

Національна академія правових наук України
Національний юридичний університет
імені Ярослава Мудрого



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ПРАВОВА АРГУМЕНТАЦІЯ: ДЕЯКІ ЗАГАЛЬНОТЕОРЕТИЧНІ АСПЕКТИ

Анотація. *Актуальність дослідження обумовлена тим, що правова аргументація, якою послуговуються зокрема судді під час ухвалення рішень, часто зазнає критики. Допомогти вирішити актуальне завдання з покращення правової аргументації може саме загальнотеоретичне осмислення правової аргументації, що й є метою даного дослідження. У статті обґрунтовано загальнотеоретичну модель правової аргументації, яку здійснюють у різних видах юридичної діяльності – правотворенні, правотлумаченні, правозастосовуванні, правореалізації. Для цього використано такі методи дослідження як загальнотеоретичний, моделювання, дедукції, аналізу й абстрагування. Запропоновано розмежовувати термінологічно правове аргументування як діяльність і правову аргументацію як результат цієї діяльності, а також результат діяльності з реконструювання правової аргументації іншого суб'єкта, та надано визначення кожного з цих понять. Встановлено, що загальнотеоретична модель правової аргументації охоплює склад (корпус) правової аргументації, інструменти правової аргументації, реконструювання й оцінювання правової аргументації. Виявлено, що до складу (корпусу) правової аргументації підставно відносити: аргументувальну ситуацію; суб'єктний склад; мету правої аргументації; об'єкт правового аргументування; зміст правового аргументування. Виокремлено субстантивний та процесовий аспекти інструментів правового аргументування. Практична цінність статті полягає у тому, що загальнотеоретична модель правової аргументації створює підстави для покращення аргументувальної практики у різних видах юридичної діяльності*

Ключові слова: *загальнотеоретична модель правової аргументації, склад (корпус) правової аргументації, аргументувальна ситуація, інструменти правового аргументування, реконструювання й оцінювання правової аргументації*

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LEGAL ARGUMENTATION: SOME GENERAL THEORETICAL ASPECTS

Abstract. *The relevance of the study is explained by the fact that the legal arguments used by judges in particular when making decisions are often criticised. The general theoretical understanding of legal argumentation, which is the purpose of this study, can help to solve the urgent problem of improving legal argumentation. The article substantiates the general theoretical model of legal argumentation, which is carried out in different types of legal activities – lawmaking, interpretation, law enforcement. For this purpose, such research methods as general theoretical, modelling, deduction, analysis and abstraction were used. It is proposed to distinguish between terminological legal argumentation as an activity and legal argumentation as a result of this activity, and the result of activities to reconstruct the legal argumentation of another entity, and provide a definition of each of these concepts. It is established that the general theoretical model of legal argumentation covers composition (corpus) of legal argumentation, tools of legal argumentation, reconstruction and evaluation of legal argumentation. It is identified that in the composition (corpus) of legal argumentation it is reasonable to include: argumentative situation; subjective composition; the purpose of the right argument; object of legal argumentation; the content of legal argumentation. The substantive and procedural aspects of the tools of legal argumentation are singled out. The practical value of the article is that the general theoretical model of legal argumentation creates grounds for improving argumentative practice in various types of legal activity*

Keywords: *general theoretical model of legal argumentation, composition (corpus) of legal argumentation, argumentative situation, tools of legal argumentation, reconstruction and evaluation of legal argumentation*

INTRODUCTION

The issue of the quality of legal argumentation is the cornerstone of practical jurisprudence, especially law enforcement. Building a convincing legal argument for different recipients is a difficult task and requires special skills of the argumentator. The legal argumentation contained in national court decisions is often criticised as weak or unconvincing. The general theoretical comprehension of legal argumentation can help to solve the urgent problem of improving legal argumentation. It can offer a comprehensive answer to the question of which legal argument is convincing, including tools for building, reconstructing and evaluating such arguments through the construction of a general theoretical model of legal argumentation. The implementation of these tasks will serve to improve the practice of legal argumentation not only in law enforcement, but also in law interpretation, lawmaking, law enforcement and legal science.

