of Art. 92, Art. 4 of the Law of Ukraine "On Environmental Protection"[1], Articles 1, 3, 78 of the Land Code of Ukraine,[2], as well as articles of the Water Code of Ukraine[3], the Forest Code of Ukraine[4] and the Subsoil Code of Ukraine[5]. An example of this are the provisions of Art. 149 of the Commercial Code of Ukraine, which repeat Part 1 of Art. 38 and Art. 23 of the Law of Ukraine "On Environmental Protection"[6], and Part 2 of the same Art. has no regulatory impact at all, including only the informative component. The same is observed in the analysis of the provisions of the following articles: Art. 150 of the Commercial Code of Ukraine (acquisition of land title together with water bodies, forests, perennial plantations thereon is regulated by Articles 56, 59, 79 of the Land Code of Ukraine; Art. 7 of the Law of Ukraine "On Farming"[7]; the procedure for exercising this title is determined by Art. 51 of the Water Code of Ukraine, Art. 12 of the Forest Code of Ukraine, Articles 18, 23 of the Subsoil Code of Ukraine, Art. 4 of the Land Code of Ukraine[8]; the procedure for granting land ownership is determined by Part 3 of Art. 14 of the Constitution of Ukraine[9]); Art. 151 of the Commercial Code of Ukraine (duplicates the provisions of Art. 2, Part 3 of Art. 38 of the Law of Ukraine "On Environmental Protection"[10]. The implementation of economic activity is regulated in the Land, Water, Forest Codes of Ukraine, Subsoil Code of Ukraine and other regulations regarding the use of natural resources); Art. 152 Commercial Code of Ukraine (duplicates Articles 90, 95 of the Land Code of Ukraine; Art. 18 of the Law of Ukraine "On Farming"; Art. 7 of the Law of Ukraine "On Personal Farming"[11]; Art. 153 Commercial Code of Ukraine refers to Articles 91, 96 of the Land Code of Ukraine, Art. 44 of the Water Code of Ukraine, Articles 14, 19, 20, 21 of the Forest Code of Ukraine, Art. 24 of the Subsoil Code of Ukraine, Art. 34 of the Law of Ukraine "On Fauna").

As a result, it should be noted that the provisions of Articles 148–153 of Chapter 15 *"Use of Natural Resources in Management"* of the Commercial Code of Ukraine[12] by their

[1] Law of Ukraine "On Environmental Protection". (1991, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1264-12

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

[3] Water Code of Ukraine. (1995, June). Retrieved from https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80

[4] Forest Code of Ukraine. (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80

[5] Subsoil Code of Ukraine. (1994, July). Retrieved from https://zakon.rada.gov.ua/laws/show/132/94-%D0%B2%D1%80

[6] Law of Ukraine "On Environmental Protection", op. cit.

[7] Law of Ukraine "On Farming". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/973-15

[8] Water Code of Ukraine. (1995, June). Retrieved from https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80; Forest Code of Ukraine. (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80; Subsoil Code of Ukraine. (1994, July). Retrieved from https://zakon.rada.gov.ua/laws/show/132/94-%D0%B2%D1%80; Land Code of Ukraine. (2001, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2768-14

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

[10] Law of Ukraine "On Environmental Protection", op. cit.

[11] Law of Ukraine "On Farming". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/973-15

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

very nature, contain provisions referring to special regulations and are not of a regulatory nature. Accordingly, they can without exception be excluded as such that duplicate the provisions of special legislation [17]. Particular attention in this study should be given to the issues of the use of intellectual property rights in economic activity (Chapter 16 of the Commercial Code of Ukraine). An analysis of Chapter 16, *"Use of Intellectual Property Rights in Economic Activity"*, points to the conclusion on duplication of the provisions of the Civil Code of Ukraine[1], including the provisions of special regulations in this sector.

Provisions of Art. 154 of the Commercial Code of Ukraine are exemplary, which are of a blanket nature and for the most part are non-regulatory. They merely state that the provisions of the Civil Code of Ukraine shall be applied to govern such relations. The provisions of Art. 155 of the Commercial Code of Ukraine duplicate the provisions of Art. 420 of the Civil Code of Ukraine, which defines the list of intellectual property rights. Art. 156 of the Commercial Code of Ukraine also contains no substantive regulation, as it duplicates the provisions of Part 1 of Art. 462 of the Civil Code of Ukraine, Articles 7, 8 of the Law of Ukraine "On Protection of Rights to Industrial Designs"[2]. Articles 8, 9 of the Law of Ukraine "On Protection of Rights to Inventions and Utility Models"[3]. Art. 157 of the Commercial Code of Ukraine duplicates the provisions of Part 1 of Art. 494 of the Civil Code of Ukraine, including Part 3 of Art. 5 of the Law of Ukraine "On Protection of Rights to Marks for Goods and Services"[4]. Art. 158 of the Commercial Code of Ukraine does not determine the specifics of legal regulation and is a reference to other regulations, and also partially duplicates Part 3 of Art. 16 of the Law of Ukraine "On Protection of Rights and Marks for Goods and Services", which gives grounds to claim that there is no actual influence of the Commercial Code of Ukraine rules on the regulation of such relations as against the rules contained in special regulations.

Thus, almost all of the provisions of Chapter 16, *"Use of Intellectual Property Rights in Economic Activity"* (except Articles 160, 161 of the Commercial Code of Ukraine), duplicate the provisions of the Civil Code of Ukraine, inclduing the provisions of special regulations and thus can be excluded as having no regulatory effect.

The analysis of Chapter 17 *"Securities in Economic Activities"* also shows that there is no independent regulatory influence, since the types of securities, their issue, sale, acquisition are governed by Art. 195 of the Civil Code of Ukraine, as well as the Law of Ukraine "On Joint Stock Partnerships"[5], the Law of Ukraine "On Securities and the Stock Market"[6], the Law of Ukraine "On the Circulation of Bills in Ukraine"[7] and the Law of

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15.
[2] Law of Ukraine "On Protection of Industrial Design Rights". (1993, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3688-12
[3] Law of Ukraine "On Protection of Rights to Inventions and Utility Models". (1993, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3687-12
[4] Law of Ukraine "On Protection of Rights to Marks for Goods and Services". (1993, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3689-12
[5] Law of Ukraine "On Joint Stock Partnerships". (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/514-17
[6] Law of Ukraine "On Securities and Stock Market". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3480-15
[7] Law of Ukraine "On the Circulation of Bills in Ukraine". (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2374-14

Ukraine "On the Depository System of Ukraine"[1]. As an example, we shall take Art. 164 of the Commercial Code of Ukraine, the provisions of which duplicate the provisions of the Law of Ukraine "On Securities and the Stock Market"[2] (Part 2, Art. 8 – regarding the prohibition of covering losses at the cost of the bonds of the enterprise; provisions of Art. 12 – regarding the concepts and general provisions concerning investment certificate); including the provisions of the Law of Ukraine "On Joint-Stock Partnerships"[3] (Part 5 of Art. 15; Part 2 of Art. 19 – regarding the special procedure for the use of shares to cover losses; Art. 13 – regarding the right of depositors to receive of the deposit and interest on it (savings (deposit) certificates after the specified term [17]. Features of the issue, circulation, and repurchase of securities, joint investment institutions are regulated in the Law of Ukraine "On Joint Investment Institutions"[4]. Part 6 of Art. 164 of the Commercial Code of Ukraine contains no regulatory mechanisms. Financial activities of the states that created the real estate operations fund and attracted funds of individuals and legal entities are regulated by the Law of Ukraine "On Financial and Credit Mechanisms and Property Management in the Construction of Housing and Real Estate Transactions"[5]. Part 7 of Art. 164 of the Commercial Code of Ukraine duplicates the provisions of Part 1 of Art. 14 of the Law of Ukraine "On Securities and the Stock Market"[6]. The issue and circulation of securities is regulated by the Law of Ukraine "On Circulation of Bills in Ukraine"[7] and the Law of Ukraine "On Securities and the Stock Market"[8]. Part 8 of Art. 164 of the Commercial Code of Ukraine is purely informative, has no regulatory effect, since the production of securities (or their forms) is regulated by the Law of Ukraine "On the National Bank of Ukraine"[9]. The same applies to other articles in this chapter.

The foregoing suggests that Chapter 17 "Securities in Economic Activities", namely Articles 163-166 of the Commercial Code of Ukraine[10] can be removed without negative consequences, given their referential nature and lack of regulatory impact.

Chapter 18 *"Corporate Rights and Corporate Relations"*. Unlike the controversial regulation of corporations and corporate rights in the Commercial Code of Ukraine, the Civil Code of Ukraine does not contain the definition and regulation of corporate law and corporate relations. In its turn, the Commercial Code of Ukraine also does not address this issues, as it rather ambiguously defines the approach to defining corporate rights, since the

[1] Law of Ukraine "On the Depository System of Ukraine". (2012, July). Retrieved from https://zakon.rada.gov.ua/laws/show/5178-1

[2] Law of Ukraine "On Securities and Stock Market". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3480-15

[3] Law of Ukraine "On Joint Stock Partnerships". (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/514-17

[4] Law of Ukraine "On Joint Investment Institutions". (2012, July). Retrieved from https://zakon.rada.gov.ua/laws/show/5080-17

[5] Law of Ukraine "On Financial and Credit Mechanisms and Property Management in Housing and Real Estate Transactions". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/978-15

[6] *Op. cit.,* 2006.

[7] Law of Ukraine "On the Circulation of Bills in Ukraine". (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2374-14

[8] Law of Ukraine "On Securities and Stock Market", op. cit.

[9] Law of Ukraine "On the National Bank of Ukraine". (1999, May). Retrieved from https://zakon.rada.gov.ua/laws/show/679-14

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

provision of Art. 167 refers to “the rights of a person whose share is determined in the authorized capital (property) of a business organization”. It is known that the authorized capital is the value of the contributions of the shareholders (founders, participants) made for the purpose of forming its assets for the beginning or further activity, and also serves to guarantee the interests of creditors and debtors. In turn, property as a special object is considered to be a separate thing, a combination of things, including property rights and obligations (Part 1 of Art. 190 of the Civil Code of Ukraine). The above suggests that the approach of the Commercial Code of Ukraine to the identification of authorized capital and property of a business organization in the context of modern development of economic relations is unacceptable and creates obstacles in the cooperation of Ukrainian companies with foreign ones. Considering the best practices of the doctrine of private law, business organization should be understood as a generic concept, arising from the basic understanding of the legal entitiy as an organization.

The concept of "corporate relations", which are mentioned in paragraph 3 of Art. 167 Commercial Code of Ukraine, also does not add to the clarity, according to which "corporate relations are relations that arise, change, terminate in relation to corporate rights". Hence the misunderstanding: are the relations between business organizations and participants or the supervisory board and general meetings, etc. corporate?

The issues of the scope of the relations covered by Part 3 of Art. 167 of the Commercial Code of Ukraine remains unclear. Considering the fact that corporate legal relations, like any other legal relations, have their own structure, which consists of subjects, objects, content, as well as the grounds for the emergence of such relationships, it is also erroneous to claim that they are specifically regulated [18-20]. According to the general legal understanding, corporate relations are a type of economic relations, and therefore their regulation should be in accordance with the provisions of the Civil Code of Ukraine[1], the Law of Ukraine "On Business Partnerships"[2], the Law of Ukraine "On Joint Stock Partnerships"[3], the Law of Ukraine "On Limited and Additional Liability Partnerships"[4], etc. A much broader list of competences that make up the content of corporate rights is contained in the Principles of Corporate Governance, approved by the National Securities and Stock Market Commission No. 955 of July 22, 2014.

More successful, in our opinion, is the definition of corporate relations contained in the Draft Law No. 2635 dated 19.12.2019. Thus, the draft proposes to supplement Art. 96-1 of the Civil Code of Ukraine[5] as follows: “Art. 96-1. Corporate rights.

1. Corporate rights are a set of competences that belong to a person as a participant (founder, shareholder, partner) of a legal entity in accordance with the law and/or constituent documents of a legal entity.

2. Corporate rights are acquired by a person from the moment of acquiring the right

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

[2] Law of Ukraine “On Business Societies”. (1991, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1576-12

[3] Law of Ukraine “On Joint Stock Partnerships”. (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/514-17

[4] Law of Ukraine “On Limited and Additional Liability Partnerships”. (2018, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2275-19

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

to a share (stock, share, or other object of civil rights, which certifies the participation of the person in the legal entity) in the authorized (compound) capital of the legal entity.

3. Participants (founders, shareholders, partners) of legal entities can have the rights stipulated in the constituent documents and the law.

4. The law can impose restrictions on the exercise of certain corporate rights by certain persons, as well as conditions and/or restrictions on the exercise of certain corporate rights by certain persons"

Regarding Art. 172 of the Commercial Code of Ukraine, we shall note that its provisions refer us to the Law of Ukraine "On State Property Objects Management". The provisions of this article do not have a regulatory impact, as relations related to corporate rights management are governed by an entire system of legal acts of different legal force. Relations with the exclusive subject of certain activities, in particular banking, insurance, stock exchange, joint investment, etc. are regulated by special legislation, namely the Law of Ukraine "On Privatization of State and Municipal Property".

Therefore, given the existence of an entire system of regulations governing corporate rights in general, including corporate states in particular, Chapter 18 "Corporate Rights and Corporate Relations" can be excluded without any negative consequences for the legal regulation of corporate relations. In turn, the concept of corporate rights and the specifics of their regulation should be enshrined in the Civil Code of Ukraine factoring in these reservations.

The above suggests that articles included in Section III of the Commercial Code of Ukraine *"Property Management Basis"* can be excluded from the text of the Commercial Code of Ukraine, and the concept and general provisions of corporate rights must be enshrined in the Civil Code of Ukraine.

2.3 Comparative analysis of controversial and debatable provisions of the Commercial Code of Ukraine and the Civil Code of Ukraine

Thus, the rules contained in Chapter 19 of the Commercial Code of Ukraine on the regulation of business obligations, by their very nature and content, should exclusively reflect the specific features inherent in the latter. Instead, "the regulation of business obligations in the Commercial Code of Ukraine in many cases almost coincides with the provisions stipulated in Book Five of the Civil Code of Ukraine. An example of this is the very first article of this chapter (Art. 173 of the Commercial Code of Ukraine – definition of business obligation) which by its content repeats Art. 509 of the Civil Code of Ukraine. It would seem that the focus of this paper should be on property and organizational and business obligations, but from the definitions of both property and economic (Part 1 of Art. 175 of the Commercial Code of Ukraine) and organizational and business obligations (Part 1 of Art. 176 of the Commercial Code of Ukraine) follows their private law nature, as directly stated in the analysed chapter of the Commercial Code of Ukraine (Part 1 of Art. 175, Part 4 of Art. 176 of the Commercial Code, etc.). In this regard, Section 1 of the Book Five of the Civil Code of Ukraine would be appropriate to supplement with an article that would enshrine the concept and nature of the legal obligations.

As for the grounds for the emergence of business obligations – Art. 174 of the Commercial Code of Ukraine repeats Art. 11 of the Civil Code of Ukraine almost word for word, at the same time introducing terminological confusion by using the term

"agreement" in the context of a transaction. Art. 177 of the Commercial Code of Ukraine "Social and Municipal Obligations of Business Entities" is dissonant with Art. 4 of the Commercial Code of Ukraine and duplicates the provisions of Art. 17 of the Law of Ukraine "On Fundamentals of Social Protection of Persons with Disabilities in Ukraine"[1], Resolution of the Verkhovna Rada of Ukraine "On the Concept of Sustainable Development of Settlements"[2], Art. 40 of the Law of Ukraine "On Regulation of Urban Development"[3] etc. The same applies to the wording of Art. 178 of the Commercial Code of Ukraine "Public Obligations of Business Entities", which duplicates the provisions of Art. 633 of the Civil Code of Ukraine, bringing disharmony into the understanding of the construction of a public contract. Chapter 20, "Economic Agreements" (Articles 179–188), as it appears from its content, is essentially an brief version (a kind of a "sampler") of Chapters 52–53 of the Civil Code of Ukraine. However, based on the titles of Art. 183 «Features of Conclusion of Economic Agreements under Public Procurement» and Art. 186 "Conclusion of Organizational and Economic Agreements" should reflect the dynamics of contractual obligations and their respective features. However, in their current wording, they are "copying" the provisions of Section VII of the Law of Ukraine "On Public Procurement" in the first case, and the general provisions of Chapters 52-53 of the Civil Code of Ukraine in the second case. Furthermore, the provisions of articles of Chapter 20 of the Commercial Code of Ukraine contain significant contradictions regarding the use of the construction of standard contracts (Art. 184) under the Commercial Code of Ukraine and the concept of standard conditions (Art. 630) under the Civil Code of Ukraine. The approaches used in the Commercial Code of Ukraine substantially limit the principle of freedom of contract in business, which significantly impedes investment in the country's economy.

Chapter 21 *"Prices and Pricing in the Commercial Field"* (Articles 189-192) has neither substantive nor regulatory weight, since the basic principles of price policy, the detailed regulation of relations in this field, and the exercise of state control (oversight) and surveillance in pricing is governed by the Law of Ukraine "On Prices and Pricing". Given the existence of which retention of a separate chapter in the Commercial Code of Ukraine is inappropriate. Chapter 22 *"Performance of Business Obligations. Termination of Obligations"* (Articles 193–208) as well as Chapter 20 of the Commercial Code of Ukraine also constitute a brief version of Chapters 48–51 of the Civil Code of Ukraine. Thus, Art. 193 of the Commercial Code of Ukraine contains provisions which, within a single article, specify: 1) the general conditions for the performance of the obligation (Art. 526 of the Civil Code of Ukraine); 2) elements of performance (Articles 527, 529, 531 of the Civil Code of Ukraine); 3) the legal consequences of non-performance or improper performance (Articles 610, 615, 616, 622 of the Civil Code of Ukraine); 4) confirmation of performance (Art. 545 of the Civil Code of Ukraine), which indicates the inappropriateness of its retention. By analogy, Art. 194 of the Commercial Code of Ukraine

[1] Law of Ukraine "On the basics of social protection of persons with disabilities in Ukraine". (1991, March). Retrieved from https://zakon.rada.gov.ua/laws/show/875-12

[2] Resolution of the Verkhovna Rada of Ukraine "On the Concept of Sustainable Development of Settlements". (1999, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1359-14

[3] Law of Ukraine "On Regulation of Urban Planning Activity". (2011, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3038-17

"Performance of a Business Obligation by a Third Party", which duplicates the provisions of Art. 528 Civil Code of Ukraine and creates the effect of excessive "regulation" of relations concerning the possibility of involving third parties as executors of a contractual obligation. Concerning the revision of Art. 195 of the Commercial Code of Ukraine "Transfer (Delegation) of Rights in Business Obligations" we deem it appropriate to transfer Part 1 of this Art. to Book Five of the Civil Code of Ukraine by supplementing Part 1 of Art. 527 of the Civil Code of Ukraine with paragraph 2 of the following content:

"1. The debtor shall be obliged to perform its obligation, and the creditor shall be obliged to accept the performance in person, unless otherwise stipulated by the agreement or law, does not follow from the essence of the obligations or customs of business turnover. The creditor, unless otherwise stipulated by law, can transfer to another person, with their consent, the right to accept performance from the debtor".

The wording of Art. 198 of the Commercial Code of Ukraine "Performance of Monetary Obligations" contradicts the provisions of Art. 533 of the Civil Code of Ukraine "Currency of Monetary Obligation Performance", considering that these articles reflect different approaches to assessing the possibility of a mismatch between the currency of an obligation and the currency of payment under an agreement. In modern circumstances, it appears to be impractical to imperatively restrict the ability of business entities to express monetary obligations in foreign currency (Art. 198 of the Commercial Code of Ukraine). With that, the currency of payment within the territory of Ukraine should be exclusively hryvnia.

The provisions of Chapter 22 of the Commercial Code of Ukraine (Articles 199–201) should be deleted as devoid of regulatory load, but merely repeating in brief the general and special provisions of Chapter 49 of the Civil Code of Ukraine "Ensuring Performance of Obligations". As for articles dealing with the termination of business obligations and their legal consequences (Articles 202 to 208 of the Commercial Code of Ukraine), it is appropriate to emphasize that the content of Art. 202 of the Commercial Code of Ukraine indicates duplication of the provisions of Art. 598 Civil Code of Ukraine, which consolidates a non-exhaustive list of grounds for termination of obligations under Articles 599, 601, 606, 604, 607 of the Civil Code of Ukraine, etc. The same applies to Art. 203 of the Commercial Code of Ukraine, which in its content is a combination of such articles of the Civil Code of Ukraine as: 1) Part 1 of Art. 203 of the Commercial Code of Ukraine – Part 1 of Art. 599 of the Civil Code of Ukraine; 2) Part 2 of Art. 203 of the Commercial Code of Ukraine – Part 1 of Art. 539 of the Civil Code of Ukraine; 3) Part 3 of Art. 203 of the Commercial Code of Ukraine – Parts 1-2 of Art. 601 of the Civil Code of Ukraine; 4) Part 5 of Art. 203 of the Commercial Code of Ukraine – Part 1 of Art. 602 of the Civil Code of Ukraine. A similar situation occurs with other articles in this chapter, which duplicate the provisions of the Civil Code of Ukraine, which raises reasonable doubts about their practical value and the need to retain them. The existence of Chapter 23, *"Bankruptcy Procedure for a Business Entity"* (Articles 209–215) within Section IV of the Commercial Code of Ukraine has previously caused some surprise and astonishment, and even more so with the adoption of the Bankruptcy Procedure Code of Ukraine, since there neither was nor is the need for fragmentary, superficial regulation of relations by provisions which do not regulate, and in many cases even contradict the newly adopted codified act.

Therefore, the provisions of Section IV *"Business Obligations"* should, by their very nature and content, reflect the specific features inherent exclusively in business obligation. Instead, the proposed regulation in the respective articles of the Commercial Code of Ukraine in many cases actually repeats the provisions of Book Five of the Civil Code of Ukraine. Accordingly, there are no arguments regarding the advisability of keeping this section in the Commercial Code of Ukraine.

The provisions of Section V, *"Responsibility for Offenses in Business Activity"* duplicate, by their general content, the provisions of Chapter 51 of the Civil Code of Ukraine. As an example, it is advisable to cite the provisions of Chapter 24, "General Principles of Responsibility of Participants in Economic Relations" of the Commercial Code of Ukraine, which duplicate the provisions of Chapter 51 of the Civil Code of Ukraine, and in some cases only enshrine the general rules, such as: "Participants of business relations are economically and legally liable for offenses in business activity by means of applying economic sanctions to business offenders on the grounds and in accordance with the procedure established by this Code, other laws and agreement" (Part 1 of Art. 216 of the Commercial Code of Ukraine) or: "grounds for commercial law liability of the participant in economic relations are an offense committed in business activity" (p. 1, Art. 218 Commercial Code of Ukraine). Partially duplicating the provisions of Art. 617 Civil Code of Ukraine, Art. 219 of the Commercial Code of Ukraine consolidates the grounds for exemption from said liability. This duplication appears to be inappropriate. However, Part 4 of Art. 219 of the Commercial Code of Ukraine deserves to be transferred to Art. 617 of the Civil Code of Ukraine by consolidating the ability of the parties to envisage certain circumstances which, by virtue of their extraordinary nature, may give rise to their exemption from liability in case of a breach of the obligation due to given circumstances, as well as the procedure for attesting to the occurrence of such circumstances.

Articles 220 and 221 of the Commercial Code of Ukraine completely duplicate the provisions of Articles 612 and 613 of the Civil Code of Ukraine. The same applies to the expediency of regulating procedural issues in the pre-trial dispute settlement procedure (Art. 222 of the Commercial Code of Ukraine). Art. 222 of the Commercial Code of Ukraine contains many aspects of the procedural nature that must be enshrined in the procedural codes. In this regard, it is worth emphasizing that it is appropriate to exclude Chapter 25 "Compensation for losses in the in Business Activity" of the Commercial Code of Ukraine, since it does not carry any legal load. In particular, Articles 224-225 of the Commercial Code of Ukraine duplicate the provisions of Articles 22, 623 of the Civil Code of Ukraine, and Articles 227-228 of the Commercial Code of Ukraine, respectively, duplicate Articles 541-544 of the Civil Code of Ukraine.

Chapter 26 *"Penalties and operational-economic sanctions"* should be excluded, given the internal inconsistency of its rules (for example, the recognition of fines and penalties as separate sanctions apart from the forfeit or consolidation of a set-off penalty in Art. 232 of the Commercial Code of Ukraine contrary to the provisions of Art. 624 of the Civil Code of Ukraine, etc.) and duplication of provisions of the Civil Code of Ukraine (for example, Art. 233 of the Commercial Code of Ukraine duplicates the provisions of Articles 551 and 616 of the Civil Code of Ukraine; Art. 234 of the Commercial Code of Ukraine duplicates provisions of Art. 622 of the Civil Code of Ukraine; Art. 235 of the

Commercial Code of Ukraine duplicates provisions of Art. 615 Civil Code of Ukraine, etc.). Furthermore, there is doubt regarding the wording of Art. 231 of the Commercial Code of Ukraine (especially Part 2), in which the expediency of imposing sanctions is unclear if the party to legal relations is the state. This article effectively negates the principle of legal equality of the parties in private law relations, and Chapter 26 "Penalties and operational-economic sanctions" itself does not contain any new approaches to the mechanism of bringing the offender to justice, thereby duplicating the provisions of the Civil Code of Ukraine.