The relevance of the study of legal argumentation is confirmed by the fact that in textbooks on the theory of law in recent years there are sections on legal argumentation, which outlines the most general issues of legal argumentation [1, p. 264; 2, p. 440]. Some issues of scientific journals are devoted to the issue of legal argumentation [3, p. 175-184; 4, p. 193-202]. Some special issues of legal argumentation have become the subject of Ukrainian legal research, in particular in the works of M. Koziubra, P. Rabinovych, B. Kistyanyk, and logical research, in particular in the works of O. Shcherbyna, O. Yurkevych. We are talking about the types of legal argumentation [5, p. 4-8], general theoretical characteristics of legal argumentation [6, p. 22], some features of judicial argumentation [7], logical aspects of legal argumentation [8; 9]. However, many aspects of the complex phenomenon of legal argumentation are unexplored or insufficiently studied in Ukrainian legal science, including the general theoretical model of legal argumentation.

In foreign research, legal argumentation is the subject of analysis both in the theory of argumentation and in legal research, in particular in the works of such authors as D. Walton [10]; F. Van Eemeren [11]; L. Bermejo-Luque [12]; E. Feteris [13; 14]; K. Tindale [15]; R. Alexy [16]; M. Hinton [17]. Among other aspects, representatives of different schools of legal argumentation study the components of the study of legal

argumentation, normative and/or theoretical models of legal argumentation as part of its research programme at the theoretical level, features of reconstruction and evaluation of legal argumentation, means of legal argumentation in legal discourse as a kind of general practical discourse.

In English-language sources on legal argumentation, the phrase “normative model of argumentation” is often used, but it is not always explained. According to D. Walton, the normative model of argumentation is how one should analyse and evaluate legal argumentation from a logical standpoint. This model is closely related to reality. It is based on the rationale used in everyday argumentation. This model simply reflects the legal justification in reality [10, p. 161].

F. Van Eemeren noted that the theoretical model of argumentation serves as a conceptual basis for the study of legal argumentation, outlines and approximates the philosophical ideal of reasonableness, specifying it in terms of types of argumentative steps and the validity of the grounds for these steps. If such a model well fulfills its purpose – it performs heuristic, analytical and critical functions and concerns the production, analysis and evaluation of argumentative discourse [11, p. 521].

From the standpoint of L. Bermejo-Luque, the normative model depends on what we want to evaluate – the result of argumentation, procedures or processes of argumentation [12, p. 9]. The argumentation model should perform two main tasks: to provide an acceptable characteristic of the *soundness* of the argument (which means assessing both the relationship between the basics and the conclusion, and the assessment of the basics) and to propose a method for establishing the validity of the argument. The latter depend on the concept of argumentation and the standard of validity of argumentation to adopt [12, p. 14-15].

E. Feteris believes that the theoretical model of legal argumentation contains legal arguments and norms and rules of their acceptability [13, p. 21]. The analytical model should specify the elements necessary for the rational reconstruction of the legal decision – the stages of the argumentative process, explicit and implicit arguments, hidden foundations and structures of the argument. At the same time, the logical minimum often does not allow to do so, a pragmatic maximum is needed to consider the broader verbal and nonverbal context of the argument [13, p. 201]. Rational reconstruction provides grounds for evaluating arguments [13, p. 22].

In foreign intelligence, in particular the Dutch, the theoretical model of legal argumentation represents only the theoretical level of research of the latter. In addition, it deals mainly with legal argumentation in law enforcement, disregarding official interpretation, lawmaking, law enforcement and legal doctrine. At the same time, we believe that the development of such investigations has a heuristic potential for building a general theoretical model of legal argumentation.

With this in mind, the *purpose of this article* is to, based on a certain understanding of the original concepts that reflect the complex phenomenon of legal argumentation, and the work of representatives of the theory of argumentation and legal argumentation, to propose a general theoretical model of legal argumentation. its further application for the creation, reconstruction and evaluation of legal arguments in various types of legal activities.

1. MATERIALS AND METHODS

To achieve the goal of scientific research presented in this article, a number of general scientific and special methods were used: general theoretical method, modelling method, method of analysis and synthesis, deductive method, abstraction method, generalisation method, comparative method. The study is based on the worldview axiomatic idea that legal argumentation is carried out in legal discourse, and its result bears the imprint of such a discourse, because it is its result. The main research methods presented in this article are the general theoretical method and the modeling method. It is the method of modeling allowed to propose a general theoretical model of a complex phenomenon of legal argumentation, which combines dynamic (activity) and static components.