Special attention should be paid to the provisions of Chapter 27 "Administrative and Economic Sanctions" of the Commercial Code of Ukraine on issues that were separately resolved in the provisions of the codified acts of public law (Tax Code, Customs Code, Laws of Ukraine "On Foreign Economic Activity", "On Features of State Regulation of Activities of Business Entities Related to the Sale and Export of Timber", etc.). Furthermore, to date, by means of removal of Art. 37 of the Law of Ukraine "On Foreign Economic Activity", the legislator has refused to apply such special sanctions to business entities engaged in foreign trade activities as temporary suspension of foreign economic activity; individual licensing regime and penalty). Instead, in Chapter 27 of the Commercial Code of Ukraine, these types of administrative and economic sanctions remained. The foregoing indicates that special legislation in this field has been updated without amending the Commercial Code of Ukraine as an ineffective regulator of these relations.

The presence of Chapter 28 *"Responsibility of the Business Entities for the Violation of Antitrust and Competition Laws"* in the structure of the Commercial Code of Ukraine also raises a few concerncs on this matter. Thus, the logic of the legislator is unclear, who, having foreseen the specific features of holding business entities liable for violation of antitrust law, placed this chapter in the Commercial Code of Ukraine. The expediency of its existence is undermined by the existence of perfect special legislation in this field, which is evidenced by the adoption of the Law of Ukraine "On Protection of Economic Competition" (section VIII, IX) and the Law of Ukraine "On Protection against Unfair Competition" (Chapter 5, 6). Considering the existence of special legislation in this area, the value of Chapter 28 of the Commercial Code of Ukraine is minimal, because the provisions stipulated therein do not reflect the mechanism of holding business entities liable for violations of antitrust and competition law.

2.4 Analysis of the subject matter of provisions of Section VI "Features of legal regulation in certain economy sectors" of the Commercial Code of Ukraine

The largest by volume is Chapter VI, *"Features of Legal Regulation in Certain Business Sectors"*, consisting of 8 chapters and 118 articles. This section begins with Chapter 29 *"Industries and Types of Business Activity"*, the content of which indicates that it does not carry any regulatory burden and practical value. Chapter 30 *"Features of Legal Regulation of Economic and Commercial Activities"* is divided into 6 paragraphs: supply, contracting, energy supply, stock trading, property rent and leasing, including other types of economic and commercial activity.

§ 1 "Supply" essentially duplicates the general provisions of the Civil Code of Ukraine on the sale and purchase.

§ 2 "Contracting Agricultural Production" partially duplicates the provisions of Art. 713 of the Civil Code of Ukraine. At the same time, it would be advisable, within the framework of the same article, to consolidate separate features of the performance of the terms of this agreement (Parts 2-3 of Art. 273 of the Commercial Code of Ukraine). Instead, Art. 274 of the Commercial Code of Ukraine on liability is general and does not contain any features that would distinguish it from liability under agreements of this contractual type. Thus, the Commercial Code of Ukraine does not contain rules that would not be covered by the Civil Code of Ukraine in the regulation of agricultural contracting. Furthermore, it is doubtful whether regulation of agricultural production contracting is based on a model agreement.

§ 3 "Energy Supply" partially replicates Art. 714 of the Civil Code of Ukraine. Furthermore, the subject of the agreements stipulated by Art. 714 of the Civil Code of Ukraine and Art. 275 of the Commercial Code of Ukraine is not identical. This issues arises due to the confusion of the terminological nature of the mentioned agreements in the Commercial Code of Ukraine and the Civil Code of Ukraine, considering that the former implies under the wording "to comply with the contractual regime of its use" the use of energy (electricity, steam, hot and overheated water), and the latter, respectively, under "adhering to the contractual regime of its use" means the use of an affiliated network, which creates a certain terminological confusion, which, with the wrong qualification and understanding of the essence of such an agreement can cause problems in its proper application.

§ 4. Stock trading concerns, as follows from the content of Part 1 of Art. of the 278 Commercial Code of Ukraine, the legal status of commodity exchange. Hence, firstly, the question arises as to the expediency of placing this paragraph within the individual contractual groups at all, and secondly, the legal status of the commodity exchange is regulated in detail at the level of special legislation (the Law of Ukraine "On Commodity Exchange"), and therefore the advisability of retaining this paragraph is rather dubious.

§ 5. "Property and Leasing" duplicates the general provisions for the rental (lease) of Chapter 58 of the Civil Code of Ukraine. Furthermore, the lease of property under Art. 283 of the Commercial Code of Ukraine is described exclusively as real, although the agreement must be described both as real and as consensual. Furthermore, the analysis of Chapters 58-59 of the Civil Code of Ukraine reveals a more detailed regulation of lease relations, both at the level of general provisions and in such objects of civil legal relations as land, housing, buildings or other capital structures, vehicles, etc. Moreover, special law "On Leasing of State and Municipal Property" and § 6 of Chapter 58 of the Civil Code of Ukraine, Law of Ukraine "On Financial Leasing", etc. cover such relations as rental of state, municipal property, and leasing. Given the significant differences between the provisions of the Civil Code of Ukraine, special legislation in these fields and § 5 of Chapter 30 of the Commercial Code of Ukraine, there is no doubt in the expediency of completely excluding this paragraph.

§ 6. Other types of business and commercial activities cover barter relations (Art. 293) and storage in the warehouse (Art. 294). The expediency of retaining this paragraph appears to be doubtful, because barter relations are settled at the level of § 6 of chapter 55 of the Civil Code of Ukraine, Art. 716 of which provides for the possibility of applying to such relations general provisions on the sale and purchase, supply agreement, contracting

agreement or other agreements, the elements of which are contained in the barter agreement, if this does not contradict the essence of the obligation. Instead, storage relations are regulated by the provisions of Chapter 66 of the Civil Code of Ukraine, under which a separate paragraph "Storage at the warehouse" is highlighted, including the special Law of Ukraine "On Certified Warehouses and Simple and Double Warehouse Certificates".

Chapter 31 *"Commercial Mediation (Agency Relations) in Management"* raises several questions, the main of which is the following: why does the Commercial Code of Ukraine identify commercial mediation in management exclusively with agency relations? At the same time, the issues of legal regulation of relations under such intermediary agreements as power of attorney, commission, consignment, and property management are left out of legal regulation. The differences between these agreements are conditioned upon the scope, subject matter, content of the rights and obligations of the parties.

The principal factor underlining the agent's intermediary functions is its performance of actions at the expense of the principal. An agency agreement can be implemented in a wider scope of relations than commission and power of attorney. This is a consequence of the coverage by the subject of actions of any nature, subject to their legitimacy and based on the authority granted. Thus, an agency agreement is an independent contractual model that has several specific features that distinguish it from adjacent contractual structures. At the same time, by its legal nature, an agency contract is a type of contract for the provision of intermediary services, where the agent always acts in the interests of the principal, based on the latter's authority and at its expense. Accordingly, it was expedient to place the said agreement within the bounds of Book 5 of the Civil Code of Ukraine by transferring the individual rational ideas of Chapter 31 of the Commercial Code of Ukraine to the Civil Code of Ukraine. For example, as implemented in Anglo-American law, which is described by an understanding of the agency agreement as a generic, where the power of attorney and the commission act as special types subordinate to the agency institution.

Chapter 32 "Legal regulation of freight transportation" duplicates the general provisions on transportation in Chapter 64 of the Civil Code of Ukraine. Furthermore, these relations are governed at various levels of special legislation: transport codes (Air Code[1], Commercial Maritime Code[2]), laws of Ukraine ("On Transport"[3], "On Railway Transport"[4], "On Road Transport[5], etc.), sub-legislative acts (Charter of Railways, Charter of Inland Waterways, Rules for Transportation of Freight by Road in Ukraine, Rules for Transportation of Freight by Rail, etc.). Due to the presence of such a wide array of multifaceted acts of the legislation in freight transportation, including the absence of any specific features in the transportation of goods that would not be covered by the Civil Code

[1] Air Code of Ukraine. (2011, May). Retrieved from https://zakon.rada.gov.ua/laws/show/3393-17

[2] Code of Merchant Shipping. (1995, May). Retrieved from https://zakon.rada.gov.ua/laws/show/176/95-%D0%B2%D1%80

[3] Law of Ukraine "On Transport". (1994, November). Retrieved from https://zakon.rada.gov.ua/laws/show/232/94-%D0%B2%D1%80

[4] Law of Ukraine "On Rail Transport". (1996, July). Retrieved from https://zakon.rada.gov.ua/laws/show/273/96-%D0%B2%D1%80

[5] Law of Ukraine "On Road Transport". (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2344-14

of Ukraine and the abovementioned special acts of legislation, the analysed chapter of the Commercial Code of Ukraine is subject to abolition.

Chapter 33 *"Capital Construction"* must be excluded as such that is not based on a unified legislative approach and causes numerous legal conflicts both in the titles of these agreements under the Civil Code of Ukraine and the Commercial Code of Ukraine and in the content of this chapter of the Commercial Code of Ukraine. For example, in the very content of Chapter 33 of the Commercial Code of Ukraine there are terminological contradictions. Art. 324 of the Commercial Code of Ukraine exemplifies this issue, where, compared to the Civil Code of Ukraine, the same agreement has different names, does not stipulate the possibility of involvement of third parties to perform certain stages of work, consolidates the obligation to conduct both prospecting (according to commercial law terminology – exploratory) and design works, the possibility is included for applying the provisions of the agreement for capital construction to the legal relations for the conduct of both prospecting and design works. The same applies to provisions concerning the legal regulation of capital construction relations that would not be covered by the Civil Code of Ukraine. Therefore, Chapter 33 of the Commercial Code of Ukraine "Capital Construction" should be abolished as such that is not based on a unified legislative approach and causes numerous legal conflicts both in the titles of these agreements under the Civil Code of Ukraine and the Commercial Code of Ukraine, and directly in the content of this chapter.

Chapter 34 *"Legal Regulation of Innovation"* in fact reproduces the provisions of Chapter 62 "Performing research, development and technological works" of the Civil Code of Ukraine. The said chapter of the Commercial Code of Ukraine is fragmentary, and on certain aspects, contrary to the provisions of the Civil Code of Ukraine, regulates scientific and technical activities. This creates shortcomings in the contractual regulation of research, development, and technological works. Moreover, Articles 325-330 of the Commercial Code of Ukraine cover not the agreement, but the innovative activities and their "state" regulation (as defined in Art. 328 of the Commercial Code of Ukraine). At the same time, several special laws, such as the Law of Ukraine "On Innovative Activity"[1], the Law of Ukraine "On Scientific and Technical Activity"[2], and the Law of Ukraine "On Scientific and Technical Information"[3] cover the legal settlement of these relations. Accordingly, the expediency of a "summary" review of something that has a detailed regulation within the framework of the Civil Code of Ukraine (regarding an agreement for the implementation of research or development and technological works) and special legislative acts (on the legal regulation of innovation activity) is devoid of any sense. Therefore, the abolition of Chapter 34 of the Commercial Code of Ukraine will in no way affect the mechanism of legal regulation of these relations.

Chapter 35 *"Features of Legal Regulation of Financial Activities"* consists of 5 paragraphs, each of which duplicates the provisions of the Civil Code of Ukraine and

[1] Law of Ukraine "On Innovation Activities". (2002, July). Retrieved from https://zakon.rada.gov.ua/laws/show/40-15

[2] Law of Ukraine "On Scientific and Scientific and Technical Activities". (2015, November). Retrieved from https://zakon.rada.gov.ua/laws/show/848-19

[3] Law of Ukraine "On Scientific and Technical Information". (1993, June). Retrieved from https://zakon.rada.gov.ua/laws/show/3322-12

contains a summary of the special legislation.

Thus, *§ 1 "Finance and Banking"* covers the definition of the legal status of banks and their financial activities. With that, the legislator, within the framework of this paragraph, allowed the combination of the legal status of banks, their legal forms, bank deposit, credit, settlement, factoring, leasing operations agreements, effectively combining the uncombinable. For instance:

1) definition of the legal status of banks, their legal forms, etc. is covered by separate laws of Ukraine "On Banks and Banking", "On the National Bank of Ukraine";

2) legal regulation of financial activities and financial services is covered by several special laws, such as: "On Financial Services and State Regulation of Financial Services Markets", "On Financial and Credit Mechanisms and Property Management in Housing and Real Estate", "On Financial Leasing", "On State Aid to Business Entities", etc.[1];

3) Chapters 71-74 of the Civil Code of Ukraine cover banking operations.

§ 2 "Insurance" duplicates the provisions of Chapter 67 of the Civil Code of Ukraine and the provisions of special laws ("On Insurance", "On Compulsory Insurance of Civil Liability of Owners of Land Vehicles" [2]). It is therefore doubtful whether Articles 352-355 of this paragraph should be retained.

§ 3 «Mediation in Securities Transactions. Stock Exchange" covers the intermediary relations in the stock market of Ukraine and directly the legal status of the stock exchange. As for brokerage agreements, these relations are governed at the level of the general provisions on representation by Chapter 17 of the Civil Code of Ukraine and the Law of Ukraine "On Securities and Stock Market"[3], which stipulates both the legal status of such an intermediary and the stock exchange. Accordingly, the expediency of retaining this paragraph is doubtful.

§ 4 "Audit" is an attempt to regulate the audit activity and the legal status of its entities. At the same time, these legal relations are governed both by the general provisions on services (Chapter 63 of the Civil Code of Ukraine) and by the updated Law of Ukraine "On Audit of Financial Reporting and Auditing"[4]. In this regard, the expediency of retaining this paragraph is also doubtful.

Placing *§ 5 "Lottery activity"* in the structure of the Commercial Code of Ukraine raises serious questions, since Art. 365-1 has no regulatory effect, as it immediately refers

[1] Law of Ukraine "On Financial Services and State Regulation of Financial Services Markets". (2011, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2664-14; Law of Ukraine "On Financial and Credit Mechanisms and Property Management in Housing and Real Estate Transactions". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/978-15; Law of Ukraine "On State Aid to Business Entities". (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1555-18

[2] Law of Ukraine "On Insurance". (1996, March). Retrieved from https://zakon.rada.gov.ua/laws/show/85/96-%D0%B2%D1%80; Law of Ukraine "On Compulsory Insurance of Civil Liability of Owners of Land Vehicles". (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1961-15.

[3] Law of Ukraine "On Securities and Stock Market". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3480-15

[4] Law of Ukraine "On Audit of Financial Reporting and Auditing". (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/2258-19

to a special law in this area "On State Lotteries in Ukraine"[1], which establishes the basic principles of state regulation of lottery activity in Ukraine with the purpose of creating favourable conditions for the development of the lottery market based on the principles of state monopoly on the issue and holding of lotteries, meeting the needs of the state budget, rights, and legal interests of citizens.

Chapter 36 *"Use of the rights of other business entities in entrepreneurial activity (Commercial Concession)"* duplicates the provisions of Chapter 76 of the Civil Code of Ukraine. Thus, the content of the provisions of the analysed chapter of the Commercial Code of Ukraine superficially, and in certain aspects contrary to the provisions of the Civil Code of Ukraine, regulates the contractual relations on the use of intellectual property rights. Furthermore, chapter 76 "Commercial Concession" of the Civil Code of Ukraine is placed after chapter 75 "Disposal of Intellectual Property Rights" of the Civil Code of Ukraine, which altogether creates a common conceptual framework for regulating relations of disposition of intellectual property rights.

Thus, the analysed content of Chapters IV-VI of the Commercial Code of Ukraine suggests that there is no need to retain them, given the existence of such a wide array of multi-level legislative acts, as well as the absence of any specific regulation of the above relations that would not be covered by the Civil Code of Ukraine and special acts of legislation.

Section VII *"Foreign Economic Activity"*, in particular Chapter 37 *"General Provisions"*, and the provisions of Articles 377-389 duplicate the rules of other legislative acts. Thus, provisions on the definition, entities, types, licensing and quotas, foreign economic agreements, their state registration, customs regulation, principles of taxation in the implementation of foreign economic activity, foreign currency accounts of entities, foreign exchange earnings, obtaining loans by subjects in foreign financial institutions, state protection of rights and legitimate interests duplicate the provisions of the Law of Ukraine "On Foreign Economic Activity"[2], the Civil Code of Ukraine (in terms of the subject composition), the Customs Code of Ukraine, the Tax Code of Ukraine, including the Law of Ukraine "On State Control of International Transfers of Military Goods and Dual Use", Law of Ukraine "On State Defence Order"[3].

Thus, Articles 377-389 of Chapter 37 "General Provisions" in Section VII "Foreign Economic Activity" of the Commercial Code of Ukraine are subject to exclusion in the absence of direct regulatory impact. The provisions of Chapter 38 *"Foreign Investment"* (Articles 390-400) duplicate the provisions of the Law of Ukraine "On the Foreign Investment Regimes" dated May 7, 1996. Thus, in particular, the first part of Art. 390 of the Commercial Code of Ukraine duplicates the provisions of part 1 of Art. 1 of the Law of Ukraine "On Foreign Investment Regimes"[4]. Art. 391 of the Commercial Code of

[1] Law of Ukraine "On State Lotteries in Ukraine". (2019, September). Retrieved from https://zakon.rada.gov.ua/laws/show/5204-17

[2] Law of Ukraine "On Foreign Economic Activity". (1991, April). Retrieved from https://zakon.rada.gov.ua/laws/show/959-12

[3] Customs Code of Ukraine. (2012, March). Retrieved from https://zakon.rada.gov.ua/laws/show/4495-17; Law of Ukraine "On State Control over International Transfers of Military and Dual-Use Items". (2003, February). Retrieved from https://zakon.rada.gov.ua/laws/show/549-15

[4] Law of Ukraine "On Foreign Investment Regime". (1996, March). Retrieved from https://zakon.rada.gov.ua/laws/show/93/96-%D0%B2%D1%80

Ukraine duplicates Art. 2 of the abovementioned law. Part 2 of Art. 391 of the Commercial Code of Ukraine contains a reference to the law and also has no independent regulatory effect. Art. 394 of the Commercial Code of Ukraine duplicates the provisions of Art. 7 of the same Law. Thus, given that the Law of Ukraine "On Foreign Investment Regimes"[1] regulates the types, forms of implementation, objects of foreign investment, prohibition and restriction of any forms of foreign investment, determines the territories where the activity of foreign investors and enterprises are restricted and prohibited, we shall conclude that Articles 390-400 of Chapter 38 of the Commercial Code of Ukraine are subject to be excluded as such that duplicate the provisions of the Law of Ukraine "On Foreign Investment Regime". In Section VIII *"Special Economic Modes"*, Chapter 39 *"Special (Free) Economic Zones"* of the Commercial Code of Ukraine, namely provisions of Articles 401-405 duplicate the content of the articles of the Law of Ukraine "On General Principles of Establishment and Functioning of Special (Free) Economic Zones"[2]. In particular, Art. 401 duplicates the provisions of parts 1-2 of Art. 1 of the specified Law, Art. 402 duplicates the provisions of Art. 2 of the said Law, Art. 403 duplicates Art. 3 of the Law, Art. 404 duplicates the provisions of Art. 13 of the same Law, and Art. 405 duplicates the provisions of Art. 4 of the same Law. Thus, given that the special regulatory act regulates the special economic regimes in detail, in particular the special (free) economic zones, Chapter 39 of the Commercial Code of Ukraine, namely Articles 401-405 of the Commercial Code of Ukraine, should be excluded as they duplicate the provisions of the articles of the Law of Ukraine "On General Principles of Creation and Functioning of Special (Free) Economic Zones"[3].

Considering that the Law of Ukraine "On Concession"[4] was adopted on 03.10.2019, which defines the legal, financial, and organizational foundations for the implementation of concession projects to modernize the infrastructure and improve the quality of socially significant services, Chapter 40 *"Concession"*, in particular, Art. 406 of the Commercial Code of Ukraine should be excluded as a provision which duplicates the provisions of the abovementioned law. Regarding Chapter 41 *"Other Types of Special Regimes of Economic Activity"* (Articles 411-418 of the Commercial Code of Ukraine), we shall note that the Law of Ukraine "On Exclusive (Marine) Economic Zone"[5] dated 23.05.1995 regulates the legal regime of exclusive (maritime) economic zone Ukraine, subject to the relevant provisions of the 1982 United Nations Convention on the Law of the Sea. Considering the fact that this law was adopted in 1995, we shall state that at the time of adoption of the Commercial Code of Ukraine in 2003, its provisions were already duplicating the provisions of the Law of Ukraine "On Exclusive (Marine) Economic Zone". For example, parts 1-2 of Art. 411 of the Commercial Code of Ukraine duplicate the provisions of part

[1] Law of Ukraine "On Foreign Investment Regime". (1996, March). Retrieved from https://zakon.rada.gov.ua/laws/show/93/96-%D0%B2%D1%80

[2] Law of Ukraine "On General Principles of Creation and Functioning of Special (Free) Economic Zones". (1992, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2673-12

[3] *Ibidem*, 1992.

[4] Law of Ukraine "On Concession". (2019, October). Retrieved from https://zakon.rada.gov.ua/laws/show/155-20

[5] Law of Ukraine "On Exclusive (Marine) Economic Zone". (1995, May). Retrieved from https://zakon.rada.gov.ua/laws/show/162/95-%D0%B2%D1%80

1-2 of Art. 2 of the Law of Ukraine "On Exclusive (Marine) Economic Zone"[1]. Part 3 of Art. 411 of the Commercial Code of Ukraine duplicates Part 1 of Art. 9 of the same Law. Part 4 duplicates Art. 10 of the above law. Part 5 contains a statutory reference to other regulations and has no regulatory effect. Art. 412 of the Commercial Code of Ukraine completely duplicates the provisions of Art. 18 of the Law of Ukraine "On State Border"[2] dated 18.12.1991. Part 3 of this article duplicates Art. 19 of the Law of Ukraine "On State Control"[3]. The provisions of Art. 413 of the Commercial Code of Ukraine contain provisions referring to special legislation, in particular the Land Code of Ukraine[4] and the Law of Ukraine "On the status and social protection of citizens affected by the Chornobyl disaster"[5]. The provisions of Art. 414 of the Commercial Code of Ukraine contain no regulatory impact, since they refer to other regulations, namely the Law of Ukraine "On the Armed Forces of Ukraine", the Law of Ukraine "On economic activity in the Armed Forces of Ukraine", which are special acts and determine the conditions of economic activities in the Armed Forces of Ukraine. Furthermore, Part 1 of Art. 414 of the Commercial Code of Ukraine establishes a general rule that specifies the powers of the Cabinet of Ministers of Ukraine, which are governed by the Law of Ukraine "On the Cabinet of Ministers of Ukraine" and the Resolution of the Cabinet of Ministers of Ukraine No. 950 "On Approval of the Regulation of the Cabinet of Ministers of Ukraine" dated 18.07.2007[6].

Art. 415 of the Commercial Code of Ukraine has a blanket form under which the law may specify the territory where, under certain conditions, a special regime of investment activity can be introduced. The relevant procedure and conditions are regulated by the Law of Ukraine "On General Principles of Creation and Functioning of Special (Free) Economic Zones"[7]. Thus, there is no need for additional regulation of this issue, and therefore Art. 415 should be excluded as such that does not contain an applicable law and has no independent regulatory impact.

Art. 416 of the Commercial Code of Ukraine contains a referential provision and has no regulatory effect, given that the procedure for conducting business activities in a state of emergency, environmental emergency is established in Part 2 of Art. 64 of the Constitution of Ukraine[8]. Parts 2 and 3 of this Art. contain a referential provision to special

[1] Law of Ukraine “On Exclusive (Marine) Economic Zone”. (1995, May). Retrieved from https://zakon.rada.gov.ua/laws/show/162/95-%D0%B2%D1%80

[2] Law of Ukraine “On State Border”. (1991, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1777-12

[3] Law of Ukraine “On State Control”. (2017, May). Retrieved from https://zakon.rada.gov.ua/laws/show/2042-19

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

[5] Law of Ukraine “On the status and social protection of citizens affected by the Chornobyl disaster”. (1991, February). Retrieved from https://zakon.rada.gov.ua/laws/show/796-12

[6] Law of Ukraine “On the Armed Forces of Ukraine”. (1991, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1934-12; Law of Ukraine “On Economic Activity in the Armed Forces of Ukraine”. (1999, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1076-14

[7] Law of Ukraine “On General Principles of Creation and Functioning of Special (Free) Economic Zones”. (1992, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2673-12

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

legislation, in particular the Law of Ukraine "On the Legal Regime of State of Emergency"[1] dated 25.04.2000 and the Law of Ukraine "On the Zone of Emergency Ecological Situation"[2] dated 25.08.2000.

The provisions of Art. 417 of the Commercial Code of Ukraine also refer to special legislation, namely the Law of Ukraine "On the Legal Status of Martial Law" dated 10.06.2015, which regulates relations in the event of declaration of martial law, including the Law of Ukraine "On Defence of Ukraine" dated 25.12.1991. Art. 418 of the Commercial Code of Ukraine contains a contradictory rule, since the special economic regime is governed by a number of special laws, which are adopted upon the submission of the Cabinet of Ministers of Ukraine in case of stabilization or acceleration of development of certain sectors of the economy. Part 2 of this article has no regulatory impact, because according to Art. 55 of the Constitution of Ukraine, everyone is guaranteed the right to challenge the decisions, actions or inaction of state authorities, local self-government bodies, officials and officers in court.

Thus, Chapter 41 *"Other Types of Special Economic Activity Regimes"*, in particular Articles 411-418 of the Commercial Code of Ukraine contain blanket rules, which duplicate the provisions of special legal acts, have no regulatory impact in their content, and therefore should be excluded in full.

CONCLUSIONS

The analysis of the provisions of the Commercial Code of Ukraine, its comparison with certain provisions of the Civil Code of Ukraine, individual laws and other regulations gives grounds to conclude that most of the rules of the Commercial Code of Ukraine are referential or blanket, and therefore have minimal regulatory impact and, as a rule, duplicate the provisions enshrined in other regulations. In such circumstances, to simplify the legal regulation of entrepreneurial activity, as well as in view of the obligations of our country (in particular, to bring the Ukrainian legislation in conformity with the legislation of the EU countries in legislation on the establishment and activity of companies, corporate governance, protection of shareholders' rights, lenders and other stakeholders on the further development of corporate governance policies in line with international standards, as well as the progressive approximation with rules and recommendations of the EU in this area), feasibility of the abolition of the Commercial Code of Ukraine raises no doubts.