The general theoretical method allowed to apply general theoretical categories and constructions to comprehend the mentioned phenomenon of legal argumentation and to fill various components of the general theoretical model of legal argumentation. In particular, the concept of composition (*corpus*) of legal argumentation as a general theoretical category with its content was proposed. This method gave grounds to single out the tools of legal argumentation, including the reconstruction and evaluation of such arguments as separate components of the general theoretical model of legal argumentation and describe them in terms of general theory of law and legal practice.

The method of abstraction together with the general theoretical method allowed to single out the components of the *corpus* of legal argumentation, namely: the argumentative situation, the subjective composition of legal argumentation, the object, purpose and content of legal argumentation. These methods also revealed the features of the argumentative situation in different types of legal activity, to determine the

subjective composition of legal argumentation, isolating the argumentator, the addressee of such arguments and the audience, to establish the purpose of legal argumentation in different legal activities, its object and content. moreover, the general theoretical method allowed to identify the types of legal activities in which legal argumentation is carried out.

To clarify the meaning of the concept of legal argumentation, the categories of whole and part were used as methodological. It was suggested to mark the activity of legal argumentation with the term legal argumentation and consider it as a whole concept, and the result of this activity, and activities for the reconstruction of legal argumentation, should be marked with the term “legal argumentation” and considered as part of relevant activities. To clarify the scope of the concept of legal argumentation, a comparative method was used – to compare the meanings of terms that denote the concept of legal legal argumentation in its research in different languages. This led to the conclusion that legal argumentation is understood as a legal basis.

The application of the method of abstraction allowed to propose a definition of the concept of argumentative situation in which legal argumentation is carried out. Methods of analysis and synthesis were used to analyse the main positions on the theoretical (normative) model of legal argumentation presented in the literature, and then on this basis to synthesise their own vision of the general theoretical model of legal argumentation, considering the modeling method and general theoretical method. The method of generalisation was used to formulate definitions of the concepts of legal argumentation and legal argumentation. At the same time, the subject of generalisation were the definitions of relevant concepts, formulated in the main approaches to understanding and research of legal argumentation.

Given the peculiarity of the subject of research in this article we can state that it is based on the deduction method, which served as an approach, which, in turn, involves the presentation of research results in a deductive way. The research methods used follow from the subject of research and together with the subject of research determine the structuring of this article. First of all, the content and scope of the concept of legal argumentation are considered, and then the general theoretical model of legal argumentation is proposed and its main components are consistently characterised: composition (corpus) of legal argumentation, tools of legal argumentation, reconstruction and evaluation of legal argumentation.

2. RESULTS AND DISCUSSION

To build a general theoretical model of legal argumentation, it is necessary to clarify the meaning of the concept of legal argumentation. We propose, first of all, to distinguish between activities of legal argumentation and the result of such activities – legal argumentation. After all, the process of legal argumentation and its result are ontologically different, although mutually transitional.

Legal argumentation is a process concept that reflects the legally significant activity to substantiate the statement with the help of certain means – legal and non-legal arguments. It is communicative, it is carried out in various types of legal activities, often in the form of discourse. For example, a judicial debate can be considered a real discourse, and a court decision with the argumentation of a final decision that reflects the results of the discourse. After all, such a decision is addressed to the parties and society and is a response to the arguments of the parties expressed during the trial.

It should also be noted that in the Ukrainian and foreign literature on legal argumentation, the distinction between legal argumentation and argumentation is mostly not carried out, instead the term “legal argumentation” is used to denote both concepts. This leads to the designation of activities (“legal argumentation”) and its result (“legal argumentation”) in one phrase and does not contribute to the deepening of understanding of the process and its result and the establishment of their patterns. However, for the sake of accuracy, we note that such a distinction can be traced in the works of some representatives of the rhetorical approach to argumentation, in particular L. Bermejo-Luque and K. Tindale, at least at the terminological level. K. Tindale writes about the acts of argumentation [15], and L. Bermejo-Luque emphasizes the need to take into account the results of argumentation, procedures or processes of argumentation in such a model [12, p. 9].

General theoretical model of legal argumentation not identical to the theoretical model of legal argumentation in her research in the theory of argumentation. In the latter, the theoretical model is part of the program of argumentation research, which covers the philosophical level (concept of rationality), theoretical level (theoretical model) and practical level (reconstruction and evaluation of argumentation) [11, p. 10]. From the analysis of the understanding of the relevant concept presented in the introduction to this article, it follows that the theoretical model of legal argumentation is understood differently, and its “content” depends on the concept of a particular researcher. The only common denominator is that such a model provides a vision of what legal arguments are [in legal argumentation] and how to evaluate them by reconstructing legal

arguments [in legal argumentation]. The most detailed and general theoretical can be considered the above position of E. Fetheris, according to which the theoretical model includes analytical model and model of evaluation of legal argumentation, although it concerns the legal argumentation in law enforcement. At the same time, as noted, the general theoretical model of legal argumentation should contain such components that would allow to create, reconstruct and evaluate any legal argumentation in different types of legal activity. Such a model should cover both the specific features of the participants, the process and means of legal argumentation, and propose criteria for assessing such arguments. Only in the presence of such “content” can it be a question of the general theoretical model of legal argumentation.

So, under *the general theoretical model of legal argumentation* we understand the theoretical and analytical model of legal argumentation, which covers both the model of creation and the model of reconstruction and evaluation of legal argumentation. At the same time, it is important to note that the practical need for the reconstruction of legal argumentation does not always arise. It usually arises in *complex* cases in the process of law enforcement or interpretation, when it is necessary to provide an interpretation of a legal norm, there is a competition of legal norms on their interpretations, or it is necessary to substantiate allegations of facts. However, this does not exclude the possibility of reconstructing legal arguments in *simple* cases or in other types of legal activity. In simple cases, one deductive argument is enough for such a reconstruction. In complex cases, conditioned upon the need to justify the choice of norm or interpretation of the norm or qualification of facts, including argumentation in scientific discussion, there may be a need for complex argumentation by providing a chain of arguments, which can be either subordinate or cumulative.

The general theoretical model of legal argumentation, in our opinion, includes: 1) the composition (corpus) of legal argumentation; 2) tools of legal argumentation; 3) reconstruction and evaluation of the [effectiveness] of legal argumentation. Consider the three components of the general theoretical model of legal argumentation.

2.1. Composition (corpus) of legal argumentation

Class (corpus) of legal argumentation is a legal construction that covers static and dynamic elements in the complex phenomenon of legal argumentation, allows giving it a holistic description and show the transition from activity – legal argumentation – to its result – legal argumentation. The composition (corpus) of legal argumentation can include: 1) argumentative situation 2) subjective composition; 3) the purpose of legal argumentation; 4) the object of legal argumentation; 5) the content of legal argumentation.

2.1.1. Features of the argumentative situation in legal activity

Under the concept of *argumentative situation*, we propose to understand the abstract situation of argumentation, which is a generalised reflection of such situations, typical of a particular type of legal activity. In our opinion, this is the main component in the body of legal argumentation, because it determines the specific features of other components. As mentioned above, legal argumentation as a communicative activity occupies a certain place in the process (or procedure) of the main types of legal activity – lawmaking, interpretation, law enforcement, including in legal science. In each of them the argumentative situation is special, which we will try to demonstrate further.

Legal argumentation in lawmaking has its own specific features depending on the peculiarities of the legal system of the state (or interstate formation), which determines the peculiarities of lawmaking. Let's try to outline the features of the argumentative situation in lawmaking, referring to the analysis of such a procedure in Ukraine. It is carried out both during the discussion of the draft normative act, and providing justification for the adoption of such an act, if it is a draft law. In this argumentative situation, written arguments are substantiated in the substantiation of the normative legal act and oral arguments are made during the speeches of the deputies of the parliament. The purpose of argumentation is different. The written argumentation in substantiation of the draft source of law aims to substantiate the necessity and expediency of its adoption. Oral argumentation is aimed at refuting the counter-arguments put forward. At the same time, if the arguments of rational orientation and prognostic character are stated in the written argumentation, then the arguments of emotional character also occur in the oral one.