Finally, it can be stated that the dispute of civilists with economic executives has long been resolved in favour of freedom by life itself in the post-Soviet space and by the experience of all countries with market economy. Therefore, any revival of economic executives, wherever it takes place, should always be regarded as an attack on freedom. The modern school of business law, with the help of the Commercial Code of Ukraine, seeks to narrow the freedom, the field of private law… It must be clearly understood that the concept of business law is a legal instrument of neo-totalitarianism.

[1] Law of Ukraine “On Legal Regime of Emergency”. (2012, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1550-14

[2] Law of Ukraine “On the zone of emergency environmental situation”. (2000, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1908-14

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ПРАВОВЕ РЕГУЛЮВАННЯ ПАТРОНАТУ НАД ДІТЬМИ В УКРАЇНІ: ПРОГАЛИНИ ТА КОЛІЗІЇ

Анотація. *Питання патронату над дітьми уже неодноразово ставали предметом наукових розвідок. Проте і в теорії, і на практиці залишилося багато проблемних аспектів, що випливають із влаштування дітей у сім'ю патронатного вихователя та потребують свого нагального вирішення. Тому, вбачається, є необхідним дослідити, чи привели зміни у правовому регулюванні відносин із патронату до покращення у забезпеченні якнайкращих інтересів дітей, їх особливого захисту і надання допомоги. Метою цієї статті було виявлення прогалин і колізій у правовому регулюванні патронату над дитиною в Україні, визначення шляхів оптимізації національного законодавства у відповідному контексті. З урахуванням поставленої мети, методологія дослідження охоплює загальнонаукові та спеціальні методи пізнання правових явищ. У результаті проведеного дослідження аргументовано, що слід, ураховуючи інтереси дітей, які (батьки чи законні представники яких) опинилися в складних життєвих обставинах, передбачити спрощений варіант тимчасового їх влаштування у сім'ї не лише патронатних вихователів, а й близьких до них (їх сімей) осіб. Крім того, доречно не обмежувати термін перебування дитини в сім'ї патронатного вихователя трьома (в окремих випадках – шістьма) місяцями. Він має визначатися органом опіки та піклування залежно від конкретних обставин, що зумовили необхідність подібного влаштування дитини. Встановлюючи межі повноважень патронатного вихователя щодо представництва інтересів дитина, яка йому передана на виховання, слід зважати на те, що відповідна діяльність не є видом законного представництва, а здійснюється за договором. Для забезпечення однозначного тлумачення положень інституту патронату та їх правозастосування на практиці доцільно усунути суперечності між окремими нормами права, заповнити прогалини у законодавчому регулюванні патронатних правовідносин.*

Ключові слова: соціальний захист дітей, домашнє насильство, орган опіки, прийомні батьки, патронатний вихователь.

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LEGAL REGULATION OF FOSTER CARE OF CHILDREN IN UKRAINE: GAPS AND CONFLICTS

Abstract. *Issues of foster care over children have repeatedly been the subject of scientific research. However, both in theory and in practice, there are still many urgent issues that arise from the placement of children in the family of a foster parent. Therefore, it seems necessary to investigate whether changes in the legal regulation of foster care relations have led to improvements in the best interests of children, their special protection and aid. The purpose of this paper was to identify gaps and conflicts in the legal regulation of foster care over children in Ukraine, to identify ways to optimize national legislation in the respective context. Considering the purpose, the research methodology involves general scientific and special methods of cognition of legal phenomena. As a result of the study, it was argued that the legislation, It should, considering the interests of children (parents or their legal representatives) who found themselves in difficult life circumstances, provide for a simplified version of their temporary placement in families not only of foster carers, but also of persons close to them (their families). Furthermore, it is appropriate not to limit the period of stay of the child in the family of a foster parent to three (in some cases – six) months. It should be determined by the guardianship authority depending on the specific circumstances that necessitated such placement of the child. When setting the limits of the foster parent's authority to represent the interests of the child transferred to them, it should be borne in mind that the relevant activity is not a type of legal representation, but is carried out under an agreement. To ensure a unambiguous interpretation of the provisions of the institution of foster care and their application in practice, it is advisable to eliminate contradictions between individual rules of law, to fill gaps in the legislative regulation of foster care relations.*

Keywords: social protection of children, domestic violence, guardianship authority, foster parents, foster carer.

INTRODUCTION

At the level of the Universal Declaration of Human Rights[1] (Part 2 of Article 25), it is proclaimed that childhood, along with motherhood, gives the right to special care and assistance. With that, all children should enjoy the same social protection. If a child is temporarily or permanently deprived of a family environment or is unable to remain in such an environment in his or her best interests, he or she shall be entitled to special protection and aid provided by the state. In this regard, states, in accordance with their

[1] Universal Declaration of Human Rights. (1948). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015.

national laws, envisage a change in childcare, which may include, inter alia, foster care (Article 20 of the Convention on the Rights of the Child[1]). Incidentally, in addressing the protection of the rights and interests of children and parents, the European Court of Human Rights notes that there must be a fair balance between the interests of the child and the interests of parents and, in maintaining such balance, particular attention must be paid to the most important interests of the child, which by their nature and importance must prevail over the interests of parents (paragraph 54 of the Decision of the European Court of Human Rights in the case "Hunt v. Ukraine" of 7 December 2006[2]). To ensure the rights, freedoms, and interests of these children, Section IV of the Family Code of Ukraine[3] stipulates forms and rules of placement of orphans and children deprived of parental care, to which the legislator included: adoption, guardianship and custody of children, foster care over children, foster family, family-type orphanage.

Without dwelling on the question of whether this list can be considered exhaustive and such that covers all forms of fostering of the relevant category of children, we support the idea that "legislation on protection of the rights and interests of the child continues to evolve, adapting to social realities" [1]. The institution of foster care over children was not left out of the optimization process: after the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Strengthening Social Protection of Children and Supporting Families with Children"[4] came into force in 2016, the legislative approach to regulating such legal relations in our country was transformed in its entirety. With that, the Decree of the President of Ukraine No. 5/2018 dated January 12, 2018[5] proclaimed the creation of foster families in accordance with the real needs for the temporary care, upbringing and rehabilitation of children who, due to difficult life circumstances, are temporarily unable to live with their parents or other legal representatives to be one of the top-priority measures to protect the rights of orphans, children deprived of parental care and persons from among them.

At the same time, the Cabinet of Ministers of Ukraine is tasked to develop and approve within six months an action plan to create a developed system of family forms of raising orphans, children deprived of parental care, dissemination of foster care and mentoring, and regional and Kyiv city state administrations were tasked, with the participation of local self-government authorities according to the competence, to provide funding for training, retraining, including foster carers (subclause 3 of clause 1, paragraph r of subclause 1 of clause 2 of the Decree of the President of Ukraine No. 721/2019 "On some issues of ensuring the rights and legitimate interests of orphans, children deprived of

[1] Convention on the Rights of the Child. (1989). Retrieved from https://zakon.rada.gov.ua/laws/show/995_021.

[2] Decision of the European Court of Human Rights in the case "Hunt v. Ukraine" (Application No. 31111/04). (2006, December). Retrieved from https://court.gov.ua/userfiles/file/court_gov_ua_sud5010/Konvenciya_z_prav/st_8/Hant.pdf.

[3] Family Code of Ukraine. (2002). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14.

[4] Law of Ukraine No. 936-VIII "On Amendments to Some Legislative Acts of Ukraine on Strengthening Social Protection of Children and Supporting Families with Children". (2016, January). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T160936.html.

[5] Presidential Decree No. 5/2018 "On Priority Measures to Protect the Rights of Orphans, Children Deprived of Parental Care and Their People". (2018, January). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/U005_18.html.

parental care, development and support of family forms of child upbringing" dated September 30, 2019[1]). Issues of foster care over children have repeatedly been the subject of scientific research. Thus, scientists studied the reasons for the emergence of foster care, their subject matter, the tasks of foster care [2], compared it with other statutory forms of fostering orphans and children deprived of parental care [3], determined the specific features of foster care [4; 5], the subject and conditions of the agreement on foster care, the grounds for its termination and cancellation [3; 6; 7] etc. However, both in theory and in practice, there are still many urgent issues arising from fostering children in the family of a foster parent. Therefore, it seems necessary to investigate whether changes in the legal regulation of foster care relations have led to improvements in the best interests of children, their special protection and assistance. Moreover, many aspects of foster care currently remain unresolved.

In view of the above, the purpose of writing this article is to identify gaps and conflicts in the legal regulation of child custody in Ukraine, to identify ways to optimize national legislation in the respective context.

1. MATERIALS AND METHODS

Considering the purpose, the research methodology involved general scientific and special methods of cognition of legal phenomena. The basis of our study includes the following methods:

1. Comparative law method. This method is the main method in the system of methodology of comparative law research and acts as a set of methods and techniques of identification of origin, development, functioning of different legal systems based on a comparative study of general and specific patterns. This method is described by comparison of single-order legal concepts, phenomena, processes and determination of similarities and differences between them. This method was useful in the analysis of scientific views and experience of foreign countries within the specified problematics.

2. Formal-dogmatic method. Formal-dogmatic approach is used in jurisprudence upon the study of statutory legal material. This method lies in determination of the content and significance of the rule of law, based on its own content. It is formal-dogmatic because it aims to reveal the dogma of law. This method allows to define legal concepts, identify their features, classify, interpret the content of legal requirements, etc. Its specific feature is a distraction from the essential aspects of law. The task, which is set, lies in clarification and explanation of the current legislation, in its systematic presentation and interpretation for the purposes of law-making and law enforcement practice. The formal-dogmatic method facilitated the interpretation of legal categories, such as "foster care over a child", "difficult life circumstances", "foster carer", etc.

3. Aristotelian method. The application of this method contributes to the reliability of gathering, generalization, and evaluation of information that forms the system of knowledge, as a result of studying the subject of comparative law. In this method, attention is paid to legal language, which reflects the legal style inherent in various legal systems.

[1] Presidential Decree No. 721/2019 “On Certain Issues of Ensuring the Rights and Legal Interests of Orphans, Children Deprived of Parental Care, Development and Support of Family Forms of Parenting”. (2019, September). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/U721_19.html.

The application of the Aristotelian method is important, and in the classification of legal systems, it brings to the system of criteria that allow to objectively classify them. This method also plays a significant role in studying the structure of law and legal sources within different legal systems. In our study, the Aristotelian method is taken as a basis for argumentation and justification of scientific conclusions and proposals.

2. RESULTS AND DISCUSSION

In the national family legislation, foster care as a form of upbringing orphans and children deprived of parental care was regulated in 2002 by the adoption of the Family Code of Ukraine[1]. However, the specified institution has already been known in our country before. Although the opinions of scientists, who conducted special studies on the time of its occurrence, differ [5; 8; 9]. But we will not delve into the historical digression given the purpose of this study. As already mentioned, since 2016, a completely new view on foster care has been declared: firstly, previously a foster child or a child deprived of parental care was placed in the family of a foster parent, now – any child (parents or their legal representatives) who is in difficult life circumstances; secondly, according to the previous wording, the child was transferred for fostering until adulthood, after the amendment – for the period of overcoming difficult life circumstances by the child, its parents, or other legal representatives, but not more than three months (in some cases the term may be extended to six months). This approach is in line with the purpose of the respective institution in the legislation of European countries: those children are assigned to be fostered who need temporary fostering in the family that would replace their own, or those who require special conditions of aid and support in the family [10].

However, the introduced changes caused a few problems in the interpretation of regulations and their enforcement. Thus, first of all, it is now illogical to place Chapter 20 "Foster care over children" in Chapter IV of the Family Code of Ukraine, which covers fostering of orphans and children deprived of parental care. According to Part 1 of Art. 252 of the Family Code of Ukraine[2], foster care of a child is a temporary care, upbringing and rehabilitation of a child in the family of a foster parent for the period of overcoming difficult life circumstances by the child, its parents, or other legal representatives. Based on the above legal definition, children who are not orphans and who are not deprived of parental care can also be assigned to a family of a foster parent.

This conclusion is confirmed by the content of the definitions "orphan" and "children deprived of parental care" (they are regulated in Article 1 of the Law of Ukraine "On ensuring legal conditions of social protection of orphans and children deprived of parental care"[3]), their comparison with the purpose of foster care and statutory definitions of difficult life circumstances (these will be discussed below). Art. 1 of the mentioned Law also lists the forms of assignment of orphans and children deprived of parental care, which do not include foster care for children.

[1] Family Code of Ukraine. (2002). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14.
[2] *Ibidem*, 2002.
[3] Law of Ukraine No. 2342-IV "On Ensuring the Organizational and Legal Conditions of Social Protection of Orphans and Children Deprived of Parental Care". (2005, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2342-15.

Family forms of upbringing and foster care are also distinguished in the Law of Ukraine "On Childhood Protection"[1] (Part 5 of Article 5), decrees of the President of Ukraine No. 5/2018 "On priority measures to protect the rights of orphans, children deprived of parental care, and persons from among them" dated January 12, 2018 (paragraph a, б of subclause 1 of clause 2)[2] and No. 721/2019 "On some issues of ensuring the rights and legitimate interests of orphans, children deprived of parental care, development and support for family forms of child upbringing" dated September 30, 2019 (subclause 3 of clause 1)[3].

It follows from the above that there is a contradiction between the content of ch. 20 and the intended purpose of Section IV of the Family Code of Ukraine. The provisions of regulations, wherein foster care is not mentioned among the forms of assignment of orphans and children deprived of parental care, are also inconsistent with the requirements of Section IV of the Family Code of Ukraine[4], which, among the rules on such forms of assignment, does contain the rules governing foster care.

Some researchers rightfully argue that foster care is not a form of assignment of orphans and children deprived of parental care, but a social service [11], a form of education or a contractual form of care [12]. In our opinion, foster care is both an assignment of children, because they are, albeit temporarily, assigned to a family, and a social service provided by foster carers, who, according to a foster care agreement, take care of the child, including their upbringing, and therefore it cannot be denied that foster care is also a form of upbringing and care.

In view of the above, in particular, the fact that any child (whose parents or other legal representatives are) in difficult life circumstances can be assigned to foster care, it is necessary to introduce changes to the Family Code of Ukraine, providing it with the new wording of the title of Section IV: "Fostering orphans, children deprived of parental care, and other children in difficult life circumstances"[5].

Next, it is not entirely clear who would be the initiator of identifying the child in need, because it, its parents or other legal representatives found themselves in difficult life circumstances. After all, it is easier to find a child who has been left without parental care than (without, for example, teachers, neighbours, relevant services and authorities) a family that is in difficult life circumstances. The answer to this question is specified neither in the Family Code of Ukraine nor in other regulations.

Thus, the Law of Ukraine "On Prevention and Counteraction to Domestic Violence"[6] vests guardianship and custody bodies, services for children in matters of prevention and

[1] Law of Ukraine No. 2402-III "On Childhood Protection". (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2402-14.

[2] Presidential Decree No. 5/2018 "On Priority Measures to Protect the Rights of Orphans, Children Deprived of Parental Care and Their People". (2018, January). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/U005_18.html.

[3] Presidential Decree No. 721/2019 "On Certain Issues of Ensuring the Rights and Legal Interests of Orphans, Children Deprived of Parental Care, Development and Support of Family Forms of Parenting". (2019, September). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/U721_19.html.

[4] Family Code of Ukraine. (2002). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14.

[5] *Ibidem*, 2002.

[6] Law of Ukraine No. 2229-VIII "On Prevention and Countering Domestic Violence". (2017, December). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-19.

counteraction to domestic violence with powers of assigning a child to the family of a foster parent in case of child's inability to live with its parents or other legal representatives due to domestic violence against this child or with its participation, including the termination of the foster care agreement on the same grounds (paragraphs 4, 7 of part 1 of Article 9).

The responsibilities of the State Social Service of Ukraine include ensuring control over the protection of the rights of children in difficult life circumstances, orphans and children deprived of parental care, assigned to foster care families, and monitoring, within the competence, the exercise of control over the activities of the families of foster carers (paragraph 4 of the Regulation on the State Social Service of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1053 dated December 18, 2019[1]).

The state promotes labour collectives, public and charitable organizations, other associations of citizens and individuals in their activities aimed, inter alia, at ensuring the implementation of measures to create a developed system of care for children in difficult life circumstances, encourages the development of child care by providing tax, investment, customs, credit and tariff benefits in accordance with the procedure established by the laws of Ukraine (parts 5, 6 of the Law of Ukraine "On Childhood Protection"[2]). The Centre for Social Services for Families, Children and Youth (paragraphs 7, 8 of the General Regulations on the Centre for Social Services for Families, Children and Youth, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 573[3]) dated August 1, 2013) is responsible for the training of candidates for foster carers, their development of competence, as well as the introduction of the latest social technologies aimed at preventing, minimizing, or overcoming difficult life circumstances (including foster care over a child).

The Resolution of the Cabinet of Ministers of Ukraine No. 148 "Some issues of child custody" dated March 16, 2017[4] approved the Procedure for creation and activities of the foster carer family, assignment, and stay of the child in the foster carer family, the Model Agreement on foster care of a child and the Procedure payment for the foster carer services and payment of social aid for child support in the foster carer family. Thus, without diminishing the role and importance of the adoption of these acts and the activities of these bodies, we can see that most of these provisions, unfortunately, will remain unfulfilled in practice without providing real state support to various social services, NGOs, associations of citizens, separate individuals, etc., proper promotion of aiding children (their parents or other legal representatives) in difficult life circumstances, and creation of state and non-state institutions that would handle the identification of relevant children. As rightfully noted in the legal literature, the further development of foster care depends to some extent

[1] Cabinet of Ministers of Ukraine Resolution No. 1053 “Some Issues of the State Social Service of Ukraine”. (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1053-2019-п.

[2] Law of Ukraine No. 2402-III “On Childhood Protection”. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2402-14.

[3] Cabinet of Ministers of Ukraine Resolution No. 573 “On Approval of the General Regulation on the Center of Social Services for Family, Children and Youth”. (2013, August). Retrieved from https://zakon.rada.gov.ua/laws/show/573-2013-п.

[4] Cabinet of Ministers of Ukraine Resolution No. 148 “Some Issues of Patronage of a Child”. (2017, March). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP170148.html.

"on economic factors, in particular, on how the state and society can mitigate the impact of instability and economic crisis on foster families, help them perform educational functions"; and "effective operation of state bodies", which should "consistently monitor the implementation of innovative forms of child care", refine procedures and rules "to fully protect the rights of children, strengthen the control functions of the Children's Services" [13]. In other countries, various non-profit organizations contribute to the implementation of similar regulations. For example, in France, the Retis association helps oversee the families, which can be attributed to risk groups. It provides aids families, monitors the development and upbringing of the child and, in crisis situations, organizes its temporary assignment either to relatives or to specialized organizations or professional educators – foster carers [10].

It appears that the family legislation of Ukraine would benefit from the introduction of such a positive experience, in particular, concerning the possibility of assigning the children in need, not only to the family of foster parents, but also to relatives close to the family (for example, friends of parents, neighbours, so-called "godparents") [14]. Currently, only a child left without parental care, including a child separated from the family, can be assigned to the family of relatives, neighbours, acquaintances, and only temporarily until a decision is made on its further assignment (paragraph 31 of the Procedure for the implementation of guardianship and custody activities related to the protection of the rights of the child, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 866 dated September 24, 2008[1]).

Although, it should be noted that in Part 3 of Art. 231 of the Law of Ukraine "On Childhood Protection"[2] the relevant provision is partially formally established: if due to difficult life circumstances the child temporarily does not reside or cannot reside with its parents or other legal representatives, its support and upbringing can also be performed by relatives. However, the procedure for assigning a child to them outside the application of the forms of assignment stipulated in Section IV of the Family Code of Ukraine[3] has not been established. We believe that a simplified procedure for assigning children in difficult life circumstances to relatives and other close people should be enshrined at the legislative level. Apart from the definition of "foster care over a child" (Part 1 of Article 252 of the Family Code of Ukraine), the legislation also defines the respective agreement: the guardianship and custody authority assigns a child in difficult life circumstances to the family of a foster parent (Part 2 of Article 253 of the Family Code of Ukraine[4]). When interpreting these provisions, their inconsistency immediately transpires, as the concept of "foster care over the child" is revealed through the wording "difficult life circumstances of the child, its parents or other legal representatives". In the definition of the respective agreement, the legislator indicates the difficult life circumstances of only the child. There is no doubt that the analysed provisions must be harmonised. But to determine in which

[1] Decree of the Cabinet of Ministers of Ukraine No. 866 “Issues of the activity of guardianship and custody bodies related to the protection of the rights of the child”. (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/866-2008-п.

[2] Law of Ukraine No. 2402-III “On Childhood Protection”. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2402-14.

[3] Family Code of Ukraine. (2002). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14.

[4] *Ibidem*, 2002.

direction to move when making changes to them, we must first understand what does the concept of "difficult life circumstances" include.

According to Art. 1 of the Law of Ukraine "On Childhood Protection"[1] a child who is in difficult life circumstances is a child who is in conditions that adversely affect its life, health and development due to disability, serious illness, homelessness, conflict with the law, involvement in the worst forms of child labour, addiction to psychotropic substances and other addictions, ill-treatment, including domestic violence, evasion of parents or guardians from their duties, natural disasters, man-made accidents, cataclysms, hostilities or armed conflicts, etc., which were established after the evaluation of the child's needs. Art. 1 of the Law of Ukraine "On Social Services"[2] defines difficult life circumstances (regardless of the specific subject, including the child) as circumstances that adversely affect the life, health and development of the person, the functioning of the family, which the person/family cannot overcome on its own. With that, the factors that can cause difficult life circumstances are: old age; partial or complete loss of motor activity, memory; incurable diseases, diseases that require long-term treatment; mental and behavioural disorders, including due to the use of psychoactive substances; invalidity; homelessness; unemployment; poverty; behavioural disorders in children due to parental divorce; evasion of parental responsibilities by parents or guardians; loss of social ties, including while in prison; child abuse; gender-based violence; domestic violence; getting into a situation of human trafficking; damage caused by fire, natural disaster, catastrophe, hostilities, terrorist act, armed conflict, temporary occupation. Thus, upon determining the difficult life circumstances in general, and not only those in which the child found itself, the legislator provided that such circumstances have a negative impact not only on life, health and development, but also on the functioning of the family. An additional qualifying feature of these circumstances is also the fact that a person cannot overcome them on their own.

Having compared the factors enshrined in these regulations, which can form the basis for a person to get into difficult life circumstances, we can conclude that their list differs significantly. Indeed, some factors may not be related to the term "child" (e.g., old age, unemployment). However, some of them are essentially identical, although differently formulated in the cited legislative provisions: for example, "serious illness" and "military action" stipulated in Art. 1 of the Law of Ukraine "On Childhood Protection"[3], and "incurable diseases, diseases that require long-term treatment" and "hostilities" – in Art. 1 of the Law of Ukraine "On Social Services". Without arguing on the need to use unified legal terminology and the completeness of these lists, we shall note: even a superficial analysis of both regulations shows that the child will also require additional protection and support in difficult life circumstances of its parents or other legal representatives. In this regard, changes should be introduced to the definition of the agreement on foster care over a child, adding in Part 1 of Art. 253 of the Family Code of Ukraine [4] after the word "child" the phrase "if it and (or) its parents or other legal representatives are in difficult life

[1] Law of Ukraine No. 2402-III "On Childhood Protection". (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2402-14.
[2] Law of Ukraine No. 2671-VIII "On Social Services". (2019, January). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T192671.html.
[3] Law of Ukraine No. 2402-III "On Childhood Protection", 2001.
[4] Family Code of Ukraine. (2002). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14.

circumstances". Furthermore, the new wording of ch. 20 of the Family Code of Ukraine stipulates other periods of stay of a child in the family of a foster parent: currently the child is fostered for the period of overcoming the difficult life circumstances by the child, its parents or other legal representatives. The specific term for which a child is assigned to a foster parent is set by the guardianship and custody authority, but it may not exceed three months. However, in the presence of circumstances justifying the necessity and expediency of the child's stay in the family of a foster parent beyond the specified period, the guardianship and custody authority may extend it. In any case, the total period of stay of the child in the family of a foster parent may not exceed six months (Part 6 of Article 252 of the Family Code of Ukraine[1]).

Returning to the factors that cause difficult life circumstances, we can see that in some cases, the relevant circumstances cannot be eliminated at all (e.g., old age, disability), or overcoming some of them takes more than three to six months, for which the child is assigned to the family of a foster parent. Therefore, a logical question arises: would not the child suffer even greater harm, considering, ,above all, the psycho-emotional aspects, by taking it away (even after a maximum period of six months) from the family of the foster carer and assigning it to the next similar family or by applying other forms of assignment to it, stipulated by Part 2 of Article 253 of the Family Code of Ukraine[2]? Of course, it is difficult to disagree that all forms of assignment of orphans and children deprived of parental care (and in our case – other children (their parents or other legal representatives) can only mitigate the negative impact of the situation in which the child finds itself, and not fully compensate for the absence of the family [15]. In this regard, if possible, such a negative impact should not be exacerbated by the constant movement of the child from one place of residence to another [14]. Proceeding from the foregoing, we believe it is appropriate not to limit the period of stay of a child in the family of a foster parent to three or six months. It should be determined by the guardianship and custody authority depending on the specific circumstances that necessitated the respective assignment of the child. But to implement this, one must first change the provisions set out in Part 6 of Art. 252 of the Family Code of Ukraine[3].

Within the framework of this study, we consider it necessary to also address the issue of representation of the child upon assigning it to foster care. Since we have repeatedly emphasized that a child who is not an orphan and who is not deprived of parental care can also be assigned to foster care, its parents (other legal representatives) are not deprived of the relevant powers [16; 17]. This conclusion is confirmed by the provisions of Art. 255 of the Family Code of Ukraine, which set the duties of a foster parent (in particular, in paragraphs 3, 5 of this article it is emphasized that parents and other persons specified by the law are legal representatives). However, the powers of parents and other interested parties regarding legal representation are limited: they cannot return a child without the appropriate decision of the guardianship and custody authority, as follows from Part 2 of Art. 253 of the Family Code of Ukraine[4]. And then – who are the foster carers: legal or contractual representatives? It is especially important to get an answer to this question

[1] Family Code of Ukraine. (2002). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14.
[2] *Ibidem*, 2002.
[3] *Ibidem*, 2002.
[4] *Ibidem*, 2002.

when it is impossible to determine the whereabouts of the parents (other legal representatives) of the child or when the child is assigned to the family of a foster parent against their will [18]. Of interest in this aspect is the provision enshrined in paragraph 12 of the Procedure for interaction of state bodies and local governments in identifying separated children who are not citizens of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 832 dated November 16, 2016[1], according to which the foster parent is recognized as the legal representative of the child separated from the family. Some researchers, without arguing their position, claim that foster parent is a procedural representative [7].

As for the procedural representation of the interests of the child by the foster parent, it, indeed, can represent the interests of the child in court based on the concluded foster care agreement: according to subclause 3 of clause 2 of the Model Agreement on Foster Care over a Child, approved by the Resolution of the Cabinet of Ministers of Ukraine No. dated March 16, 2017[2], the guardian undertakes to represent the interests of the child in the relevant institutions and organizations. However, we cannot agree that the foster carer is the legal representative, given the following considerations:

1) according to Art. 242 of the Civil Code of Ukraine[3] the legal representatives are parents, adoptive parents, and guardians. Other persons may be legal representatives only in cases established by law. Special provisions enshrine the status of legal representatives, in particular, of foster parents (Part 4 of Article 256-1 of the Family Code of Ukraine) and foster parents (Part 4 of Article 256-6 of the Family Code of Ukraine[4]). The law does not provide for such a status for foster carers;

2) the assignment of a child to foster care is performed based on the corresponding agreement, the conclusion of the agreement, except cases expressly stipulated in the regulations, according to the generally accepted definition of legal representation, does not belong to its features;

3) assignment of a child to the family of a foster parent, as a general rule, is performed upon the written consent of the child's parents or other legal representatives (parts 2, 3 of Article 254 of the Family Code of Ukraine[5]). In this case, they even assume certain obligations and are granted additional rights under the agreement on foster care of a child (paragraphs 6, 7 of the Model Agreement on Foster Care over a Child, approved by the Resolution of Cabinet of Ministers of Ukraine No. 148 dated March 16, 2017[6]);

4) in any case, the party to the agreement on the custody of the child is the body of guardianship and custody, which, in fact, transfers the scope of powers determined by the legislator to the foster parent.

Therefore, in view of the above, it can be concluded that the foster parent is the

[1] Decree of the Cabinet of Ministers of Ukraine No. 832 "On the features of social protection of divorced children who are not citizens of Ukraine". (2016, November). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP160832.html.

[2] Cabinet of Ministers of Ukraine Resolution No. 148 "Some Issues of Patronage of a Child". (2017, March). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP170148.html.

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

[4] Family Code of Ukraine. (2002). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14.

[5] *Ibidem*, 2002.

[6] Cabinet of Ministers of Ukraine Resolution No. 148 "Some Issues of Patronage of a Child". (2017, March). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP170148.html.

child's representative under the agreement. We shall once again emphasize that a unambiguous solution to this issue is of great practical importance in the representation of the interests of the child assigned to the family of a foster parent, determining the limits of the right to take appropriate action by a foster parent in legal relations concerning this child [19-21]. Although the problems of implementing the analysed legislative provisions are not limited to the above. One can also pay attention to the rule on the need to obtain the consent of the child to assign it to the family of a foster parent, if it has reached such an age and level of development that can express it [22]. After all, the legislator does not determine the form for obtaining (the written consent of the child is mentioned only in the sub-legislative act – paragraph 14 of the Procedure for creation and activities of the foster carer family, assignment, and stay of the child in the foster carer family, approved by the Resolution of the Cabinet of Ministers No. 148 dated March 16 2017 [1]) and fixing such consent, does not envisage the consequences of the child's unwillingness to live in the family of the foster carer.

Furthermore, it is illogical to establish a rule in paragraph 9 of the specified Procedure concerning the mandatory training of an adult family member who will take part in the provision of child care, a candidate for foster carer according to the program approved by the Ministry of Social Policy, at the request of the social institution and with the consent of this family member (*emphasized by us*. – S.B.). Firstly, "obligation" is inconsistent with the terms "request" and "consent." Secondly, when undergoing the same training, for some reason, the candidate for foster carer may later become such, and a member of its family retains its original status. And thirdly, it remains unclear whether it is possible to conclude an agreement with a candidate for foster carer, if adult family members are against taking part in the provision of foster care, or even not against it, but refuse to undergo this training [23; 24]. The legal literature states that it is "appropriate to extend the foster care agreement to both spouses if the foster carer is married, since truly appropriate living conditions for the child should be created by all adult family members who must undertake to contribute to the performance of the agreement" [2]. We fully agree with the opinion that a foster parent who is married must obtain the consent of the other spouse in order to enter into an agreement of foster care over the child [2]. However, in our opinion, the consent should be obtained from other adult family members of the foster parent, as the child will reside together with them.

Although it is fair to note that even the consent of family members of the foster parent to foster a particular child does not in any way oblige them to comply with the terms of the foster care agreement [11; 25]. However, upon writing this article we did not aim at in-depth investigation of the outlined and other similar aspects, and therefore they can be a promising direction in further research to optimize the institution of child care in our country and develop conceptual foundations for its application in practice.

CONCLUSIONS

In consideration of the foregoing, it can be stated that the legal regulation of the institution of foster care over children requires further improvement. In particular, we believe that,

[1] Cabinet of Ministers of Ukraine Resolution No. 148 "Some Issues of Patronage of a Child". (2017, March). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP170148.html.

considering the interests of children (their parents or other legal representatives) in difficult life circumstances, a simplified version of their temporary assignment to the family should be provided not only for foster parents but also for their relatives. Furthermore, it is prudent not to limit the period of stay of the child in the family of a foster parent. Such period should be determined by the guardianship and custody authority depending on the specific circumstances that necessitated such assignment of the child.

Upon setting the limits of the foster parent's powers to represent the interests of the child assigned to him/her, it should be borne in mind that the respective activity is not a type of legal representation, but is carried out under according to an agreement. And, of course, the state must not only formally declare the support of foster care for children at legislative level, but also provide real guarantee and support measures for the interests of children in need of foster care and persons and organizations that provide assistance in implementing and development of foster care in Ukraine. The study will be useful in the interpretation and application of family legislation of Ukraine, which are part of the institution of foster care; upon mastering the subject of assignment of orphans and children deprived of parental care by applicants for higher education; as well as upon further research and development of the issues concerning foster care.

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ОСОБЛИВОСТІ ЗАСТОСУВАННЯ ЗАПОБІЖНИХ ЗАХОДІВ ЩОДО ОСІБ, ЯКІ СТРАЖДАЮТЬ НА ПСИХІЧНІ РОЗЛАДИ: НАЦІОНАЛЬНИЙ ВИМІР

Анотація. *Стаття присвячена дослідженню актуальних питань застосування запобіжних заходів стосовно осіб, щодо яких здійснюється кримінальне провадження по застосуванню примусових заходів медичного характеру (далі – COMPULSORY PSYCHIATRIC CARE) у контексті міжнародних стандартів та інтерпретаційної практики Європейського суду з прав людини (далі – ЄСПЛ). Метою даної роботи є виокремлення та аналіз особливостей обрання до особи, яка страждає на психічний розлад, запобіжних заходів на підставі матеріалів узагальнення вітчизняної правозастосовної практики у кримінальних провадженнях щодо застосування COMPULSORY PSYCHIATRIC CARE. Методи дослідження обрані з урахуванням мети, завдань та предмета дослідження. У роботі були використані загальнонаукові і спеціальні методи наукового пізнання (діалектичний, статистичний, порівняльно-правовий, аналізу, синтезу, узагальнення). Комплексне використання зазначених методів сприяло проведенню об'єктивного і всебічного наукового дослідження. На підставі аналізу чинного законодавства та судової практики виокремлені особливості обрання запобіжних заходів у кримінальних провадженнях щодо COMPULSORY PSYCHIATRIC CARE, а саме: а) застосовуються стосовно особи, яка страждає на психічний розлад; б) обираються лише в кримінальних провадженнях щодо застосування COMPULSORY PSYCHIATRIC CARE; в) мають специфічну мету, обумовлену наявністю психічного розладу, на який страждає особа. Вказана специфіка обрання передбачених ст. 508 Кримінального процесуального кодексу України (далі – ТНЕ СРС) заходів дозволила поставити під сумнів правомірність законодавчого підходу щодо віднесення їх до інституту запобіжних заходів у кримінальному провадженні. Зокрема, зроблено висновок, що на відміну від передбаченої ст. 177 ТНЕ СРС загальної мети застосування запобіжних заходів (щодо підозрюваного, обвинуваченого, засудженого), метою обрання передбачених ст. 508 ТНЕ СРС запобіжних заходів*

(щодо особи, стосовно якої передбачається застосування COMPULSORY PSYCHIATRIC CARE) є: 1) запобігання ризикам її можливої неправомірної поведінки; 2) надання їй кваліфікованої психіатричної допомоги; 3) забезпечення її безпеки та безпеки інших осіб. У цьому ключі слід зауважити, що обґрунтованій критиці юридичної спільноти піддається позиція вітчизняного законодавця щодо можливості застосування запобіжних заходів до осіб, які страждають на психічні розлади. Основним аргументом у цьому дискусійному питанні є те, що вказані особи не можуть бути суб'єктами, до яких застосовуються запобіжні заходи, оскільки останні за загальними правилами можуть бути обрані до чітко визначених суб'єктів кримінального процесу – підозрюваних, обвинувачених та засуджених.

Ключові слова: запобіжні заходи, кримінальне провадження, практика ЄСПЛ, примусові заходи медичного характеру.

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FEATURES OF APPLICATION OF PRECAUTIONARY MEASURES FOR PERSONS SUFFERING FROM MENTAL DISORDERS: NATIONAL DIMENSION

Abstract. *The paper investigates topical issues of application of precautionary measures against persons subject to criminal proceedings for the application of compulsory psychiatric care in the context of international standards and interpretative practice of the European Court of Human Rights (ECHR). The purpose of this paper is to identify and analyse the specific features of applying precautionary measures to a person suffering from a mental disorder based on the materials of generalization of domestic law enforcement practice in criminal proceedings regarding the application of compulsory psychiatric care. Research methods are selected with consideration of the purpose, objectives, and subject of research. General scientific and special methods of scientific cognition (dialectical, statistical, comparative law, analysis, synthesis, generalization) were used in the work. The integrated use of these methods has contributed to an objective and comprehensive scientific study. Based on the analysis of the current legislation and judicial practice, the specific features of application of preventive measures in criminal proceedings regarding compulsory psychiatric care are singled out, namely: a) they are applied to a person suffering from a mental disorder; b) are selected only in criminal*

proceedings concerning the application of compulsory psychiatric care; c) have a specific purpose conditioned by the presence of a mental disorder from which the person suffers. The specifics of the applying the measures envisaged by Art. 508 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC) allowed to question the legitimacy of the legislative approach as to their allocation to the institution of precautionary measures in criminal proceedings. In particular, it was concluded that in contrast to the general purpose of application of precautionary measures stipulated by Art. 177 of the CPC (concerning the suspect, the accused, the condemned), for the purpose of applying precautionary measures envisaged by Art. 508 of the CPC (concerning a person in respect of whom the application of compulsory psychiatric care is stipulated) are: 1) prevention of risks of their possible illegal behaviour; 2) provision of qualified psychiatric care to them; 3) ensuring the person's safety and the safety of others. In this regard, it should be noted that the position of the domestic legislator on the possibility of applying precautionary measures to persons suffering from mental disorders is subject to reasonable criticism of the legal community. The main argument in this debatable issue is that these persons cannot be subjects to which precautionary measures are applied, as the latter, according to the general rules, can be applied to clearly defined subjects of criminal proceedings – suspects, accused, and convicts.

Keywords: precautionary measures, criminal proceedings, ECHR practice, compulsory psychiatric care.

INTRODUCTION

The issue of deteriorating mental health of the population is currently relevant to many countries around the world. Official statistics show that as of January 1, 2017, in Ukraine 1,673,328 of its inhabitants were registered in connection with mental and behavioural disorders, of which 694,928 – due to disorders related to alcohol and drug use (or 3,9% of the population). In 2016, 182,415 patients were hospitalized in psychiatric care facilities with an average of 53.4 days in hospital[1]. Paul Hunt, the UN special rapporteur on the right to the highest attainable standard of physical and mental health, described individuals suffering from mental breakdown as "one of the marginal and most vulnerable groups in the world" [1]. However, a person's mental illness not only affects the adequacy of their own behaviour – it can manifest itself on a greater scale. In particular, these are socially dangerous acts committed by persons suffering from mental disorders. In view of this, the UN Declaration on the Rights of the Mentally Retarded of 20 December 1971[2] declared that in the event of prosecution in connection with any act, a mentally retarded person shall have the right to the due process of law, which takes full account of the degree of their mental development. This requirement is reflected in domestic legislation in the fact that in ch. 39 of Section VI of the CPC of Ukraine[3] criminal proceedings concerning the

[1] Decree of the Cabinet of Ministers of Ukraine No. 1018-p "On the approval of the concept for the development of mental health in Ukraine for the period up to 2030". (2017, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1018-2017-%D1%80.

[2] Declaration of the Rights of the Mentally Retarded. (1971, December). Retrieved from https://docs.dtkt.ua/ru/doc/995_119.

[3] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from: https://zakon.rada.gov.ua/laws/show/4651-17.

application of compulsory psychiatric care were defined as a special procedure of criminal proceedings, i.e. as a special legal procedure to be applied to persons suffering from mental disorders [2]. Its specificity is conditioned by the search for a reasonable balance between the public interests of the state in the performance of criminal proceedings and the private interests of a person suffering from a mental disorder and unable to bear responsibility for committing a socially dangerous act on general grounds. The current model of legal regulation of the status of such persons is based on international standards and interpretive practice of the ECHR.

One of the most important sources of international law in this regard is the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[1], the rules of which, combined with the legal positions of the ECHR, establish minimum standards of protection of the rights and legitimate interests of persons suffering from mental illness. Peculiarities of proceedings against persons suffering from mental disorders are embodied at the level of international regulations, such as: United Nations General Assembly Resolution No. 46/119 "Principles for the Protection of Persons with Mental Illness and the Improvement of Psychiatric Care" of 18 February 1992[2]; Recommendation of the Committee of Ministers to States Parties No. R (83) 2 on the legal protection of persons suffering from mental disorders who are involuntarily detained as patients of 22 February 1983[3]; Recommendation No. 1235 on psychiatry and human rights from 01.01.1994[4], etc. However, despite the elevated level of legal protection of a person suffering from a mental illness, their constitutional rights and freedoms may be restricted to address the challenges of criminal proceedings. Thus, domestic criminal procedural legislation stipulates the possibility of applying precautionary measures against a person in respect of whom compulsory psychiatric care is envisaged or the issue of application of such measures was resolved (Article 508 of the CPC[5]). The matter of their application to a person in respect of whom compulsory psychiatric care is envisaged has not received widespread independent study in science. Factoring in that these are specific precautionary measures for vulnerable people, the specifics of their application are a priority. The purpose of this paper is to identify and analyse the features of applying precautionary measures to a person suffering from a mental disorder based on the generalization of domestic law enforcement practice in criminal proceedings concerning the use of compulsory psychiatric care.

1. MATERIALS AND METHODS

Writing of this paper involved: regulations of basic international standards in psychiatric care; the legal position of the ECHR on the observance of the rights of persons suffering

[1] European Convention on Human Rights. (1950). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.

[2] United Nations General Assembly Resolution No. 46/119 “On Principles for the Protection of Persons with Mental Illness and the Improvement of Psychiatric Care”. (1992, February). Retrieved from https://zakon.rada.gov.ua/laws/show/v002p710-16.

[3] Recommendation of the Committee of Ministers to States parties on the legal protection of persons suffering from mental disorders who are involuntarily detained as patients. (1983). Retrieved from https://zakon.rada.gov.ua/laws/show/994_074.

[4] Recommendation No. 1235 “On psychiatry and human rights”. (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/994_200.

[5] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from: https://zakon.rada.gov.ua/laws/show/4651-17.

from mental disorders in the context of the requirements of Articles 5 and 6 of the Convention[1]; criminal procedural legislation of foreign countries (Belarus, Kazakhstan, Kyrgyzstan, Lithuania, Moldova, the Russian Federation, Estonia, Uzbekistan).

The theoretical basis of the paper includes scientific articles of domestic and foreign lawyers in criminal law and procedure. The methodological basis of the study is the dialectical method of scientific knowledge and special methods – comparative law, analysis, synthesis, and generalization. The use of the dialectical method allowed to investigate the specific features of the application of precautionary measures against persons suffering from mental disorders, factoring in the integrity of the phenomenon and the interconnectedness of its individual elements. Comparative law analysis of the criminal procedural legislation of Ukraine and foreign countries allowed to state the terminological discrepancy in determining the legal nature of coercive measures that can be applied to persons suffering from mental disorders. The method of analysis allowed to study the statutory content of criminal procedural laws of foreign states and, with consideration of the specific features of the legal system of our state, provided an opportunity to formulate proposals to improve the special procedure of criminal proceedings for compulsory psychiatric care. The method of synthesis contributed to the systematic integration of the identified features of the application of measures to persons suffering from mental disorders under Art. 508 of the CPC[2], which allowed to question the legitimacy of the legislative approach to their attribution to the institution of precautionary measures in criminal proceedings. Based on the analysis of judicial practice, the method of generalization allowed to establish the specifics of the application of precautionary measures against persons suffering from mental disorders and to formulate sound conclusions aimed at improving the regulations of the studied issues.

These methods were used holistically to ensure the objectivity, comprehensiveness of the study, and the reliability of its results.

2. RESULTS AND DISCUSSION

One of the criminal procedural guarantees of the constitutional rights and freedoms of a person suffering from a mental disorder is the implementation of a special procedure for criminal proceedings concerning the application of compulsory psychiatric care. A similar name for this institution of criminal procedure is contained in the CPC of Kazakhstan (Chapter 54)[3], the CPC of the Kyrgyz Republic (Chapter 55)[4]; the CPC of Lithuania (Chapter 29)[5], the CPC of Moldova (Section 3 of Chapter 2)[6], the CPC of Uzbekistan

[1] European Convention on Human Rights. (1950). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.

[2] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

[3] The Criminal Procedure Code of the Republic of Kazakhstan. (2014). Retrieved from https://online.zakon.kz/m/document?doc_id=31575852.

[4] The Criminal Procedure Code of the Kyrgyz Republic. (1999). Retrieved from https://online.zakon.kz/Document/?doc_id=30241915.

[5] The Criminal Procedure Code of the Republic of Lithuania. (2000). Retrieved from http://okpravo.ru/zarubezhnoe-pravo/ugolovnoe-pravo-zarubezhnyh-stran/уголовный-кодекс-литвы.html.

[6] The Criminal Procedure Code of the Republic of Moldova. (2003). Retrieved from https://online.zakon.kz/document/?doc_id=30397729.

(Chapter 61)[1] and others. According to the criminal procedure legislation of some foreign states, the names "criminal proceedings concerning the application of coercive measures of treatment and security" are used to denote this institution of criminal procedure (Chapter 46 of the CPC of Belarus[2]); "Proceedings regarding the application of involuntary psychiatric treatment" (Chapter 16 of the CPC of Estonia[3]), etc.

As we consider the legal institution, the nature of which is common to most national legal systems, we shall note that the specifics of national legal awareness, the degree of proximity to European standards and other factors create variability in the regulation of the same issue in different countries. In a comparative aspect, we shall note that both domestic criminal procedural legislation and the CPC of most foreign countries, the possibility of applying, placement in a medical institution for psychiatric examination to persons suffering from mental disorders (Article 509 of the CPC of Ukraine[4], Art. 443 of the CPC of Belarus[5], Article 569 of the CPC of Uzbekistan[6], Article 435 of the CPC of the Russian Federation[7], etc.). Investigating the legal nature of this measure, O.A. Ruchina considers it a special measure of procedural coercion [3]. A broader understanding is offered by O.I. Tsokolova, who notes that being essentially a measure of procedural coercion, which lies in isolating the person who committed a socially dangerous act, it simultaneously acts as a measure of psychiatric care and treatment of the person. [4].

It should be noted that apart from placement in a medical institution for psychiatric examination, the domestic legislator envisages the possibility of choosing *precautionary measures* against persons in criminal proceedings concerning the application of compulsory psychiatric care, namely: 1) transfer under custody to guardians, close relatives, or family members with mandatory medical supervision; 2) placement in a psychiatric institution in conditions that exclude its dangerous behaviour (Part 1 of Article 508 of the CPC[8]). By way of comparison, the criminal procedural legislation of Kazakhstan contains a direct prohibition on the application of precautionary measures to persons who committed acts under criminal law and suffer from mental illness. However, it allows to apply *security measures* to the specified category of persons: 1) transfer of the patient under the supervision of relatives, guardians, trustees with notification of the health authorities; 2) placement in a special medical institution that provides psychiatric care

[1] The Criminal Procedure Code of the Republic of Uzbekistan. (1994). Retrieved from https://lex.uz/docs/111463.

[2] The Criminal Procedure Code of the Republic of Belarus. (1999). Retrieved from https://kodeksy-by.com/ugolovno-protsessualnyj_kodeks_rb.htm.

[3] The Criminal Procedure Code of Estonia. (2015). Retrieved from https://yurotdel.com/zakony/ugolovno-processualnyy-kodeks-estonii.html.

[4] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

[5] The Criminal Procedure Code of the Republic of Belarus. (1999). Retrieved from https://kodeksy-by.com/ugolovno-protsessualnyj_kodeks_rb.htm.

[6] The Criminal Procedure Code of the Republic of Uzbekistan, op. cit.

[7] The Criminal Procedure Code of the Russian Federation. (2001). Retrieved from http://www.consultant.ru/document/cons_doc_LAW_34481/.

[8] The Criminal Procedure Code of Estonia. (2015). Retrieved from https://yurotdel.com/zakony/ugolovno-processualnyy-kodeks-estonii.html.

(Article 507 of the CPC of Kazakhstan[1]). Comparative law analysis of these provisions of the criminal procedural legislation of Ukraine and Kazakhstan allows to state the terminological discrepancy in determining the legal nature of coercive measures that can be applied to persons suffering from mental disorders. However, these measures are almost similar in their essential general characteristics.

In general, pointing to the controversy of the domestic legislative approach to the attribution of transfer of a person under custody of guardians, close relatives, or family members with mandatory medical supervision and placement in a psychiatric institution in conditions that exclude the person's dangerous behaviour to the institution of precautionary measures, we shall note the following. Interpretation of the provisions of Chapters 18 and 39 of the CPC in their systematic connection allows to highlight the features of application of precautionary measures stipulated by Art. 508 of the CPC[2], namely: a) they are applied to a person suffering from a mental disorder or mental illness; b) they are possible only in criminal proceedings concerning the application of compulsory psychiatric care; c) they have a specific purpose conditioned by the presence of a mental disorder from which the person suffers. We shall consider each of them in more detail.

1. *Application to a person suffering from a mental disorder*. Firstly, we shall note that, as follows from the content of Part 3 of Art. 508 of the CPC, the application of the envisaged precautionary measures is performed in accordance with the general rules stipulated by the CPC[3] – they may be chosen if there are grounds for clearly defined subjects of criminal proceedings: suspects, accused, and convicted persons. Therefore, in our opinion, persons suffering from mental disorders cannot be subjects to whom precautionary measures are applied.

Furthermore, the legislator links the potential possibility of applying the precautionary measures envisaged by provisions of Part 1 of Art. 508 of the CPC as soon as a person is diagnosed with a mental disorder or mental illness. The main mechanism for verifying a person's mental state is the mandatory psychiatric examination in cases established by law. At the same time, in accordance with Art. 242 of the CPC[4] the duty of the investigator or prosecutor to ensure that an examination is carried out to determine the mental state of a suspect arises in the presence of information that casts doubt on the person's sanity, or suggests their limited sanity. That is, the process of ensuring the examination actually depends on the subjective assessment of adequacy of the suspect's behaviour by the investigator or prosecutor, factoring in the circumstances of a particular criminal case. Moreover, it depends on their level of knowledge in psychiatry regarding sanity or insanity. However, timely detection of a person's mental illness based on an expert's opinion helps to ensure the person's rights with additional criminal procedural guarantees and allows to apply special precautionary measures to such person.

The case law of the ECHR has repeatedly emphasized that the deprivation of liberty of a person who is mentally ill cannot be considered as such that meets the requirements

[1] The Criminal Procedure Code of the Republic of Kazakhstan. (2014). Retrieved from https://online.zakon.kz/m/document?doc_id=31575852.

[2] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

[3] *Ibidem*, 2012.