Legal argumentation is part of the official interpretation. It allows, through the formulation of interpretative arguments, to “come out” in a certain way of interpreting the law in interpretative acts. The specific features of the argumentative situation in this type of legal activity are that it is carried out both in the constitutional proceedings in oral form and in writing in the decision of the Constitutional Court of Ukraine, which objectifies the results of such proceedings. Within these two manifestations of the argumentative situation in lawmaking, the subjects of argumentation are different, as well as its means and purpose.

Legal argumentation in law enforcement is carried out both on issues of facts and on issues of law. It allows to substantiate the legal qualification and is an independent type of activity in court proceedings, which is provided by procedural law. Even more, there is an argumentative dialogue situation in the trial, in which the parties provide their options for arguing the circumstances of the case, convincing the court of the acceptability of their position, and the court, weighing their arguments, offers its own arguments for the case. That is, this type of legal activity is also characterized by two types of argumentative situation with different subject composition, means and purpose.

Legal argumentation in legal science can be carried out orally and in writing in discussions, scientific papers, comments. The argumentative situation in legal science is characterized by the use of rational arguments in argumentation – legal and non-legal. In oral argumentation it is permissible to resort to emotional arguments. In general, oral scientific discussion has the peculiarities of argumentation, due to both the presentation of arguments and their content, and the ability to often resort to non-legal arguments to convince the audience and the recipients of the argument.

Legal argumentation in law enforcement is carried out, for example, in the process of legal advice or in the relationship “lawyer-client” or between the parties in concluding contracts, especially with the participation of legal advisers. Despite the presence of legal arguments in it, this situation is more like a practical argument, which is often carried out orally. Accordingly, it is dominated by non-legal arguments for the benefits and benefits of the terms of the contract or protection strategy for the client. At the same time, in the oral dialogic part of such arguments, they can also try, for example, to force the opposite party to agree with certain terms of the contract, which are not favourable to it, resorting to manipulation of arguments.

2.1.2. Subjective composition

The subjective composition of legal argumentation covers both its mandatory subjects and optional, and the legal audience. Legal argumentation depends on who are the subjects of legal argumentation – on their needs and interests, legal understanding, pre-understanding of the object of legal argumentation; concept of rationality.

Subjects of legal argumentation are classically recognised in the theory of argumentation as *the argumentator* (who through legal argumentation creates legal argumentation) and the *addressee of the argumentation* (the one to whom this argumentation is directed and who has a legitimate opportunity to refute the arguments put forward to put forward their arguments, i.e. not to have their point of view (position), but to accept the point of view proposed by the argumentator). These subjects can change roles in different argumentative situations. For example, in a court debate between the parties in a bilateral argument, the plaintiff will argue his position and the addressee of the defendant's position; in unilateral argumentation between the parties to the proceedings and the court, the former will act as argumentators with their positions, and the court – the addressee of the argument; in the unilateral argumentation between the court and the parties, the argumentator will be the court, and the parties – the addressees of the arguments set out in the court decision.

As K. Kargin rightly remarked, it is expedient to distinguish from the subjects of legal argumentation the subjects who assist him – persons who help the argumentator to make arguments, but do not do it themselves [18, p. 44]. We consider it expedient to call them not subjects, but participants in legal argumentation to terminologically distinguish them from subjects. As an example, we can cite the hearing of an expert, a witness in a lawsuit or the hearing of a specialist in constitutional proceedings. In addition, *an optional subject of legal argumentation* can be considered a *reconstructor* of such arguments. This is the individual or collective entity that reproduces the legal arguments of another entity for a specific purpose. For example, the court reconstructs the arguments of the parties to the proceedings, the court of second instance reconstructs the arguments of the court of first instance to review the case on appeal; the scientist reconstructs the real legal argumentation for its scientific analysis and evaluation, the legal interpreter can reconstruct the legal argumentation of the initiator of the appeal to him to provide his legal interpretative arguments. The reconstructor can be present only in certain argumentative situations, so we consider him an optional subject.