[4] *Ibidem*, 2012.

of Art. 5 § 1 (e), if the decision on such deprivation was taken without the opinion of a medical expert (see: § 59 of the Case of Ruiz Rivera v. Switzerland[1]; § 31 of the Case of S.R. v. the Netherlands[2]). With that, the ECHR notes the systemic issue of case law concerning the de facto special status of expert opinions of psychiatrists, as their importance is unreasonably exaggerated by the courts themselves, especially in cases of psychiatric care provision. Indeed, domestic law enforcement practice demonstrates a rather superficial approach of judges to assessing the expert's opinion as a source of evidence in criminal proceedings concerning compulsory psychiatric care. Thus, in the vast majority of rulings, courts refer to the expert's opinion on a person's mental state, without paying attention to the analysis of their research part. Only in isolated cases do judges acknowledge non-compliance with the established regulatory requirements for the form of the expert's opinion, noting, for example, that "a copy of the outpatient forensic psychiatric examination No. 1557 regarding Person_3 attached to the investigator's request, does not contain the date of examination and the date of issue of this act, it is not affixed with the seal of the expert institution with its details, and is not duly certified by an official.

These circumstances render it impossible for the investigating judge to reliably establish the fact of mental activity or mental illness of the suspect in court"[3]. In the context of the investigated subject matter, the issue concerning the possibility of application of precautionary measures to the person prior to the moment of reception of the expert opinion comes to the fore. Indeed, Part 2 of Art. 508 of the CPC allows to aplly precautionary measures to a person from the moment a mental disorder or mental illness is established, as evidenced by national law enforcement practice. Thus, the investigating judges refuse to apply a *precautionary measure in the form of placement in a psychiatric institution in conditions that exclude dangerous behaviour of the person*, if "the claim contains no evidence to indicate the establishment of the fact of mental disorder or mental illness in Person_2, as required by Art. 508 of the CPC of Ukraine"[4].

However, is it legal to apply precautionary measures envisaged in Part 1 of Art. 176 of the CPC? Our study of judicial practice allowed to identify cases where investigators appealed to the court to apply for a preventive measure in the form of detention, citing the fact that the precautionary measures envisaged in Part 1 of Art. 508 of the CPC[5] are applicable to a person from the moment of establishing the fact of mental disorder or mental illness based on an expert opinion, therefore to the person must be subject to precautionary measures in the form of detention until such opinion is procured. Thus, for example, the decision of the investigating judge of the Khersonskyi City Court of

[1] Judgment of the European Court of Human Rights, "Case of Ruiz Rivera v. Switzerland" (Application No. 8300/06). (2014, February). Retrieved from http://hudoc.echr.coe.int/eng?i=001-141434.

[2] Decision of the European Court of Human Rights, "Case S.R. v. the Netherlands" (Application No. 13837/07). (2012, September). Retrieved from http://hudoc.echr.coe.int/fre?i=001-113629.

[3] Court decree of the Horlivka Central Municipal District court of Donetska Oblast, Case No. 253/74/13-k. (2013, January). Retrieved from http://reyestr.court.gov.ua/Review/28567962.

[4] Court decree of the Desnianskyi District Court of Kyiv, Case No. 754/16539/190. (2019, November). Retrieved from http://www.reyestr.court.gov.ua/Review/85702284.

[5] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

Khersonska Oblast dated February 14, 2019[1] denied the investigator's request for precautionary measures in the form of detention, "considering that the suspect Person_2 is registered in a psychoneurological clinic diagnosed with bipolar affective disorder is currently being treated at the public institution Khersonska Regional Psychiatric Hospital, and considering that the investigator in the claim does not ask to apply the precautionary measures envisaged in Part 1 of Art. 508 of the CPC of Ukraine[2] to the suspect and did not attach to the materials of the claim the information on the possibility of applying precautionary measures under Part 1 of Art. 508 of the CPC of Ukraine to the suspect, and also considering that in the past the suspect was subjected to coercive measures of a medical nature, in connection with which the investigating judge concluded that the petition was not subject to satisfaction".

This decision was the subject of consideration at the Khersonskyi Court of Appeal, which agreed with the arguments of the investigating judge, as information on the identity of the suspect raises reasonable doubts regarding their sanity and the possibility of being the subject of the incriminated offense. With that, as noted by the Court of Appeal, previously the suspect had already been subjected to coercive measures of a medical nature in the form of hospitalization in a psychiatric institution… According to the response of the public institution Khersonskyi Regional Psychiatric Hospital No. 735 dated March 1, 2019, Person_2 was undergoing compulsory treatment in the specified institution from August 4, 2014 to February 3, 2015. The specified information is crucial in this case, and therefore the arguments of the prosecutor regarding the absence of forensic psychiatric examination in the materials and the illegality of the application of precautionary measures envisaged by Part 1 of Art. 508 of the CPC of Ukraine[3] are unfounded"[4].

Giving a legal assessment to the above judicial approach, we must point to its doubtfulness. As follows from the provisions of Part 2 of Art. 508 of the CPC, the precautionary measures envisaged in part 1 of this article shall be applied by the court to the person from the moment of establishing the fact of mental disorder or mental illness. Therefore, before receiving the expert's opinion, an appeal to the investigating judge with a request to apply the precautionary measure provided for in Art. 508 of the CPC does not meet the requirements of criminal procedural law. The most logical scenario in this situation, from the standpoint of the general requirements of the CPC for the application of precautionary measures and in order to perform the tasks of criminal proceedings, is to file a petition with the court requesting to apply precautionary measures stipulated by the provisions of Art. 176 of the CPC until an expert opinion is procured. Because, according to the general rules, precautionary measures can be applied clearly defined subjects of criminal proceedings – suspects, accused and convicted if there are reasonable grounds for such measures (Part 2 of Article 177 of the CPC)[5].

[1] Court decree of the Khersonskyi City Court of Khersonska Oblast, Case No. 766/2393/19. (2019, February). Retrieved from http://reyestr.court.gov.ua/Review/79857804.

[2] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

[3] *Ibidem*, 2012.

[4] Court decree of the Khersonskyi Court of Appeal, Case No. 766/2393/19. (2019, March). Retrieved from http://reyestr.court.gov.ua/Review/80714662.

[5] The Criminal Procedure Code of Ukraine, op. cit.

2. Possibility only in criminal proceedings concerning the application of compulsory psychiatric care. Criminal procedural legislation of some foreign states does not formalize the beginning of the specified procedure of criminal proceedings by means of documentation [5]. In this part, the criminal procedural legislation of Ukraine is more progressive, as it links the moment of the beginning of criminal proceedings concerning the application of compulsory psychiatric care to the issuance of a separate procedural document – a resolution. As follows from Part 2 of Art. 503 of the CPC, if the grounds for the implementation of the specified special procedure of criminal proceedings are found *in the course of the pre-trial investigation*, the investigator, the prosecutor shall be obliged to issue a resolution to change the pre-trial investigation procedure and proceed in accordance with the rules of ch. 39 of the CPC of Ukraine[1].

As R.M. Shagieieva points out, the resolution on initiation of proceedings, and not just on the appearance of a person in need for the application of compulsory psychiatric care, is conditioned by the fact that additional guarantees will operate within the framework of this special proceedings [6]. Considering the particular importance of this procedural document, some researchers insist on the necessity of providing its copy to a person suffering from a mental illness [7]. Of course, the issuance of a resolution to change the pre-trial investigation procedure is of exceptional importance, because: a) it formalizes the determination of the moment of the beginning of the specified special procedure; b) it facilitates the timely involvement of counsel and legal representative; c) it enforces other additional guarantees of the rights and legitimate interests of persons suffering from mental illness; d) it allows to apply special precautionary measures envisaged by Art. 508 of the CPC. Illustrative in this aspect are examples from judicial practice, where investigating judges, refusing to grant motions, note the following: "in violation of the specified requirements of the law, the procedure of pre-trial investigation at the time of the appeal to the investigating judge with a request to change the measure of restraint by resolution of the investigator or prosecutor is not changed (materials of the investigator's appeal contain no such data). Proceeding from the fact that the pre-trial investigation of the criminal proceedings is not conducted in accordance with Chapter 39 of the CPC of Ukraine, there are no legal grounds for the investigating judge to apply the precautionary measures specified in Article 508 of this Code[2] to the suspect".

In this regard, it is appropriate to remind that the legislator envisages the necessity of issuing a separate procedural document (decision to change the trial procedure) in case of identification of grounds for special criminal proceedings *in the course the proceedings* (Article 362 of the CPC of Ukraine)[3], which is confirmed by generalization materials of the judicial practice[4].

3. Existence of a specific purpose conditioned by the presence of a mental disorder from which a person suffers. According to the general rules, the purpose of the application of precautionary measures is to ensure the performance of the procedural obligations

[1] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.
[2] *Ibidem*, 2012.
[3] *Ibidem*, 2012.
[4] Court decree of the Zhytomyrskyi Court of Appeal, Case No. 295/2444/18 (2020, January). Retrieved from http://reyestr.court.gov.ua/Review/86983607.

imposed on the suspect, the accused, as well as to prevent attempts to: 1) hide from the pre-trial investigation and/or court; 2) destroy, hide, or distort things or documents that are essential for establishing the circumstances of a criminal offense; 3) illegally influence a victim, witness, other suspect, accused, expert, specialist in the same criminal proceedings; 4) obstruct criminal proceedings in any other way; 5) to commit another criminal offense or to continue a criminal offense of which the person is suspected or accused (Part 1 of Article 177 of the CPC). In comparison with the given general provision it is necessary to emphasize that the purpose of application of special precautionary measures envisaged by Art. 508 of the CPC[1] has certain features conditioned by the specifics of the procedural status of the subject to which they can be applied.

Prevention of the risks of misconduct by a person suffering from a mental disorder as a purpose of applying precautionary measures to such a person. As a rule, the nature of a person's mental illness determines their inability to comprehend the purpose, the nature of the precautionary measure applied and the procedural consequences of violating its conditions. In view of the above, it is quite logical to conclude that the actions of a person suffering from a mental disorder do not contain the intention to commit possible negative procedural behaviour within the meaning of Part 1 of Art. 177 of the CPC. This conclusion allows some researchers to express scientific opinions on the inhumanity of the application of precautionary measures to such persons in terms of moral aspects [3]. However, it should be noted that the general rules of application of precautionary measures do not bind the risks specified in Part 1 of Art. 177 of the CPC exclusively with a deliberate form of possible negative behaviour of the person. Thus, analysing the judicial practice, which is entirely based on the rules of current criminal procedural law, we shall note that in addressing the application of certain special precautionary measures envisaged by Art. 508 of the CPC[2] the judges state the very potential risks of possible negative behaviour of a person suffering from a mental disorder, without examining the matter of intentional nature of the person's possible actions[3].

Provision of qualified psychiatric care as a goal of applying precautionary measures to a person suffering from a mental disorder. This goal is not explicitly stipulated in domestic criminal procedural law. With that, firstly, the case law of the ECHR has repeatedly emphasized that persons suffering from mental disorders "can be deprived of their liberty either for the purpose of medical treatment, or in connection with the needs of society, or in connection with medical and social grounds combined" (paragraph 37 of the Case of "Gorshkov v. Ukraine"[4]) [8-10]. Secondly, considering the essence of special

[1] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

[2] *Ibidem*, 2012.

[3] Court decree of the Pavlohradskyi Municipal District Court of Dnipropetrovsk region, Case No. 172/730/19. (2019, July). Retrieved from http://www.reyestr.court.gov.ua/Review/83181965; Court decree of the Koroliovskyi District Court of Zhytomyr, Case No. 296/8331/19. (2019, August). Retrieved from http://www.reyestr.court.gov.ua/Review/84014997; Court decree of the Darnytskyi District Court of Kyiv, Case No. 753/1454/20. (2020, January). Retrieved from http://www.reyestr.court.gov.ua/Review/87390283.

[4] Judgment of the European Court of Human Rights, "Case of Gorshkov v. Ukraine" (Application No. 67531/01). (2005, November). Retrieved from http://hudoc.echr.coe.int/eng?i=001-70855.

precautionary measures envisaged by Art. 508 of the CPC[1] – transfer into custody of guardians, close relatives, or family members with *compulsory medical supervision* and placement *in a psychiatric institution* in conditions that exclude the person's dangerous behaviour – it can be argued that the sole purpose of their application is to provide a person with qualified psychiatric care. Thirdly, despite the lack of regulation of this purpose in the domestic criminal procedural legislation, it is common in judicial practice.

Thus, along with other circumstances for the application of special precautionary measures, courts motivate their choice, in particular, by the necessity of ensuring the treatment of a person. Examples of such motivations are the following quotes from court decisions: "the judge considers the already specified conclusion of the forensic psychiatric examination, the gravity of the incriminated act, information on a person suffering from a persistent mental disorder, and agrees with the arguments that only such a measure will ensure proper procedural behaviour and *reception of medical treatment* by a person in criminal proceedings regarding the application of compulsory psychiatric care" [2]; "considering the fact that Person_2 at present cannot be aware of their actions and control them, the court considers it necessary, factoring in his mental state and *the need for treatment* in a psychiatric institution, in order to prevent new crimes, apply precautionary measure for Person_2 in the form of placement in a psychiatric institution under regular supervision, in conditions that exclude his dangerous behaviour…"[3]. In the light of the above, the analysis of the legal positions of the ECHR, the provisions of the current CPC [4] and generalization materials of domestic law enforcement practice in criminal proceedings on the application of compulsory psychiatric care allows to state the presence of a separate purpose of applying precautionary measures to a person suffering from mental disorder – provision of qualified psychiatric care [11-13].

Ensuring the safety of a person suffering from a mental disorder and other persons as a purpose of applying precautionary measures to a person suffering from a mental disorder. Analysis and generalization of the case law of the ECHR allows to identify the main causes of deprivation of freedom of persons referred to in Art. 5 § 1 (e) of the Convention[5]: on the one hand, such persons may pose a threat to society and, on the other hand, their own interests require isolation measures (Case of Witold Litwa v. Poland (paragraph 60)[6]; Gorshkov v. Ukraine (paragraph 37)[7]). In this respect, the ECHR, in the

[1] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

[2] Court decree of the Khersonskyi City Court of Khersonska Oblast, Case No. 766/7737/16-k. (2016, September). Retrieved from http://www.reyestr.court.gov.ua/Review/61626189; Court decree of the Shevchenkivskyi District Court of Zaporizhzhia, Case No. 336/3015/16-k. (2016, May). Retrieved from http://www.reyestr.court.gov.ua/Review/58025862.

[3] Court decree of the Zhovtnevyi District Court of Mariupol of Donetska Oblast, Case No. 263/11981/18. (2018, November). Retrieved from http://www.reyestr.court.gov.ua/Review/77884916.

[4] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

[5] European Convention on Human Rights. (1950). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.

[6] Judgment of the European Court of Human Rights, "Case of Witold Litwa v. Poland" (Application No. 26629/95). (2000, April). Retrieved from http://hudoc.echr.coe.int/eng?i=001-58537.

[7] Judgment of the European Court of Human Rights, "Case of Gorshkov v. Ukraine" (Application No. 67531/01). (2005, November). Retrieved from http://hudoc.echr.coe.int/eng?i=001-70855.

case of Hutchison Reid v. the United Kingdom[1], noted that the detention of a mentally ill person may be necessary not only in cases where a person needs therapy and other treatments to recover or improve their condition, but also when it is necessary to supervise such a person so that they do not harmed themself or others (paragraph 52) [14; 15]. Furthermore, as evidenced by the materials of the generalization of judicial practice, in applying precautionary measures envisaged by the provisions of Art. 508 of the CPC[2], the courts provide the following reasoning, for example: "by the mental state and the nature of the committed socially dangerous act, the person poses a special threat to themself and society"[3]; "the person's mental state can be a public threat"[4]; "considering the sufficiency of the grounds for the conclusion on the danger of Person_2 for himself, other persons due to his mental state, as well as the possibility of him causing significant harm to others"[5], etc.

In summary, it should be noted that there is a separate purpose of the application of special precautionary measures – to ensure the safety of a person suffering from a mental disorder and the safety of others.

CONCLUSIONS

According to the results of studying the scientific articles of domestic and foreign lawyers in criminal law and procedure, the position of the domestic legislator on the possibility of applying *precautionary measures* to persons suffering from mental disorders is subject to reasonable criticism in the legal community. A key argument in this controversial issue is that people with mental disorders cannot be subject to precautionary measures. Because the latter, according to the general rules, can be chosen for clearly defined subjects of criminal proceedings – suspects, accused and convicted.

Application of precautionary measures to persons suffering from mental disorders has its own specific features. Clarification of the content of these features allows to doubt the legitimacy of the legislative approach regarding the attribution of measures envisaged by Art. 508 of the CPC to the institution of precautionary measures in criminal proceedings. In particular, in contrast to the general purpose of the application of precautionary measures, envisaged by the provisions of Art. 177 of the CPC (in respect of a suspect, accused, convicted), the purpose of applying the precautionary measures envisaged by the provisions of Art. 508 of the CPC (concerning a person in respect of whom the application of compulsory psychiatric care is envisaged) is as follows: 1) to prevent the risks of possible misconduct by the person; 2) to provide the person with qualified psychiatric care; 3) to ensure safety of such person and the safety of others.

[1] Judgment of the European Court of Human Rights. Case of Hutchison Reid v. the United Kingdom (Application No. 50272/99). (2003, February). Retrieved from http://hudoc.echr.coe.int/eng?i=001-60954.

[2] The Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

[3] Court decree of the Suvorovskyi District Court of Odesa, Case No. 493/1305/18. (2019, December). Retrieved from http://reyestr.court.gov.ua/Review/86338646.

[4] Court decree of the Malynskyi District Court of Zhytomyrska Oblast, Case No. 289/427/19. (2019, May). Retrieved from http://www.reyestr.court.gov.ua/Review/81537282.

[5] Court decree of the Prydniprovskyi District Court of Cherkasy, Case No. 711/11142/18. (2019, June). Retrieved from http://reyestr.court.gov.ua/Review/82447324.

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МОВА КРИМІНАЛІСТИКИ: ФОРМУВАННЯ ПОНЯТІЙНО-ТЕРМІНОЛОГІЧНОГО АПАРАТУ

Анотація. *Будь-яка теорія припускає наявність свого термінологічного апарату – мови, яка створюється для вирішення специфічних наукових завдань і призначена для опису відповідної предметної області; у криміналістиці він також служить ефективним засобом мислення, має бути вкрай спеціалізований для відтворення неповторності предмета дослідження, що актуалізує дослідження в цьому напрямі. Розглянуто наукові підходи до формування мови криміналістики, її понятійно-термінологічного апарату, за допомогою якого наука криміналістика описує свій предмет дослідження. Наголошено на тому, що розвиток науки визначається, передусім, становленням її мови як системи загальних та окремих понять, що знаходять своє відбиття у певних термінах, знаках. Констатовано, що мова криміналістики являє собою складну, багаторівневу, цілісну систему, елементами якої виступають категорії, поняття, терміни, знаки, символи. Звернуто увагу на те, що протягом розвитку криміналістики безперервно відбувається вдосконалення її мови, уточнення визначень, збагачення термінологічного словника (тезаурусу). Зазначено, що сучасний стан розвитку криміналістики, формування перспективних учень (теорій) обумовили необхідність упровадження до її наукового апарату значної кількості нових понять, термінів, знаків, шляхом застосування різноманітних лінгвістичних підходів, терміноелементів, лексичних одиниць. Нововведення торкаються не лише загальної теорії криміналістики, а й її основних розділів – техніки, тактики та методики. При цьому мова криміналістики, її понятійно-термінологічний апарат має розвиватися за певних критеріїв та умов, визначених як в спеціальній, так і в криміналістичній літературі. Відмова ж від традиційних підходів щодо визначення окремих криміналістичних понять, прагнення до новацій і уніфікацій завжди потребують особливої обережності та всебічної обґрунтованості.*

Ключові слова: понятійно-термінологічний апарат, мовні нововведення, критерії розвитку мови, символи.

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CRIMINALISTICS' LANGUAGE: CONCEPT-TERMINOLOGICAL APPARATUS FORMATION

Abstract. *Any theory assumes the presence of its terminological apparatus – a language that is created to solve specific scientific problems and is designed to describe the relevant subject area; in criminalistics, it also serves as an effective means of thinking, should be highly specialised to reproduce the uniqueness of the subject of study, which actualises the study in this direction. Scientific approaches to the formation of the criminalistics' language, its conceptual and terminological apparatus, through which this science describes its subject of study, were considered. It is emphasised that the development of science is determined primarily by the formation of its language as a system of general and individual concepts, which are reflected in certain terms, signs. It was stated that the criminalistics' language is a complex, multilevel, holistic system, the elements of which are categories, concepts, terms, signs, symbols. Attention is drawn to the fact that during the development of criminalistics there is a continuous improvement of its language, clarification of definitions, enrichment of the terminological dictionary (thesaurus). It was noted that the current state of development of criminalistics, the formation of promising doctrines (theories) necessitated the introduction into its scientific apparatus of a large number of new concepts, terms, signs, through the use of various linguistic approaches, terminological elements, lexical units. The innovations concern not only the general theory of criminalistics, but also its main sections – techniques, tactics and methods. In this case, the criminalistics' language, its conceptual and terminological apparatus must develop under certain criteria and conditions defined in both special and forensic literature. The rejection of traditional approaches to the definition of certain forensic concepts, the desire for innovation and unification always require special care and comprehensive justification.*

Keywords: conceptual-terminological apparatus, language innovations, criteria of language development, symbols.

INTRODUCTION

The problem of the science language is general theoretical, so it is studied not only by criminalistics, but also by other branches of law; the objects include the language of criminal proceedings, the language of criminal procedure law, and philosophy, psychology, philology and other sciences study this issue. Among forensic doctrines (theories) of scientific orientation a separate, independent place is occupied by the doctrine of language [1], i.e. the conceptual and terminological apparatus by which forensic science describes its subject of study. And this is not accidental, because the development of science is determined primarily by the formation of its language as a system of general and individual concepts, which are reflected in certain terms, signs. Forensic categories and the

conceptual apparatus as the basis for the formation of forensic theory have a special meaning, because they allow to achieve unambiguity in the terminology used by various forensic theories. According to the figurative expression of I.F. Panteleev, the language of science is its face. The high level of its development is one of the bright indicators of maturity, improvement of theoretical positions of science. As a form of reflecting the results of scientific knowledge, the science language must adequately reflect the content of its ideas, conclusions and practical results, be bright, accurate, definite, unambiguous, economical (especially in the rapid growth of scientific information) and strongly linked to its basis – natural literary language. Only under these conditions, professional language is able to successfully perform its cognitive and informational role, as well as the function of professional communication [2].

The expression of R.S. Belkin is fair, in which he notes that the language of criminalistics "is not a special, accessible only to a narrow circle of specialists conceptual and terminological apparatus. There is no such language and cannot be. It is a system of concepts, first, of everyday and general scientific character, second, those that function in the structure of the criminalistics language, specific to this area of knowledge" [3] .The criminalistics' language and its analysis is a complex multifaceted problem that has historical roots – the problem of the science language exists as long as there is scientific consciousness. Author's statements of the solution of this problem very much differ in the content. In modern scientific literature and journalism in official documents and regulations, a variety of conceptual apparatus and terminology are used, which are borrowed from different areas of scientific knowledge and express the essence of phenomena and categories in many ways and ambiguously.

Diversity, lack of unification of terms of criminalistics, unsystematic nature of terms and concepts used to denote the same phenomena and concepts creates certain difficulties, because in different cases there is a different meaning, the difficulty of understanding a true meaning of an idea in each case. Differentiation of different terms and concepts that make up the criminalistics' language has theoretical and applied significance, in particular for rule-making and law enforcement. It should be noted that during the development of criminalistics there is a continuous improvement of its language, clarification of definitions, enrichment of terminological vocabulary (thesaurus). In this aspect it is worth to mention the works of M.O. Selivanov [4], R.S. Belkin [3; 5; 6], Yu. V. Golovin [7], V. Ya. Karlov [8], V. Yu. Shepitko [9] and others. The only dissertation work of V. Ya. Radetskaya in the domestic forensic science was devoted to the problem of formation of the doctrine of the criminalistics' language [10]. Of particular importance in terms of the formation of the modern concept of the criminalistics' language should be considered the publication of encyclopaedic publications [11; 12], the initiator and direct leader of the author's teams of which is V. Yu. Shepitko. At the same time, in the modern forensic literature, there are proposals for the formation of the conceptual and terminological apparatus of this science, which are contradictory, require additional argumentation and separate consideration. The criminalistics' language also changes in connection with the replacement of some definitions by others, clarification of existing definitions, in connection with the differentiation of definitions on different grounds. The criminalistics' language is influenced by the unification of the terminology of criminalistics: reduction of the number of terms denoting the same object; replacement of existing terms with new

ones that are different from the old terms or exist instead of them; updating and replenishment of criminalistics terminology through the use of terms of new areas of scientific knowledge – computer science and modelling, legal logic, etc.

As it can be seen, today criminalistics as a science has a fairly large scientific and categorical apparatus. At the same time, some forensic terms have not yet found unity in interpretation and have ambiguity in the interpretation of their content, which creates a vagueness of wording. Therefore, the question of systematisation and streamlining of terminology as one of the priority tasks of the theory of criminalistics remains relevant.

1. MATERIALS AND METHODS

These issues relate to the scientific problems of the general theory of criminalistics connected to the elucidation of trends in the science of criminalistics, the formation of its conceptual and terminological apparatus, determining the specifics of forensic knowledge and language forms of their expression. Each science uses a special language, which consists of concepts expressed by definitions and symbols (signs and terms). The criminalistics' language is one of the objects of study of criminalistics, but the content and meaning of the criminalistics' language and means of expression in criminalistics are insufficiently studied by criminologists – there is no reason to talk about the sufficiency of material for research.

Recently, the study of the language of criminal law, criminal justice, criminalistics and forensic science is given great importance. The problem of the language of science is general theoretical, so it is studied not only in criminalistics, but also in other branches of legal sciences (language of criminal justice, language of criminal procedure law, etc.), as well as philosophy, psychology, philology and other sciences. This leads to the involvement for analysis of the methods of these sciences. Although thinking and consciousness are perfect, the language that expresses them is material. Language arises in society, is a social phenomenon and performs two important functions – the expression of consciousness and the transmission of information. Problems of language, thinking and conversation are the subject of research in psychology, so it is advisable to use the methodology of this science in the analysis.

Means of expression consist of a system of verbal and nonverbal signs and concepts that reflect information about material and ideal objects and phenomena. The process of analyzing the language of criminalistics involves the use of both means of expression. Verbal (from the Latin verbalis – verbal) means of expression – concepts, categories, terms and terminological phrases. Nonverbal (symbolic) means of expression – formulas, graphs, diagrams, plans, photographs, holograms, models, etc. In addition, it is possible to use mixed means of expression that combine verbal and nonverbal means: video and film images, computer technology, accompanied by the recording of verbal language. All these means of expression allow you to record and transmit information about crimes committed, as well as about any other objects and phenomena studied by forensic science. It is obvious that the system of means of expression in criminalistics, like any language, is not stable, is in a state of constant development. This leads to the deepening of scientific knowledge, improvement of the conceptual apparatus of science and research methodology. In addition, the development of means of expression in criminalistics. The use of accepted terminology should reveal the content of relevant concepts at the level of modern ideas

about them, and especially the most general concepts – forensic categories, defined by the subject of criminalistics.

The correctness of perception, the presence of the content of criminalistics terminology is significantly influenced by the correctness of the use of terms, their compliance with grammatical and stylistic rules and logical patterns of definition. Therefore, methods of philology are used for analysis. In order to solve the outlined problems, a set of general scientific and special methods of scientific cognition was used in the work. Thus, the use of dialectical and historical methods of cognition allowed to study the evolution of scientific views on the criminalistics' language, the specifics of the formation of its conceptual and terminological apparatus, the validity of the introduction of new scientific concepts, terms, signs, symbols. The comparative method provided an opportunity to analyse the recently proposed terminological innovations in the criminalistics' language, identify their positive aspects and certain shortcomings that do not contribute to the real enrichment of the modern criminalistics' language, but, conversely, lead to terminological looseness and cluttering the language of this field. This kind of research allowed to talk about the necessity to develop the criminalistics' language, its conceptual and terminological apparatus under certain criteria and conditions defined in both special and criminalistics literature.

The use of formal-logical and system-structural methods led to the conclusion that the scientific apparatus of criminalistics is a complex, multilevel, holistic system of categories, concepts, terms, special signs, symbols formed in the process of origin and development of criminalistics, serving to reflect special concepts and the names of typical objects of this science. The method of analysis provided a generalisation of accumulated theoretical knowledge on the formation of the scientific arsenal of criminalistics based on the specifics of the development of this field of knowledge, prospects for creating a separate doctrine of the criminalistics' language, the possibility of attracting relevant knowledge from various scientific fields. The choice of research methodology for the conceptual and terminological system of criminalistics is also due to the fact that this science is in constant dynamics, characterised by the mobility of the content of concepts and terms against the background of the constancy of the sign, different interpretations; as well as the multifaceted terminological nominations. Conscious attitude to language in criminalistics, understanding of methodological bases and terminological apparatus, principles of language formation and rules of use of concepts and terms, are the main postulates of modern scientific development. Therefore, the analysis of the criminalistics' language is one of the important tasks of modern methodology of science. Research of problems of criminalistics' language promotes strengthens processed of science theorising, provides unity of various ways of display of the analysed phenomena, creates universal methods of research, systematises an information field of the analysis and system of criminalistics knowledge.

Criminalistics categories and the conceptual apparatus are the basis for the formation of forensic theory, because it is the formation of a qualitative conceptual apparatus allows to unambiguously use the theory of terminology. Despite the rather large scientific apparatus of the science of criminalistics, some criminalistics terms still have ambiguity in interpretation, which requires further systematisation and streamlining of the terminology of the criminalistics theory.

2. RESULTS AND DISCUSSION

In the special literature various definitions of the concept "science language" are offered [13-15], where the main features are as follows:

- the language of science is a synthetic concept of the methodology of science, which combines all the linguistic means used in science to express the acquired knowledge at a specific historical stage of its development [16];
- the language of science is a set of means of formation and justification;
- provisions of science, the conceptual apparatus of scientific theory together with the methods of proof and confirmation [17];
- the language of science is a tool for knowing the world and presenting the acquired knowledge [18];
- the language of science is a system of concepts, signs, symbols that are created and used by a particular field of scientific knowledge in order to obtain, reflect, process, preserve and use knowledge. It arises and is formed as an instrument of cognition of a certain sphere of phenomena and its specificity is determined both by the peculiarities of the sphere under study and by the methods of its cognition [19];
- the language of science is a specific sign system that serves as a material expression of the results of scientific cognitive activity, which can act as a natural language (language of direct communication) and artificial (signs, symbols, mathematical expressions, chemical formulas, etc.) [20].

Discovered by professor R.S. Belkin main trends in the development of the criminalistics' language remain relevant today. At the same time, there are modern trends in the development of means of expression in criminalistics (the use of computer technology and computer modelling, etc.), which requires updating the methodological basis of analysis. Criminalistics, like any science that deals with the acquisition of knowledge through the understanding of one or another side of objective reality, cannot do without individual words and their combinations that reflect certain concepts, i.e. without terms, in their totality (system), in other words without terminological apparatus. In this case, the terms mean a well-defined and suitable for use in science vocabulary. Scientific terminology of criminalistics, as a set of terms and special signs formed in the process of origin and development of criminalistics and those that serve to reflect the special concepts and names of typical objects of this science, and is a linguistic form of professional knowledge.

The concepts of criminalistics form a complex, multilevel, holistic system. In particular, the categories of criminalistics can be considered extremely general, such that are not generalised further within this science, concepts – for example, forensic techniques, forensic tactics, forensic methods, forensic recommendation, forensic technique, forensic tool, tactical operation, traces, tactics crime, method of crime, etc. These categories include other concepts that fall within their scope and are in a relationship of subordination. Thus, the category "trace of crime" includes "materially fixed traces of reflection" and "ideal traces" ("traces of human memory"), the category "modus operandi" – "method of preparation", "method of commission" and "method of concealment". Thus, the criminalistics' language is a dynamic conceptual system based on definitions and designations (terms, signs), which are a means and method of criminalistics thinking and are used in the description (fixation) of forensic information in the practice of lawyers [21].

The current state of development of criminalistics, the formation of promising students (theories) necessitated the introduction of a significant number of new concepts, terms, signs in its scientific apparatus. The innovations concern not only the general theory of criminalistics, but also its main sections – techniques, tactics and methods. The basis of the doctrine of the criminalistics' language is the theory of reflection, because each degree of reflection of reality in the human mind implies the need for cognitive procedure of reality and certain research procedures through the language form. In the philosophical literature it was noted that in the structure of the science language can be distinguished two sublanguages – the language of observation and the language of theory. The language of observation includes those statements of science that form the results of observation and experiment; the language of theory includes statements that are the result of logical reasoning [16]. In V.M. Pashchenko's interpretation, verbal scientific language is an intertwined unity of two complementary sublanguages: 1) language for describing real facts, phenomena and essences that exist independently of human, it is the so-called "object-essential verbal scientific sublanguage"; 2) the language of descriptions of research results and interpretations, generalisations, creation of scientific concepts and theories, this is the so-called "subject-knowledge verbal scientific sublanguage". This sublanguage has all the definitions derived from the names of science. And if the first sublanguage serves as an empirical presentation of data, it is a language for defining the source materials of research – and presentation of the studied entities, the second – to reflect the processes of processing, understanding and verification of collected source material – empirical, theoretical and methodological [22].

The special literature also rightly emphasised that without the use of natural language it is impossible to explain and interpret the scientific provisions reflected in the concepts and terms of science [23]. In this case, it is mainly about verbal texts, which, of course, can be supplemented by meaningful symbols, formulas, models and accompanied (decorated) with pictorial elements: diagrams, graphs, drawings, maps and more. But, as I.L. Mikhailin emphasises, symbols and depicted elements do little without meaningful correct verbal text to inform a consumer of scientific knowledge [18]. In this regard, the criminalistics' literature drew attention to the fact that today its main part has not gone beyond natural language, and has not yet managed to construct a comprehensive system of formalised language operating scientific categories and concepts, as well as concepts of crime investigation [24]. At the same time, with the use of methods and concepts of formal logic, information theory, forecasting, higher mathematics in criminalistics, the question of developing sign systems arises, i.e. the replacement of vocabulary description with symbols, signs, formulas. In this regard, M.S. Polevoy once drew attention to the fact that the means and methods of criminalistics are based and created on the basis of means and methods of many natural and technical sciences, including mathematics and cybernetics. And if so, then in the language of criminalistics in its interaction with mathematics and cybernetics, it is impossible to assimilate elements of the latter [25]. Given this language of criminalistics, its conceptual and terminological apparatus must develop under certain criteria and conditions. According to R.S. Belkin modern trends in the criminalistics' language include the following:

1) *expanding the range of concepts and definitions used* – a reflection of both growth and qualitative changes in forensic knowledge, which can manifest itself in two directions:

a) in increasing the number of forensic definitions, i.e. definitions of such concepts, which only forensic science uses; b) in increasing the number of forensically interpreted definitions used in scientific and everyday language;

2) *change of definitions* – both replacement of some definitions by others, and specification of the definitions used;

3) *differentiation of concepts and their definitions* – the separation of definitions relating to the broadest forensic concepts – categories that are generic in relation to the definitions of concepts included in the content of these categories;

4) *unification of criminalistics' terminology* – reduction of terms defining the same object, or replacement of several accepted terms by one new one, which will exist not next to the old terms, but instead of them;

5) *development of criminalistics' sign systems* – formalisation of language criminalistics by creating unified systems of mathematical and other symbols that reflect certain forensic concepts [26].

It should be borne in mind that the successful formation of criminalistics' modern language is hindered by the following problems: ambiguity of terms; double variability in the use of terms (the peculiarity is that one word (phrase) has several meanings, i.e. most words are polysemous, while the term must accurately reflect a concept in science); inattention to the semantics of the word; excessive emotional colouring of terms; violation of logical sequence in the formulation of definitions; incorrect tracing (transliteration) of Russian equivalents; stylistic design of author's interpretations; inconsistency of the conceptual criterion and logical-stylistic organisation, which leads to the violation of the connecting connections of the term in the text material [10]. In addition, when formulating a concept it is necessary to adhere to the dialectical unity between the phenomenon of reality, concept and term. This unity is that the main, defining and primary in it is the phenomenon of reality. The concept is a reflection of this phenomenon in the minds of people, and the term serves as a lexical expression of the concept [27]. Since the middle of the last century, the terminological system of criminalistics has been experiencing a period of accelerated development. This is evidenced, on the one hand, by the emergence of new terms (e.g., forensic situation, forensic victimology), on the other – the replacement of existing ones with others, while maintaining the previous meaning of the term, its content (e.g., graphic examination – handwriting examination; microobjects – microtraces; forensic explosives – forensic explosive science, etc.) and changes in its content (for example, investigative tactics – forensic tactics; investigative version – forensic version). There is also a process of unification of terminology, which is associated, firstly, with the reduction of the number of terms denoting the same object, and, secondly, with the replacement of several accepted terms with one new [28].

The formation of the conceptual apparatus of criminalistics, its terminological system took place on the basis of various sources: words and phrases formed by applying various linguistic approaches, in particular, on the basis of Greco-Latin terminological elements (dactyloscopy, poroscopy, edgeoscopy, habitoscopy, phonoscopy, homeoscopy, odorology, homology (doctrine of an identity of an offender, etc.), lexical units borrowed from other foreign languages (diagnostics, tactics, information, etc.), vocabulary units of Russian origin and which are interpreted to the scientific apparatus of domestic criminalistics (detention "by hot traces" (following a hot scent), the establishment of the

whole in parts, etc.).These processes and their results give scientists a reason to single out certain elements in the structure of the criminalistics' language. Ya. Radetskaya distinguishes three groups of terms that are represented in the criminalistics' language: 1) general scientific terms, which are used to achieve the stylistic design of theoretical works on criminalistics; 2) legal terms, the main fund of which is contained in legislative acts, and where the following are distinguished: a) terms of generalised meaning; b) intersectoral terminology; c) industry terminology; 3) the actual forensic terminology [10]. In other words, the concepts used in forensics can be divided into the general, adapted and forensic.

Analysis of the modern criminalistics' language allows the proposed innovations, provided they are evaluated, to be combined into three groups. The first includes concepts and terms that are really aimed at increasing the scientific potential of criminalistics, activation of its cognitive function. The second group consists of such concepts and terms that need clarification, coordination of positions. Finally, the third group contains concepts and terms, the feasibility of which causes significant criticism [29]. Consider in more detail, first of all, those that relate to the conceptual provisions of criminalistics, the definition of its nature, the elucidation of the object-subject area of research. In the early 1970s, a new scientific concept emerged, based on the so-called activity approach. According to this concept, the object of criminalistics research is the activity: on the one hand – criminal, on the other – detection, investigation and prevention of criminal acts. The proposed concept could not but affect the transformation of scientific views on the object-subject area of criminalistics, the formation of its conceptual apparatus. In the forensic literature, along with the term "criminal activity" [30; 31] the term "forensic activity" is increasingly used [32] and, as a consequence, there are proposals to consider forensics itself not only as a science and academic discipline, but also as a kind of practical activity [33]. In particular, V.Ya. Koldin notes that "the task of practical forensic research is to establish the truth in a particular criminal case, i.e. the truth of a single fact" [34]. M.P. Yablokov writes that "predicting the practical nature is associated with the prediction of the peculiarities of forensic activities for the detection and prevention of a particular crime" [35].

It seems appropriate to make some remarks on the above positions. First, criminalistics is not directly involved in the detection and investigation of a specific crime. It is known that this is the function of investigative and judicial bodies, which use a variety of knowledge, tools, methods and recommendations, including forensic, to perform this activity. Secondly, as noted by R.S. Belkin, "it is customary to distinguish between forms of activity in the fight against crime only by the nature of their legal regulation. From this point of view, there are operational and investigative, procedural forms of activity, but not forensic … Ambiguous understanding of the term "criminalistics" – as a science and as a practice – is not appropriate as well as the use of the terms "forensic relations", "forensic activities". Thirdly, criminalistics reflects the most significant patterns inherent in the objects of its study, sets out general recommendations for typical investigative, investigative, expert situations. Therefore, forensic scientists are primarily faced with the task of developing the scientific basis for the introduction into criminalistics and expert practice of technical means, tactics and appropriate methods of detection and investigation of crimes. For similar reasons, the proposals on the introduction of such integration

constructions as "forensic odorology", "forensic psychology" and "forensic information" into the conceptual apparatus are not sustainable. In this case, the addition of the term "forensic" to the usual general scientific concepts not only does not enhance their meaning and does not expand the scope, but on the contrary creates a situation where they become the object of critical remarks.

Regarding forensic odorology and the attempt of some scientists to elevate it to the rank of a separate forensic theory or even science [36; 37], in this regard, it seems appropriate in the context of this issue to make some comments. First, integration processes can take place only in such areas of knowledge that have a relevant theoretical basis and are generally accepted. Especially when it comes to criminal proceedings and the procedure of proof. Secondly, it should be clearly understood that the integration of knowledge takes place as an objective natural process, and not at the request of individual researchers. Moreover, if there are no corresponding objective synthesising bases, then all attempts to unite certain knowledge are in vain, and the results of such a scientific search cannot be called anything other than forensic phantoms. Third, the integration of knowledge in criminalistics and new theoretical constructions should be formed taking into account its official, pragmatic function and based on the principles of criminal justice. Ignoring these principles can lead to significant methodological errors and inconsistencies with current legislation.

In this regard, as can be seen, position of V.D. Basay on the formation of a separate forensic doctrine – "forensic odorology" is quite vulnerable. At the same time, V.D. Basay for some reason calls "criminalistics odorology" *partial* (author's italics – V. Zh.) doctrine, while in criminalistics the term "separate doctrine (theory)" is accepted. Moreover, the author in his judgments on this issue is not consistent, because along with the term "partial criminalistics doctrine" uses the term "partial odorological doctrine", which is not the same thing. The fact is that odoology itself as a field of knowledge is currently making only the first steps and is only in the process of formation. It lacks the proper tools to carry out appropriate odorological research with a high degree of representativeness of the results, and therefore efforts to combine odorological and criminalistics knowledge should be considered premature. V.D. Basay's thesis about the fundamental impossibility of instrumental study of odour traces is not convincing, because the author ignores the dialectic of scientific and technological progress. At the same time, proposals for laboratory examination of traces and samples of a human odour using a specially prepared dog detector and any other bioanalyser (as the author proposes to use rats' sense of smell) and issued in accordance with the conclusion of the commission odorological examination [37], that is by procedure document, contrary to applicable law and may not be considered appropriate.

Another debatable integration construction is "forensic psychology". The founders of this concept V.O. Obraztsov and S.M. Bogomolova believe that "investigative psychology" inaccurately reflects the content of the relevant section of legal psychology, and therefore it is more correct to speak of "criminalistics psychology" as an integrative, generalising category, covering as investigative, so other types of psychology of forensic investigation in pre-trial criminal proceedings [38]. In author's opinion, in this case, these scientists make an epistemological error. Of course, certain branches of general psychology, including law, study the laws of the human psyche, which are manifested in

the relevant sphere of social relations. As for jurisprudence, these relations are regulated by law and are implemented in such forms of activity as judicial, investigative, operational-search, criminal-executive, expert, etc.

Thus, if there is no criminalistics activity, i.e. the area where certain patterns of the human psyche are manifested, then it is not possible to identify the relevant field of knowledge that examines them, namely "forensic psychology". This does not in any way deny the existence of integration links between criminalistics and legal psychology. These connections really exist and are manifested primarily in the aspect of the tactics development and their combinations of individual investigative actions. The remarks made concern only the fundamental impossibility of forming "forensic psychology" as an independent direction of branch knowledge. The use of the term "forensic information" should also be considered a linguistic innovation that needs separate consideration. Indeed, the information approach since the formation and development of computer science, cybernetics has been widely used, including in criminalistics. Increasingly, the terms "information" or "data" have been replaced by the term "information", in the literature there is a conversation about information processes and structures in criminalistics [39], for example, about the interrogation as an information process [40]. Fascinated by the new scientific direction, some forensics have forgotten that the term "information" should be used only in a clearly defined subject area. In this regard, it can hardly be considered impeccable to introduce into the scientific apparatus of such a category as "forensic information" and, moreover, attempts to differentiate it into evidence and tactical [41]. Such attempts provoked critical remarks from some scientists, among whom the most categorical was R.S. Belkin. "Like forensic activity," he noted, "the term "forensic information" is meaningless and pointless. It does not carry any semantic load, as it is impossible to determine which information is forensic and not procedural or operational, which are its only sources. In nature, there is no such information, but only information meaningful for forensic, which means any information that is used to solve forensic problems, regardless of its type and sources. And in terms of means, tasks and purpose of proof, information can only be evidential or indicative" [42]. And, as a summary, R.S. Belkin attributed this term to the category of so-called forensic phantoms.

The proposal of G.A. Matusowskiy to review the category "methods of crime investigation" in two aspects should also be considered debatable. First, as a process of investigation of crimes, as a specific activity of bodies and persons authorised by law, carried out on the basis of the use of forensic techniques, methods of investigative tactics, methods of investigation of certain types. Secondly, as a section of criminalistics, which contains a system of comprehensive forensic recommendations for the detection, investigation and prevention of certain types of crimes. "It is in the relationship of these two areas – practical and theoretical," said G.A. Matusowskiy, "the method of investigating crimes reveals its purpose" [33]. As for the theoretical direction, there are no objections, because "methodology of crime investigation" is traditionally considered as a purely scientific category. At the same time, the desire to consider the category "methodology of crime investigation" as a synonym for "investigation process" or "investigation activity" contradicts the provisions of semantics and etymology, where the method is considered as a set of methods, techniques, operations of reality cognition. In other words, "methodology" is a set of scientific advice on the most effective ways to carry

out activities to detect, investigate and prevent crimes, and not the activity itself. In addition, the proposal to introduce the term "automated crime investigation methodology" into the conceptual apparatus of forensic science should also be considered insufficiently substantiated [43]. Indeed, in the scientific and reference literature, guidelines for the optimal organisation of pre-trial investigation can be set out in a descriptive (most traditional) and formalised form, in the form of specific programs or algorithms. But programs and algorithms cannot fully reflect the content and structure of the descriptive method, and therefore the addition of the term "methodology" to the term "automated" does not seem correct. As it can be seen, the desire of individual authors to unjustified unification, simplification of certain terms, which leads to the emergence of such innovations, which cannot be called anything other than scientific jargon, should be recognised as another negative trend. It is worth proposing to replace the traditionally used term "theory of operational and investigative activities" with the term "ordology", and "the process of implementing operational and investigative measures" – with the term "orthological regulations" [41]. Frankly, it is highly doubtful that the theory of criminalistics is in dire need of such unifications, as the latter lead to terminological looseness and cluttering of the science language.

CONCLUSIONS

The criminalistics' language as a system of concepts, terms, signs, symbols is developing dynamically. There is a constant enrichment of the scientific arsenal of this field of knowledge. At the same time, this process should take into account the general trends in the development of the science of criminalistics, its conceptual and terminological apparatus. The rejection of traditional approaches to the definition of certain forensic concepts, the desire for innovation and unification always require special care and comprehensive justification. Some of the terms and means used may seem unsatisfactory. Criminalistics, unlike most other areas of research, makes an attempt to apply a scientific method in the field, which is why there are certain problems of interpretation that can be avoided. The conceptual and terminological aspect of criminalistics deserves close attention in all different legal actions: law-making, law enforcement, law interpretation and law implementation. Criminalistics terminology deserves special attention, as it should not be interpreted randomly or by analogy. Its use should be orderly, clearly regulated, as its use is often associated with the most significant restrictions on individual rights. To denote the conceptual, doctrinal content of criminal science, it is necessary first of all to involve categories and terms that reflect the essence of domestic criminalistics policy.

As the study shows, there is still a need to develop uniform and unambiguous concepts in legal terminology in general and in the criminalistics' apparatus in particular, because the language of scientific theory is not yet unambiguous and is to some extent debatable.

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СУЧАСНІ ПІДХОДИ МІЖНАРОДНОГО ПРИВАТНОГО ПРАВА ТА КОЛІЗІЙНІ НОРМИ ДОГОВОРІВ ПРО ПРАВОВУ ДОПОМОГУ У ЦИВІЛЬНИХ СПРАВАХ

Анотація. *Частина договорів про правову допомогу між Україною та іншими державами містить колізійні норми. Ті з них, що визначають право застосовуване до договірних зобов'язань, сімейних та спадкових відносин є такими, що не відповідають сучасним підходам визначення права, застосовуваного до згаданих груп відносин. Метою статті є розкриття відмінностей між колізійним регулюванням приватних відносин у договорах про правову допомогу між Україною та деякими країнами ЄС та сучасними підходами до колізійного регулювання таких відносин у інших джерелах міжнародного приватного права; пояснення того, як слід вирішувати колізії між договорами про правову допомогу та іншими міжнародними договорами; окреслення основних напрямків удосконалення колізійних норм у договорах про правову допомогу. Методами дослідження були порівняльний, діалектичний та формально-логічний, які дозволили виявити проблеми колізійного регулювання у договорах про правову допомогу, та зробити висновки для їх усунення. Використання зазначених методів дозволило з'ясувати, що для регулювання договірних зобов'язань за відсутності угоди сторін про вибір застосовуваного права найчастіше використовується прив'язка lex loci contractus. Договір між Україною і Румунією не передбачає можливості вибору права до договірних зобов'язань. Договори про правову допомогу імперативно визначають право, застосовуване майнових відносин подружжя. Вони використовують дуалістичний підхід до визначення права, застосовуваного до спадкування. Встановлено, що конкуренція норм цієї Конвенції та нормами договорів про правову допомогу між Україною та Польщею і Україною та Естонією має вирішуватися на користь Гаазькою конвенції. Запропоновано внести зміни до договорів про правову допомогу укладеними між Україною та Державами-Членами ЄС: колізійні норми, що визначають право, застосовуване до договірних, сімейних і спадкових відносин викласти у новій редакції, використавши у якості моделі колізійні норми відповідних регламентів ЄС.*

Ключові слова: колізійне регулювання, договірні відносини, Гаазька конвенція, заповідач, спадкові відносини.

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MODERN APPROACHES TO PRIVATE INTERNATIONAL LAW AND CONFLICTING PROVISIONS ON LEGAL AID IN CIVIL CASES

Abstract. *Part of the legal aid treaties between Ukraine and other states contains rules concerning conflict of laws. Where those that determine the law applicable to contractual obligations, family, and hereditary relations are not in line with current approaches to determining the law applicable to the specified groups of relations. The purpose of the paper is to uncover the differences between the regulation of conflict of laws in private relations in the legal aid treaties between Ukraine and some EU countries and the modern approaches to the regulation of conflict of laws in such relations, contained in other sources of private international law; an explanation of how to solve conflicts between legal aid treaties and other international treaties; outlining the main areas of improvement of rules concerning conflict of laws in legal aid treaties. The methods of the study were comparative, dialectical, and Aristotelian, which allowed to identify the problems of regulation of conflict of law in legal aid treaties and to draw conclusions for their elimination. Application of these methods allowed to find out that lex loci contractus is most often used to regulate contractual obligations in the absence of an agreement of the parties on the choice of applicable law. The agreement between Ukraine and Romania does not provide for the choice of the law for contractual obligations. Legal aid treaties imperatively determine the law applicable to the property relations of the spouses. They apply a dualistic approach to determining the right to inherit. It has been established that competition between the rules of this Convention and the rules of legal aid treaties between Ukraine and Poland and Ukraine and Estonia should be decided in favour of the Hague Convention. It is proposed to amend the legal aid treaties concluded between Ukraine and the EU Member States: the rules concerning conflict of laws, which define the law applicable to contractual, family, and hereditary relations should be revised using the relevant EU regulations as a model.*

Keywords: regulation of the conflict of laws, contractual relations, Hague Convention, testator, hereditary relations.

INTRODUCTION

Legal aid treaties contain several rules important for international private law (hereinafter referred to as IPL), including rules concerning conflict of laws. Ukraine has concluded such agreements with many countries, including the following Member States: the Republic of Poland, the Republic of Bulgaria, Romania, the Estonian Republic, the Republic of Lithuania, the Republic of Latvia, the Czech Republic, Hungary, the Hellenic Republic, the Republic of Cyprus. Furthermore, according to the Ministry of Justice of

Ukraine, by virtue of the Law "On Legal Succession"[1] , the treaties concluded by the former USSR continue operating: the Convention between the USSR and the Italian Republic on Legal Aid, the Treaty between the USSR and the Finnish Republic on Legal Aid (as to this Treaty, legal succession of Ukraine was executed via exchange of notes), the Agreement between the USSR and the Federal People's Republic of Yugoslavia on Legal Aid[2]. However, the Ministry of Foreign and European Affairs of the Republic of Croatia does not mention this treaty among the treaties in force between it and Ukraine[3].

Legal aid treaties as a source of IPL were investigated by individual scholars. In particular, the place of legal aid treaties among other sources of IPL was analysed by A.S. Dovhert [1]; regulation of conflict of laws of certain types of private relations in legal aid treaties – by V.S. Khachatrian [2]; issues of the international civil process in such treaties – H.A. Tsirat [3]; issues of inheritance in legal aid treaties – O.O. Karmaza [4], M.O. Mykhailiv [5]. At the same time, the conformity of the regulation of conflict of laws in the legal aid treaties to modern approaches of international private law in Ukraine was not analysed. Resoluton of conflict of laws between legal aid treaties and other agreements have not been resolved, nor has the specificity of interpreting such treaties been analysed.

Therefore, the purpose of this paper is to identify the differences between the regulation of conflict of laws in private relations in the legal aid treaties between Ukraine and some EU countries and the modern approaches to the regulation of conflict of laws in such relations in IPL; to explain how to solve conflict of laws between legal aid treaties and other international treaties; to outline the main areas of improvement of rules concerning conflict of laws in legal aid treaties.

1. MATERIALS AND METHODS

To achieve the purpose of the study, the following methods of scientific knowledge were used: comparative, dialectical, Aristotelian. In particular, the comparative method was used to identify the essence of regulation of conflict of laws in legal aid treaties and current IPL sources, and allowed to identify differences in approaches to regulation of conflict of laws in these instruments. Thus, most legal aid treaties were found to use *lex loci contractus* to determine the law applicable to the contractual relations in the absence of an agreement between the parties as to the choice of applicable law; for real estate agreements, which are subject to *lex rei sitae* connecting factor. Modern IPL sources use other points of contact: the law of the country with which the contract is most closely connected; the law of the country where the party performing the contract has its habitual place of residence; fixed points of contact, which do not include *lex loci contractus*. The comparative method revealed differences in the regulation of conflict of laws in relations concerning marriage property. It was found that, unlike current IPL sources, some legal aid treaties forbid spouses to choose the law to be applicable to property relations between

[1] Law of Ukraine "On Legal Succession" (1991, October). Retrieved from https://zakon.rada.gov.ua/laws/show/1543-12.

[2] Legal basis in the field of legal relations in civil and criminal cases. Retrieved from https://minjust.gov.ua/m/str_9385.

[3] List of international treaties and international acts concluded between the Republic of Croatia and Ukraine. Retrieved from http://www.mvep.hr/en/foreign-politics/bilateral-relations/overview-by-country/ukraine,144.html.

them. The use of this method made it possible to identify the distinctive features of regulation of conflict of laws in hereditary relations: thus, legal aid treaties apply the dualistic approach to regulation of conflict of laws in hereditary relations, while the most recent source of IPL, which contains rules concerning conflict of laws applicable to hereditary relations, applies monistic approach. The comparative method revealed differences in legal aid treaties and current IPL sources as to the regulation of conflict of laws concerning the form of testaments. In particular, it was established that, compared to current IPL sources, legal aid treaties offer fewer alternatives to determining the law that can govern the form of a testament. Furthermore, the comparative method allowed to identify the place of legal aid treaties among the sources of law of EU and Ukraine, which contain rules concerning conflict of laws, and to identify the commonality in approaches to this issue: legal aid treaties concluded between Ukraine and a particular EU Member State take precedence over both national legislation of Ukraine and EU regulations containing rules concerning conflict of laws.

The dialectical method was used to find out the extent to which the rules concerning conflict of laws, contained in legal aid treaties, conform to the needs of modern life. It revealed the obsolescence and inconvenience of *lex loci contractus* connecting factor. The use of the dialectical method allowed to conclude that depriving the spouses of the opportunity to choose the law applicable to property relations between them does not meet modern requirements, and in some cases conduces legal uncertainty. The dialectical method helped to identify the difficulties caused by the application of a dualistic approach to the regulation of conflict of laws in hereditary relations in the modern world and to identify issues arising from its application. The dialectical method allowed to identify the inconsistency of the regulation of conflict of laws concerning the form of testament in the legal aid treaties, particularly with regard to the *favour testamenti* principle, which is one of the key principles in modern IPL. The discrepancy, in particular, is that legal aid treaties concluded between Ukraine and the EU Member States provide less opportunity to implement this principle than is required in modern life.

The Aristotelian method was used to develop proposals for resolving conflicts between the rules of legal aid treaties and those of other international treaties. In particular, this method allowed to establish that competition between provisions of the Hague Convention on conflict of laws, which concern the form of testaments and the rules of legal aid treaties between Ukraine and Poland, and Ukraine and Estonia should be decided in favour of the Hague Convention.

2. RESULTS AND DISCUSSION

2.1 Common features of regulation of conflict of laws in legal aid treaties between Ukraine and individual countries

First, it should be noted that all legal aid treaties between Ukraine and other countries can be classified into 3 groups. The first group includes treaties that do not contain rules concerning conflict of laws[1]. The second group includes treaties containing rules

[1] Treaty between Ukraine and the Republic of Hungary on Legal Aid in Civil Affairs. (2001, August). Retrieved from https://zakon.rada.gov.ua/laws/show/348_026; Treaty between Ukraine and the Hellenic Republic on Legal Aid in Civil Affairs. (2002, July). Retrieved from

concerning conflict of laws relating only to hereditary relations and the form of the testament[1]. The third group consists of treaties that have rules concerning conflict of laws that determine the law applicable to a wide range of relations: contractual, non-contractual, family, hereditary, restrictions, and deprivation of legal capacity [2].

Analysis of the rules concerning conflict of laws in legal aid treaties suggests that the approaches they use to determine the law applicable to contractual obligations, family, and hereditary relations are archaic and do not correspond to modern tendencies in the regulation of specified groups of relations.

For example, most legal aid treaties, to determine the law applicable to the regulation of contractual relations, the parties of which did not agree on the law applicable to the contract, establish *lex loci contractus* connecting factor, except contracts for real estate, regulated according to *lex rei sitae*[3].

Meanwhile, the inconvenience of using such a connecting factor as *lex loci contractus* is generally recognized. It is explained by the fact that different legal systems have different approaches to determining the place of conclusion of the contract (in some countries – the place of sending the bill of acceptance, in others – the place of receiving the bill of acceptance). Furthermore, situations often occur where the contract is not in any way related to the state of the place of its conclusion. It is for this reason that modern IPL sources do not use this connecting factor to determine the law applicable to contractual relations.

For example, the Law of Ukraine "On International Private Law" (hereinafter referred to as LoU "On IPL") provides that in the absence of a choice of law to the agreement, contractual relations shall be governed by the law of the state with which the treaty is most closely connected (Art. 44 of the LoU "On IPL"). This right is determined by analysing the terms and conditions, the essence of the transaction or the totality of the circumstances of the case (Art. 32, Part 3 of the LoU "On IPL"). If the analysis of these factors does not allow to determine the law applicable to the contractual relations, it shall be defined as the law of the state "where the party responsible for performance, which is crucial for the content of the transaction, has its place of residence or location" (Art. 32, Part 3 of the LoU "On IPL"). Article 44, Part 1 of the LoU "On IPL" defines such a party for 23 agreements. Article 44, Part 2 of the LoU "On IPL" offers a specific mechanism for determining the law that has the closest connection to the agreement for certain types of

https://zakon.rada.gov.ua/laws/show/300_013; Treaty between Ukraine and the Republic of Bulgaria on Legal Aid in Civil Affairs. (2004, May). Retrieved from https://zakon.rada.gov.ua/laws/show/100_056.

[1] Treaty between Ukraine and the Republic of Cyprus on Legal Aid in Civil Affairs. (2004, September). Retrieved from https://zakon.rada.gov.ua/laws/show/196_008. (hereinafter referred to as the Treaty between Ukraine and Cyprus).

[2] Treaty between Ukraine and the Republic of Poland on Legal Aid and Legal Relations in Civil and Criminal Affairs. (1993, May). Retrieved from https://zakon.rada.gov.ua/laws/show/616_174 (hereinafter referred to as the Treaty between Ukraine and Poland); Treaty between Ukraine and the Republic of Lithuania on Legal Aid and Legal Relations in Civil, Family, and Criminal Affairs. (1994, November). Retrieved from https://zakon.rada.gov.ua/laws/show/440_002 (hereinafter referred to as the Treaty between Ukraine and Lithuania).

[3] Agreement between Ukraine and the Czech Republic on Legal Aid in Civil Affairs. (2008, December). Retrieved from https://zakon.rada.gov.ua/laws/show/203_018 (hereinafter referred to as the Treaty between Ukraine and Czechia).

agreements. The connecting factor applicable to consumer contracts, in the absence of a choice of law, is the law of the country where the consumer has its place of residence (Art. 45, Part 3 of the LoU "On IPL"). That is, the LoU "On IPL" does not apply the *lex loci contractus* connecting factor to contractual obligations.

The Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)[1] (hereinafter referred to as Rome I Regulation) also does not apply the said factor, which, in the absence of a choice of law by the parties to the agreement, offers a number of fixed connecting factors, among which there are no *lex loci contractus* (Articles 4-8 of Rome I Regulation). Furthermore, the contract may be governed by the law of the state where the party carrying out a specific performance of the agreement has its habitual residence, if it is an agreement that is not mentioned in Art. 4, Part 1 of the Rome I Regulation or if it contains elements of various agreements referred to in Art. 4, Part 1 of the Rome I Regulation. It is therefore considered that the "specific performance" connecting factor in the Rome I Regulation is used in a subsidiary manner [6].

The *lex loci contractus* connecting factor also is not applicable in the Law of Switzerland "On International Private Law" (hereinafter referred to as the LoS "On IPL")[2], which is rightly referred to as the "Comprehensive Codification" of IPL [7]. According to the document, the primary connecting factor applicable to the contractual obligations in the absence of an agreement of the parties as to the choice of applicable law is the law of the state with which the agreement is most closely related. The law applicable to certain types of agreements is determined according to other connecting factors, but there are no *lex loci contractus* among them (Art. 117-123 of the LoS "On IPL").

Article 31 of the Agreement on Legal Aid between Ukraine and Romania, instead of the term "contractual relations", uses the term "legal relations with immovable and movable property" and defines the law applicable to them as "the law of that contracting party in whose territory the real estate or movable property is located". However, the parties to such legal relations are not empowered to choose the law applicable to such relations. Considering that the aforementioned Treaty between Ukraine and Romania contains special rules concerning conflict of laws which cover different groups of private legal relations (Article 33 – tort relations, Articles 34-36 – hereditary relations, Article 26 – relations governing marriage property) other than contractual, it is obvious that Art. 31 refers to contractual relations.

Depriving the parties to the agreement of the right to choose the law applicable to the agreement appears more than surprising, considering the fact that the principle of autonomy of the will of the parties (in particular, in contractual relations) is a fundamental principle of the modern IPL, enshrined in most of its sources (for example, Article 3 of the Rome I Regulation, Article 43 of the LoU "On IPL", Article 116 of the LoS "On IPL"). A considerable number of international contracts contains an agreement on the choice of applicable law, most of which are supported by courts [8].

Rules concerning conflict of laws that determine the law applicable to the marriage

[1] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593.

[2] Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987 (stand am Januar 2019). Retrieved from https://www.admin.ch/opc/de/classified-compilation/19870312/index.html.

property relations also do not correspond to modern approaches of their regulation, since they do not establish the right of spouses to choose the law applicable to them, and imperatively define such right (see, for example, Article 26 of the Treaty between Ukraine and Lithuania, Article 29 of the Treaty between Ukraine and Czechia, Article 26 of the Treaty between Ukraine and Romania)[1].

Meanwhile, Article 61 of the LoU "On IPL", including Article 22 of the EU Regulation on enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes allow spouses to choose the law applicable to marriage property regimes [2] (hereinafter referred to as the Marriage Property Regulations) (although there are restrictions on alternatives from which the applicable law can be chosen). With that, as commenters of the said Regulation note, this document treats the autonomy of the will of the spouses to choose the law applicable to the regimes of marriage property as a matter of paramount importance, Moreover, it avoids ambiguity as to the law governing the regimes of marriage property, which is inevitable if spouses do not choose the right applicable to their property relations [9].

Regulation of conflict of laws in hereditary relations in legal aid treaties is also obsolete. In particular, this is because they apply a dualistic approach to determining the right to inheritance (that is, the inheritance of movable property is governed by the law of the country where the heir had its last residence (or by the law of the country of its nationality, if it chose the law of that country in the testament); real estate is inherited according to the law of the country where the property is located (see, for example, Article 36 of the Agreement between Ukraine and the Republic of Estonia on Legal Aid and Legal Relations in Civil and Criminal Affairs[3] (hereinafter referred to as the Treaty between Ukraine and Estonia), Article 34 of the Treaty between Ukraine and Romania, Article 35 of the Treaty between Ukraine and Lithuania, Article 18 of the Treaty between Ukraine and Cyprus. In principle, this corresponds to the approach contained in Article 70 of the LoU "On IPL", but the most progressive codifications of rules concerning conflict of laws apply a monistic approach to determining the law applicable to inheritance (that is, inheritance is subject to the law of one state, regardless of whether the hereditary mass includes both movable and immovable property). This is conditioned upon the fact that the use of different connecting factors, and therefore the laws of different states to inherit one person's property significantly complicates the planning of inheritance, especially when the law of one of the states applied to the inheritance has the institution of compulsory

[1] Treaty between Ukraine and the Republic of Lithuania on Legal Aid and Legal Relations in Civil, Family, and Criminal Affairs. (1994, November). Retrieved from https://zakon.rada.gov.ua/laws/show/440_002 (hereinafter referred to as the Treaty between Ukraine and Lithuania); Treaty between Ukraine and the Czech Republic on Legal Aid in Civil Affairs. (2008, December). Retrieved from https://zakon.rada.gov.ua/laws/show/203_018 (hereinafter referred to as the Treaty between Ukraine and Czechia).

[2] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1103.

[3] Treaty between Ukraine and the Republic of Estonia on Legal Aid and Legal Relations in Civil and Criminal Affairs. (1995, February). Retrieved from https://zakon.rada.gov.ua/laws/show/233_659.

inheritance, and the law of another state uses other mechanisms to protect the interests of the family [10]. For this reason, for example, the EU Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[1] (hereinafter – the Succession Regulation) does not contain any specific rules concerning conflict of laws applicable to the inheritance of immovable property, and defines the right applicable to inheritance at large). (see Articles 21, 22 of the Succession Regulation).

Regulation of the conflict of laws concerning the form of the testament, which is contained in legal aid treaties, is also not in line with current approaches. Thus, most of them provide that the form of the testament or the act of cancellation thereof may be governed either by the law of the state where it was drafted, amended, or revoked accordingly, or by the law of the state whose nationality the testator had at the time of drafting the testament or the act of at the time of cancellation thereof (see, for example, Article 19 of the Treaty between Ukraine and Cyprus; Article 39, Part 2 of the Treaty between Ukraine and Poland). Meanwhile, the basis of modern regulation of the conflict of laws concerning the form of testament underlies the *favour testamenti* principle, according to which the intention of the testator is to be given the maximum possible effect [11]. The implementation of the *favour testamenti* principle is ensured by the fact that the rule concerning conflict of laws, which defines the law applicable to the form of testament, establishes several alternative connecting factors, which, referring to the laws of different states, enable the court to choose the one which refers to the law that supports the validity of the testament [12]. That is why, for example, the Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions, concluded on 5 October 1961 (hereinafter referred to as the Hague Convention), establishes, compared with the legal aid treaties, a greater number of alternatives to determine the law applicable to the form of testament. In particular, Art. 1 of the Hague Convention states that: "a testament is valid as to its form if the same is in conformity with national law: a) the place where the testator made it, or b) the nationality of the testator at the time of the drafting the testament or at the time of their death, or c) a permanent place of testator's residence at the time of the drafting the testament or at the time of their death, or d) the habitual residence of the testator at the time of drafting the testament or at the time of their death, or e) as far as real estate is concerned – its location".

It is noteworthy that all alternatives in this rule concerning conflict of laws are connected by the "or" conjunction. That is, it is sufficient that the form of the testament corresponds to the law of at least one of the states mentioned in any of the alternatives. Article 72 of the LoU “On IPL” provides for connection factors similar to those in the Hague Convention to determine the law governing the form of a testament and the act of its cancellation. We support the opinion that the said article (similar to the Hague Convention) seeks to determine the choice of any of the alternatives it establishes to determine the applicable law [13].

[1] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012R0650.

2.2 Interaction of legal aid treaties with other sources containing rules concerning conflict of laws

Since the Hague Convention involves States with which Ukraine has bilateral legal aid treaties, which also contain connection factors regarding the form of the testament, which differ from those specified in the Hague Convention, it is necessary to find out which the rules will be subject to prevailing application. The Hague Convention does not address the matter of correlation of its rules with those of other international treaties. Article 97 of the Treaty between Ukraine and Poland states that: "this Treaty shall be without prejudice to the provisions of other Treaties to which one or both Contracting Parties are bound". Therefore, in case of competition between the Treaty between Ukraine and Poland and the Hague Convention, the latter shall be subject to application.

The Treaty between Ukraine and Estonia does not determine the correlation of its provisions with the rules of other international treaties in which the contracting states take part. Therefore, this issue will be resolved according to Art. 30 of the Vienna Convention on the Law of Treaties, which permits the application of a previous treaty which has not been terminated, only to the extent that its provisions are compatible with those of the following treaty.

In this regard, it is important to decide which contract is the previous one and the following one. Sometimes the answer to that question is obvious. For example, in 1992, two states acceded to the multilateral convention adopted in 1985, which entered into force in 1990. Later, in 2000, they entered into a bilateral agreement, which entered into force for each of them in 2001. It is clear that the 2000 treaty, which came into force in 2001, is the following one compared to the 1985 treaty, which came into force in 1990 in general, and in 1992 for the two states in particular..

However, more complex cases are also encountered, such as the situation with the Hague Convention and the Treaty between Ukraine and Estonia. It is known that the Hague Convention was adopted on 5 October 1961 and entered into force on 5 January 1964.[1] According to Article 15 (1) of the Hague Convention, it shall come into force on the 60th day after the deposit of the third instrument of ratification. It entered into force for Ukraine on 14 May 2011, and for Estonia on 12 July 1998.[2] According to Article 15 (1) of the Hague Convention, it shall enter into force for each state that signs it and subsequently ratifies it on the 60th day after the deposit of its instrument of ratification. According to Article 14 of the Hague Convention, the deposit of instruments of ratification is carried out by the Ministry of Foreign Affairs of the Netherlands. The Legal Aid Treaty with Estonia was signed on 15 February 1995 and entered into force on 17 May 1996.

In this regard, it should be noted that there are several approaches in international law to determine the date with which the understanding of the "following treaty" is connected in Art. 30 of the Vienna Convention. The first assumes that such a date is the date of acceptance of the international treaty (in other words, the date on which it became open for signing) [14]. The second is the date of entry into force [14]; the third is the entry into force of a specific state [14]; the fourth is the date of occurrence of mutual rights and

[1] Hague Convention. Retrieved from https://www.hcch.net/en/instruments/conventions/full-text/?cid=40.
[2] Status table of Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. Retrieved from https://www.hcch.net/en/instruments/conventions/status-table/?cid=40.

obligations between specific states. If the Hague Convention entered into force on 12 July 1998 and for Ukraine on 14 May 2011, the date on which the mutual rights and obligations arise therefrom is 14 May 2011.

In our opinion, the date of adoption of an international treaty cannot be decisive for the establishment of a "following treaty", since the opening of a treaty for signing does not in itself impose any obligations on specific states perform it. The same applies to the entry into force of an international treaty. Thus, the entry into force of the 1964 Hague Convention had no consequences for either Ukraine or Estonia. The entry into force of an international treaty for one country has no consequences for the other. Therefore, the date of entry into force of an international treaty for a particular country cannot be decisive for determining which of the two international treaties is the following. Therefore, it should be acknowledged that the following of the two international treaties is the one under which mutual rights and obligations later arose. Considering the fact that the Hague Convention's mutual rights and obligations for Ukraine and Estonia arose on May 14, 2011, and for the Treaty between Ukraine and Estonia – on May 17, 1996, the Hague Convention should be recognized as the "following" of these two treaties.

Therefore, competition between the Hague Convention and the Treaty between Ukraine and Estonia should be resolved in favour of the Hague Convention.

There are several theories regarding the interaction of international treaties and national law [15]. However, Art. 19, Part 1 of the Law of Ukraine "On International Treaties of Ukraine"[1] envisages priority of the rules of international treaties over the national law of Ukraine. The law of other states (e.g. Poland) with which Ukraine has legal aid treaties defines the correlation between international treaties and national law in a similar fashion [16].

According to the general rule provided, in particular, by Art. 62 of the Regulations on regimes of marriage property, Art. 25 of the Rome I Regulation, Art. 75 of the Succession Regulation, the rules of the international treaty in which the participating Member State(s) and third country(ies) take precedence over the rules of the corresponding regulation. If only international Member States are involved in an international treaty, then the relevant regulation, which regulates the same issues as the international treaty, shall be subject to overriding application. Regulations may, however, provide for exceptions to the latter rule.

That is, the rules concerning conflict of laws of the legal aid treaty between Ukraine and the EU Member State take precedence over the rules concerning conflict of laws of the EU, which contain the rules concerning conflict of laws that define the law applicable to the same issues as the specified international treaty.

CONCLUSIONS

Part of the legal aid treaties between Ukraine and other states contains conflict of law rules. The rules concerning conflict of laws in legal aid treaties to determine the law applicable to contractual obligations, family, and hereditary relations are not in line with current IPL approaches to regulating these groups of relations. *Lex loci contractus* is most often used

[1] Law of Ukraine "On International Treaties of Ukraine". (2004, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1906-15.

to regulate contractual obligations in the absence of the parties' agreement on the choice of applicable law. Modern IPL sources (the LoU "On IPL", Rome I Regulation) offer other connecting factors to determine the law applicable to the contract in the absence of an agreement on the choice of law more convenient to govern the contractual relations. The Treaty between Ukraine and Romania does not provide for the possibility of choosing the law to govern contractual obligations, which contrasts sharply with the importance of the principle of autonomy of contractual parties' will, which is indisputable in the IPL doctrine, and is reflected in current IPL rules concerning conflict of laws.

Furthermore, legal aid treaties imperatively determine the law applicable to the marriage property relations, without giving the spouses any choice of applicable law. At the same time, LoU "On IPL" and the Regulations on Marriage Property Regimes give spouses the right to choose the law applicable to their proprietary relations. Legal aid treaties apply a dualistic approach to the definition of inheritance law, which, although consistent with the LoU "On IPL" approach, is contrary to the Succession Regulation approach, which uses a monistic approach that simplifies the regulation of hereditary relations with a foreign element as against the dualistic approach. Regulation of the conflict of laws regarding the form of the testament in legal aid treaties creates less opportunity to implement the *favour testamenti* principle than the Hague Convention and the LoU "On IPL". In this case, competition between the Hague Convention and the legal aid treaties between Ukraine and Poland, and Ukraine and Estonia should be resolved in favour of the Hague Convention. Conflicts between legal aid treaty rules and the LoU "On IPL" are solved in favour of legal aid treaties. Conflicts between legal aid treaties involving EU Member States and third countries and EU regulations containing rules concerning conflict of laws shall be solved in favour of legal aid treaties. With this in mind, it is necessary to amend the legal aid treaties, in particular those concluded between Ukraine and the EU Member States: to establish rules concerning conflict of laws applicable to contractual, family, and hereditary relations similar to the corresponding EU regulations.

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ЖИТТЯ ТА ЗДОРОВ'Я ЛЮДИНИ ЯК ОБ'ЄКТ ЕКОЛОГІЧНОГО ПРАВА У ГЛОБАЛІЗОВАНОМУ СВІТІ

Анотація. *У статті досліджуються питання правового забезпечення охорони життя та здоров'я людини в новітніх умовах глобалізаційних процесів, які охопили всі сфери політичного, економічного, фінансового, соціального, географічного та культурного життя і становляться базовим чинником людства на планеті. Ці процеси задають нові тенденції екологічного розвитку держави, по-новому визначають проблеми забезпечення екологічної безпеки через мінливий характер викликів і загроз, із якими стикається людство. Несприятливий стан навколишнього природного середовища й необхідність забезпечення екологічної безпеки вимагають ужиття адекватних заходів правового, організаційного та іншого характеру. Вважається, що в цих умовах людина, її життя та здоров'я повинні становитися в центрі механізму правового регулювання охорони та захисту, екологічної безпеки, особливостей встановлення правового статусу громадян, потерпілих від негативних наслідків прояву екологічної небезпеки та гарантій реалізації прав таких громадян. На держави покладається ціла низка зобов'язань перед людиною по створенню умов для її «екологічного комфорту». Такі зобов'язання повинні знайти своє відображення в екологічному законодавстві (законодавстві про довкілля) відповідних держав. Останнім часом загрозливого стану набувають урбанізовані території, неконтрольоване розширення яких неминуче призводить до порушення нормального функціонування біогеотичного покриву планети, а відповідно – негативного впливу на здоров'я та життя людства і, особливо, тієї його частини, яка проживає у великих містах, або інших мегаполісах. Доводиться, що загальний несприятливий стан довкілля висуває нові вимоги до екологічної безпеки, яка в умовах глобалізації світового простору й інтерналізації природоохоронних проблем стає домінантним фактором глобальної безпеки людства, оскільки відбувається загострення екологічної ситуації, що вимагає необхідності здійснення ефективної політики стосовно її покращення.*

Ключові слова: охорона клімату, правове забезпечення екологічної безпеки, антропозахисне право, державна екологічна політика.

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HUMAN LIFE AND HEALTH AS AN OBJECT OF ENVIRONMENTAL LAW IN THE GLOBALISED WORLD

Abstract. *The article examines the issues of legal protection of human life and health in the latest globalisation processes, which have covered all spheres of political, economic, financial, social, geographical and cultural life and are becoming a basic factor of humanity on the planet. These processes set new trends in the ecological development of the state, redefine the problems of environmental security due to the changing nature of the challenges and threats facing humanity. The unfavourable state of the environment and the need to ensure environmental safety require the adoption of adequate legal, organisational and other measures. It is believed that in these conditions a human, his life and health should be at the centre of the mechanism of legal regulation of protection and defence, environmental safety, especially the establishment of the legal status of citizens affected by the negative consequences of environmental danger and guarantees of such citizens. The state has a number of obligations to human to create conditions for his "environmental comfort". Such obligations should be reflected in the environmental legislation of the respective states. Recently, urban areas have been becoming threatening, the uncontrolled expansion of which inevitably leads to disruption of the normal functioning of the biogeotic cover of the planet, and consequently – a negative impact on health and life of mankind and especially that part of it living in large cities or other cities. It turns out that the general unfavourable state of the environment makes new demands on environmental security, which in the context of globalisation and internalisation of environmental problems is becoming a dominant factor in global security, as the environmental situation worsens, requiring effective policies to improve it.*

Keywords: climate protection, legal provision of ecological safety, anthropo-protective law, state ecological policy.

INTRODUCTION

In modern conditions, the concentration of industrial and chemical production, man-made activities, dangerous natural processes have a negative impact on human life and health. The greatest risks are agriculture, ferrous and nonferrous metallurgy, nuclear industry, transport and energy, which are carriers of air pollution, high noise levels, greenhouse gas emissions, drinking water shortages, reduction of green areas, land pollution. It is also about changes in land use, toxicity of the biosphere, loss of biodiversity, disruption of natural cycles, lack of natural soil and wetlands in residential, industrial and other places of permanent human habitation. Waste generation leads to land being used for landfills. The concentration of small particles in the air has an adverse effect on health. Noise pollution is exacerbated by the compaction of activities, including transport, as well as the use of hard, sound-reflecting materials, as a result of which a person is constantly faced

with problems affecting his internal psychological state. That is why human life and health are considered in the environmental legislation of Ukraine as a priority object of legal protection of the environment, as evidenced by Part 3 of Art. 5 of the Law of Ukraine "On Environmental Protection"[1].

The protection of human life and health in the latest globalisation processes, which have covered all spheres of political, economic, financial, social, geographical and cultural life and become a basic factor in human evolution on the planet, should become a trend in modern doctrine of environmental law and legislation of Ukraine. Traditionally, globalisation is considered in interrelated aspects, the main of which are: economic, mental or cultural-ideological, territorial, information-communication and ethnic. If economic and cultural-ideological (mental) globalisation is a union of capital, labour resources, goods, services and related corporations and firms, unification and integration of traditions, culture, ideology, then, in contrast, territorial globalisation is the process of consolidation of states and supranational entities, which results in the weakening of nation-states and the reduction of their sovereignty. The latter is closely linked to the centralisation of power, as modern states delegate more and more powers to influential international organisations, including the European Union, Ukraine, the World Trade Organisation, the North Atlantic Treaty Organisation, the International Monetary Fund, the World Bank and others. In addition, global environmental globalisation processes have recently become increasingly important, requiring a consistent, effective and timely solution to global environmental problems related to climate change, ozone depletion, biodiversity conservation, chemical and radioactive pollution, including acid rainfall, desertification, reduction of natural resource potential, increase in the number of man-made disasters, increase in the probability of loss of biosphere stability era, the economic capacity of which is finite [1].

The processes of globalisation set new trends in the ecological development of the state, redefine the problems of environmental security due to the changing nature of the challenges and threats facing humanity. The unfavourable state of the environment and the need to ensure environmental safety require the adoption of adequate legal, organisational and other measures [2]. According to experts, three quarters of the world's population lives in countries where consumption is so high that ecosystems simply do not have time to recover. Such "environmental debtors" have to borrow forest, water and other natural resources from other countries, sometimes to the detriment of their "creditors". "If our demand for Earth's resources grows at the same rate, we will need two such planets to meet all our needs by the mid-2030s," said James Lip, CEO of the World Wildlife Fund. According to him, today humanity uses 1.5 times more resources per year than nature can restore. Continuation of this practice threatens detrimental environmental consequences [3]. And such consequences are negative not only for the environment, but, first of all, for a human who lives in this environment. Thus, the aim of the article is to study the legal mechanism of providing favourable conditions for human life and health in the current conditions of globalisation processes taking place in the world. The current environmental legislation of Ukraine recognises the ultimate goal of environmental protection is the protection of human himself, but so far, at the level of general declarations. Therefore, the

[1] Law of Ukraine "On Environmental Protection". (1991, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1264-12

analysis of existing in the legal literature doctrinal provisions, laws and regulations on these issues is extremely important for the further development of relevant scientific proposals and recommendations.

1. MATERIALS AND METHODS

The versatility and complexity of the research issues led to a comprehensive approach to solving the scientific goal. For a detailed study of the stated topic, the author used a variety of general and special methods of cognition, the choice of which is determined by the characteristics of the object, subject, purpose and objectives of the scientific article. The study was conducted in line with the dialectic of general and special, which is extrapolated to the sphere of human life and health as an object of environmental law in the context of globalization challenges. Thus, it was found that the protection of human life and health in the latest globalisation processes, which have covered all spheres of political, economic, financial, social, geographical and cultural life and are becoming a basic factor in human evolution on the planet, should become a modern trend doctrines of environmental law and legislation of Ukraine. It is emphasised that the current environmental legislation of Ukraine recognises the ultimate goal of environmental protection is the protection of human himself, but so far at the level of general declarations.

In accordance with the outlined theoretical tasks, a set of methods of scientific cognition is used, the use of which confirms the multifaceted nature of the obtained results. Formal-logical and systemic methods allowed to study the features of ensuring the sustainability of environmental security of the state in the context of globalisation, as recently there has been an increase in environmental danger to human health and life in different regions of Ukraine due to man-made activities, dangerous natural processes and other anthropogenic changes. The use of this method made it possible to find out that a new stage in the evolution of the biosphere is taking place – the transformation into a biotechnosphere. This process is a complex and unique phenomenon characterised by a set of dynamic biological, social, economic, informational and technical processes occurring on the planet. Among all other methods of research, the method of modelling was used, which provided an opportunity to consider the scientific and legislative problem of human life and health as an object of environmental law in a globalised world that serves to improve Ukrainian legislation. The forecasting method was used in the study of globalisation of environmental processes occurring in the world. The reasons for these processes are associated with the need to meet the growing material needs of mankind, which leads to the expansion of economic activity. As a result, the problems of its global pollution, global climate change, depletion of the planet's natural resources, increasing the number of man-made disasters and accidents, increasing the likelihood of losing the resilience of the biosphere are exacerbated.

The formal-legal method is used in the analysis of legal norms that exist in the mechanism of legal regulation of protection and defence, environmental safety, features of establishing the legal status of citizens affected by the negative consequences of environmental danger and guarantees of rights of such citizens. Scientific knowledge of legal phenomena should be based on the principles of scientific objectivity, a combination of theory and practice, which eliminates the bias of research results, their dependence on various subjective factors. The method of formal logic allowed the use of general methods

in the field of economic law. Thus, one of the dominant in the methodological approach is the comparative legal approach, which allowed to determine the content of such concepts as "human life and health", "biogeotic cover of the planet", "environmental problems" and others. Using the method of analysis and systematisation, the sources of environmental law were monitored in order to determine the existence of norms on human safety, protection and defence of his lifehood in the process of carrying out the relevant types of special nature management. The presence of such norms in the legislative acts of the resource direction (Land, Water, Forest Codes, Subsoil Code, laws "On flora", "On fauna", "On air protection", "On nature reserves", "On ecological network", "On the Red Book", etc.) is extremely important for the implementation of the mechanism of protection of human life and health in the natural environment.

These and other methods were used in conjunction, which contributed to the conceptuality of the study and the validity of the formulated scientific conclusions and recommendations. The presented scientific ideas of the author in the conditions of modern development of ecological law include target, methodological, substantial, organisational-legal and effective components.

2. RESULTS AND DISCUSSION

Recently, urban areas have been becoming threatening, the uncontrolled expansion of which inevitably leads to disruption of the normal functioning of the biogeotic cover of the planet, and consequently – a negative impact on health and life of mankind and especially that part of it living in large cities or other cities. Today it is obvious that the natural and urban environment cannot develop autonomously. On the contrary, their relationship is becoming increasingly complex. There is a new stage in the evolution of the biosphere – it is transformed into a biotechnosphere. This process is a complex and unique phenomenon characterised by a set of dynamic biological, social, economic, informational and technical processes occurring on the planet. Urbanisation as one of the main components of the balance of the bio- and technosphere occupies a decisive place in these processes [4].

The pace of urbanisation in the modern world is unprecedented: since 1950, the urban population of the Earth has increased tenfold. The fastest pace of urbanisation is observed in developing countries and the most developed countries, where they together account for three quarters of the world's urban population. Cities are part of the natural environment, are habitats and ecosystems, and like any ecosystem, are dynamic and interconnected with other elements of the environment [5]. As humanity's understanding of the complex relationship between human well-being and the integrity and stability of the ecosystem deepens, it is becoming clear that the great global challenge of urban development in the 21st century is to find ways in which urban planning and governance not only meet the needs of urban dwellers in large, fast-growing cities, but meet those needs in a way that recognises the interdependent relationships of the cities and ecosystems of which they are a part. There is a growing consensus that a reductionist approach to the command form of control is not the best way to interact with what is essentially a dynamic system of adaptive living; sustainability and adaptation are a factor in the well-being of cities. This requires a significant review of the traditional model of urban development and legal regulation of relevant processes [6].

According to some researchers, the number of cities, their population, spatial extent, growth rate and degree of environmental impact are unprecedented. Today, there are a huge number of serious environmental problems in cities related to food production, energy, water supply, waste management and pollution, as well as social problems related to jobs, poverty and human health. Some researchers predict that as a result of the current speed and scale of urbanisation around the world, humanity is on the verge of a new "urban revolution". This has led to the fact that cities are largely built as separate objects, in which buildings, roads, natural, energy objects, financial resources were studied separately from each other that ultimately has a negative impact a the person who is in this city (permanently or temporarily) [1; 7; 8]. Unfortunately, the Sustainable Development Strategy "Ukraine 2020", which was approved by the Decree of the President of Ukraine of January 12, 2015, did not contain any environmentally oriented items, including it did not mention the legal provision of environmental protection in cities[1].

However, in recent years, settlements are increasingly seen as complex ecosystems, which implies the need to consider them as a complex system of components that are in constant interaction with each other. The boundaries of each ecosystem are not fixed. Therefore, the whole city can be considered as an ecosystem or its smaller components, such as lake ecosystems, housing ecosystems, green ecosystems, etc., each of which can be an independent subject of study and object of management. At the same time, according to experts, a healthy ecosystem is stable and persistent as long as it retains its organisational structure and autonomy. Accordingly, the key tool to achieve the goal of the new "urban revolution" is to incorporate environmental knowledge and principles into urban governance and development processes to ensure the development of healthy, viable, sustainable urban ecosystems that will create comfortable living conditions for all urban populations. To date, a draft for Sustainable Development Strategy of Ukraine for the period up to 2030 has been developed, which includes the following elements of protection of human life and health in the urban environment:

- introduction of energy efficient and environmentally friendly public transport systems in cities based on the use of electric vehicles;
- ensuring balanced and interconnected spatial development of cities and rural settlements and opportunities for integrated planning of settlements with public participation and management;
- ensuring the effective functioning of the early warning system, prevention and elimination of the consequences of natural and man-made disasters in settlements;
- reduction of negative anthropogenic impact on human health in cities by improving air quality and disposal of municipal waste;
- ensuring general access of all segments of the population to safe, accessible and open green areas and water bodies and establishing the share of green areas in the settlements of at least 20% of the total area;
- significant increase in the number of cities and other settlements that have adopted and implemented comprehensive strategies and plans for sustainable spatial development and aimed at eliminating social barriers, improving the efficiency of natural resources,

[1] Presidential Decree "On the Sustainable Development Strategy "Ukraine – 2020". (2015, January). Retrieved from https://zakon.rada.gov.ua/laws/show/5/2015

mitigating the effects of climate change, adapting to its changes and resilience natural disasters.

The setting of such goals is due to the fact that one of the features of modern urbanisation is the concentration of a significant number of people mainly in large cities and, accordingly, their further growth. Thus, there is the formation of an urban environment or urban ecosystem, which is a qualitatively new physical and geographical state of the geo-environment, which arises as a result of long-term development of a city. During its formation all components change: atmosphere, climate, vegetation, fauna, soils, surface hydrosphere, geodynamic state of territories. In this case, the larger the size of a city, the time of its existence and the degree of development of industry in a city – the more significant changes in its environment [9-14]. In these conditions, a human, his life and health should be at the centre of the mechanism of legal regulation of protection and defence, environmental safety, especially the establishment of the legal status of citizens affected by the negative consequences of environmental danger and guarantees of the rights of such citizens. The state has a number of obligations to human to create conditions for his "environmental comfort". Such obligations should be reflected in the environmental legislation (environmental legislation) of the respective states.

In this regard, it is worth mentioning that the issue of protection of human life and health is an original, but insufficiently implemented problem of environmental law and legislation, which has been repeatedly emphasised in the legal literature. In particular, at the end of the 20th century a monograph was published by well-known specialists in the field of law and economics, professors E.V. Vilenskaya, E.O. Didorenko and B.G. Rozovsky entitled "Legal protection of humans in the environment". According to scientists, "a person is the main subject of legal relations, and the law itself exists to protect people in all spheres of life. Formally, everything is so, but in reality the law has never protected, and even today does not fully protect a human as a personality, without specifying – who exactly and within what limits" [15].

According to E. Vilenskaya, E. Didorenko and B. Rozovsky, in the existing realities, the focus on human protection in his natural environment requires qualitatively new ways to solve problems of both human protection and the environment. The essence of this trend is manifested in the definition of environmental protection not as the main task, but through the prism of the strategic problem of environmental quality management, in which human is not a passive spectator, but an active subject of positive impact on the environment and neutralisation of its negative changes. Such a conceptual idea can become the basis for the formation of a new ideology in the field of environmental law – human protection in the environment [15]. But, according to the authors of the monographic study, the proposal to consider the purpose of environmental law to protect people in their natural environment is not fully accepted by the theory of this industry, and even less – is not implemented by law and practice [15].

The concept of human protection in the natural environment was further developed on the territory of independent Ukraine in the scientific works of Academician V.I. Andreytsev [16; 17], but in a slightly different sense. In his opinion, the environmental legislation of Ukraine has established legal principles that ensure the protection and defence of human, his life, health and safety in the process of life. The author considers this set of legal norms as a complex interdisciplinary branch of legislation and law –

anthropoprotective (anthropodefensive) law of the legal system and the legal system of Ukraine [17]. In addition, to the subject of environmental law, V.I. Andreytsev in his first scientific works on this issue includes anthropoprotective (protection of human life and health from a dangerous environment) legal relations, as well as legal relations for the protection of human life and health from dangerous anthropogenic and negative impact of natural forces and natural phenomena. The author considered the life and health of citizens from a dangerous ecological state to be integrated objects of ecological law; and in the structure of environmental law singled out a complex intersectoral legal institution – the legal ecology of human, or legal support for environmental safety of citizens [16]. V.I. Andreytsev substantiates his conclusions by the existence of an extensive system of legal norms contained in the Constitution of Ukraine, the Charter of Fundamental Rights of Citizens of the European Union, and certain legislative acts: Basic principles (strategy) of state environmental policy of Ukraine until 2020 (as amended) – for the period up to 2030), the laws of Ukraine "On the basis of the legislation of Ukraine on health care"[1]; "On Ensuring Sanitary and Academic Welfare of the Population"[2]; "On Environmental Protection"[3]; "On Ecological Expertise" (expired)[4]; "On Pesticides and Agrochemicals"[5]; "On Transport"[6]; "On protection of man from the effects of ionizing radiation"[7]; the Civil Code of Ukraine[8]; Criminal Code of Ukraine[9]; Code of Ukraine "On Administrative Offences"[10] and some others [18]. Incidentally, it should be noted that not all sources of environmental law have rules on human safety, protection and defence of human life in the implementation of relevant types of nature. These norms only partially are present in some codes and laws of post-resource orientation [17]. In particular, the Land Code of Ukraine[11], which aims to regulate land relations in order to ensure land rights of citizens, legal entities, territorial communities and the state, rational use and protection of land, human security and protection in land use does not pay the necessary attention and leaves them outside the scope of legal regulation. As an exception, it is worth to consider Art. 5 of this Code, where among the principles on which the land legislation is based, the priority of environmental safety requirements is mentioned, which, of course, in the

[1] Law of Ukraine "On the basis of the legislation of Ukraine on health care". (2020, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2801-12

[2] Law of Ukraine "On Ensuring Sanitary and Academic Welfare of the Population". (2018, October). Retrieved from https://zakon.rada.gov.ua/laws/show/4004-12

[3] Law of Ukraine "On Environmental Protection". (1991, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1264-12

[4] Law of Ukraine "On Ecological Expertise". (2017, December). Retrieved from https://zakon.rada.gov.ua/laws/show/45/95-%D0%B2%D1%80

[5] Law of Ukraine "On Pesticides and Agrochemicals". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/86/95-%D0%B2%D1%80

[6] Law of Ukraine "On Transport". (1994, November). Retrieved from https://zakon.rada.gov.ua/laws/show/232/94-%D0%B2%D1%80

[7] Law of Ukraine "On protection of man from the effects of ionizing radiation". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/15/98-%D0%B2%D1%80

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

[9] Criminal Code of Ukraine. (2020, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14

[10] Code of Ukraine "On Administrative Offenses". (2020, April). Retrieved from https://zakon.rada.gov.ua/laws/show/80731-10

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

relevant interpretation is general (abstract). In addition, the creation of zones of special regime of land use around the military facilities of the Armed Forces of Ukraine and other military formations to ensure the protection of the population are provided (Article 115).

The Water Code of Ukraine regulates in more detail the issues related to the safety of human life and health. First of all, water users are obliged to comply with the established standards of maximum permissible discharge of pollutants, as well as sanitary and other requirements for landscaping (Article 44). According to A.S. Yevstihnieiev [19], this can be one of the most important and effective guarantees of safe for human life and health use of water [19]. In addition, the Code provides for environmental safety standards, environmental water quality standards (Article 35), urgent measures to prevent natural disasters caused by harmful effects of water, accidents on water bodies and eliminate their consequences (Article 108). In particular, in emergency situations on water bodies related to their pollution, which may adversely affect the health of people, the enterprise, institution or organisation due to which an accident occurred, or which detected it, must immediately begin to eliminate it consequences and report an accident to the relevant central executive bodies.

Similar provisions are contained in the legislation on subsoil. Thus, the Code of Ukraine on subsoil[1] provides requirements to ensure: in the geological study of subsoil – environmentally safe for human life and health of the environment (Article 38 of the CUS); during the design, construction and commissioning of mining and mineral processing facilities, as well as underground structures not related to the extraction of minerals – measures to ensure the safety of people (Article 50 of the CUS); in the development of mineral deposits and processing of mineral raw materials – safe for people to conduct work (Article 53 of the CUS). The bodies of state mining supervision of geological exploration, their use and protection are empowered to verify the correctness and timeliness of measures to ensure the safety of people from the harmful effects of work related to subsoil use (Article 63 of the CUS).). In addition, failure to comply with the requirements for the safety of people from the harmful effects of work related to subsoil use may result in disciplinary, administrative, civil or criminal liability under the laws of Ukraine (Article 65 of the Criminal Code). A large number of normative documents in the field of subsoil protection, the list of which is given in the Index of normative legal acts on labour protection, approved by the order of the State Service for Mining Supervision and Industrial Safety of Ukraine dated April 12, 2012, № 74, contain instructions on limiting negative impacts subsoil use for human health. However, according to A.S. Yevstihnieiev, most of them were developed and adopted in Soviet times and are obsolete, which makes it impossible to effectively use them in modern conditions [19].

The Law of Ukraine "On Protection of Atmospheric Air"[2] provides for certain legal measures regarding human safety in the environment [20; 21]. In particular, in order to create a favourable living environment, prevent harmful effects of atmospheric air on human health, emissions of the most common and dangerous pollutants are regulated, the list of which is established by the Cabinet of Ministers of Ukraine (Article 11 of the Law

[1] Code of Ukraine on subsoil. (1994, July). Retrieved from https://zakon.rada.gov.ua/laws/show/132/94-%D0%B2%D1%80

[2] Law of Ukraine "On Protection of Atmospheric Air". (2017, December). Retrieved from https://zakon.rada.gov.ua/laws/show/2707-12

"On Protection of Atmospheric Air"). In order to ensure optimal living conditions in areas of housing, public recreation and rehabilitation of the population in determining the location of new, reconstruction of existing enterprises and other facilities that affect or may affect the state of the air, sanitary protection zones are established (Art. 24 of the Law "On Protection of Atmospheric Air"). To determine safety for human health during the design, placement, construction of new and reconstruction of existing enterprises and other facilities, environmental impact assessment and state sanitary examination in the manner prescribed by law are conducted (Article 25 of the Law "On Protection of Atmospheric Air"). Finally, persons guilty of violating the rights of citizens to a safe environment for life and health are liable under the law (Article 33 of the Law "On Protection of Atmospheric Air"). The Forest Code of Ukraine[1] contains only a reference to the protection of human health in the context of the basic requirements for forest management (Article 64). In particular, enterprises, institutions, organisations and citizens carry out forestry taking into account the economic purpose of forests, natural conditions and are obliged to strengthen water protection, defensive, climate regulation, sanitation, health and other useful properties of forests to improve the environment and human health. Declaratively, these issues are announced in the Laws of Ukraine "On Flora" and "On Fauna"[2]. In particular, in order to protect the health of the population, the business entity may take measures to regulate the distribution and number of certain species of wild plants (poisonous, narcotic, quarantine, etc.) (Article 22 of the Law "On Flora"[3]). Work related to the reproduction of natural plant resources is carried out in ways that ensure their reproduction in the shortest possible time and do not harm human health (Article 24). The Law "On Fauna" provides, among the basic requirements and principles of protection, rational use and reproduction of wildlife, the necessity to regulate the number of wild animals in the interests of public health (Article 9) and public safety (Article 32).

Instead, the Laws of Ukraine "On the nature reserve fund of Ukraine", "On the Ecological Network"[4] do not contain provisions for the legal provision of human safety in the natural environment. This is evidence of the limited impact of resource legislation on the creation of safe conditions for human life in the conditions of human's exploitation of natural objects and complexes that can adversely affect its health and life.

CONCLUSIONS

Thus, the general unfavourable state of the environment makes new demands on environmental security, which in the context of globalisation and internalisation of environmental problems is becoming a dominant factor in global security, as the

[1] Forest Code of Ukraine. (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80

[2] Law of Ukraine "On Flora". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/591-14; Law of Ukraine "On Fauna". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2894-14

[3] Law of Ukraine "On Flora". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/591-14; Law of Ukraine "On Fauna". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2894-14

[4] Laws of Ukraine "On the nature reserve fund of Ukraine". (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2456-12; Laws of Ukraine "On the ecological network". (2018, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1864-15

environmental situation worsens, requiring effective policies to improve it. An important direction in the implementation of this process should be the mechanism of legal support of the system of scientifically sound quality standards of natural objects, resources and complexes, environmental impact assessment standards, environmental protection, which will ensure safe, as required by Art. 50 of the Constitution of Ukraine, for human life and health environment, and in the long run – favourable and healthy existence of human as a biological species in the natural environment.

Environmental law, especially in its subsectors on natural resources, should be focused on the main goal – ensuring human safety in the environment, its direct protection, respect for environmental rights, freedoms and interests. Ecological safety, environmental protection, rational use of nature and other ideological general ecological factors in the national legislation should be considered through the prism of safe conditions of human existence, life, health and evolution as a biosocial personality.

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