The *audience* also, we believe, should belong to the subjective composition of legal argumentation. Audience in legal argumentation is a specific or abstract person or group of persons who have an interest in the content and outcome of legal argumentation and who seek to convince the subjects of legal argumentation of the acceptability of their argumentation. Audiences will differ in different argumentative situations. For example, the audience for the argumentative situation “court – the parties to the process” will be the society to which the court decision is indirectly addressed. A distinction should be made between the audience and the direct addressee of the argument, who, unlike the audience, can take part or participate in decision-making based on the results of the argument. For example, in the oral argumentation situation in lawmaking, the

“initiator of the bill – the parliament”, members of parliament who will vote in favor of the bill will be the addressees of the argument, and society or non-governmental organizations interested in the bill or the social group to which the bill applies – the legal audience.

The purpose of legal argumentation is the subject of analysis in the theory of argumentation. K. Kargin believes that the purpose of legal argumentation is to persuade the addressee of the argument and, as a consequence, to change his position [18, p. 51]. In our view, the notion of purpose should not add a sign of consequence. After all, only effective legal argumentation leads to a change in the position of the addressee – full or partial, but this does not preclude the intention of the argument to change the position of the addressee in whole or in part. Assessing the effectiveness of legal argumentation is a separate component of the general theoretical model of legal argumentation. In addition, the argumentator has a convincing influence not only on the addressee of the argument, but also on the audience. Therefore, in our opinion, the purpose of legal argumentation in the most general formulations is to convince the addressee of legal argumentation, and the audience in the acceptability of a position (standpoint, thesis, conclusion) by providing arguments – legal and illegal.

Of course, the purpose of legal argumentation is specific depending on the argumentative situation in a particular type of legal activity. For example, the purpose of legal argumentation in lawmaking is to convince members of parliament and society of the acceptability of establishing, changing or terminating legal regulation. The purpose of legal argumentation in legal interpretation is to convince the initiator of the appeal, stakeholders and society in the acceptability of a certain understanding or interpretation of the content of the legal prescription or other legal properties. The purpose of legal argumentation in law enforcement is to convince the parties to the case, the court and society in the acceptability of the presentation or interpretation of facts, law, the operative part of the law enforcement decision. The purpose of legal argumentation in law enforcement is to convince the addressee of the argumentation of the profitability or necessity of implementation of the legal requirement in a certain way. The purpose of legal argumentation in legal doctrine is to convince the addressee of the argumentation – direct or indirect, including the legal audience – in the correctness or acceptability of the position of the argumentator. At the same time, the result is the subject of evaluation of the effectiveness of argumentation and is a separate component of the general theoretical model of legal argumentation.

2.1.3. *Object of legal argumentation*

The object of legal argumentation is what the legal argumentation in a certain argumentative situation is aimed at. In the general scientific aspect, an object is a category that denotes any real or imaginary, materialised or ideal reality, which is considered as something external to man and his consciousness and which becomes the subject of theoretical and practical activities of the *subject* [19, p. 438]. Given that legal argumentation is a communicative activity, the object of legal argumentation can be considered a statement about something. After all, the very statement about something becomes the object of argumentation, as a result of which it becomes the conclusion of the argument.

P. Goutloser found that the concepts of “conclusion”, “thesis”, “assertion”, “debate position”, which are used in different approaches to understanding and research of argumentation, coincide or are very similar to the concept of “point of view” used in pragmodialectics [20, p. 54]. P. Goutloser believes that the *statement* has the status of a standpoint. The standpoint is put forward under the following conditions: 1) if the affirmative speech act was executed; 2) there is a reaction of the listener to such a speech act; 3) if the indicators of the standpoint can be found in the subsequent statements of the speaker [20, p. 58-59;].

It is possible to characterise features of object of legal argumentation taking into account in what argumentative situation in what kind of legal activity carry out such argumentation. For example, the object of legal argumentation in lawmaking may be the statement about the need for legal regulation of certain social relations, the need to establish rights and responsibilities of a general nature through deontic judgments [21, p. 12]. The object of legal argumentation in law enforcement can be allegations of legally significant facts and allegations of law. The object of legal argumentation in the interpretation of law may be evaluative statements about the content of the law or other legally significant properties of the law. The object of legal argumentation in law enforcement is the statement about the profitability, necessity or usefulness of the implementation, use or compliance with the law. The object of legal argumentation in legal science is, in particular, statements about the law, interpretation of law, legal regulation, depending on the type of legal activity of doctrinal legal argumentation.

2.1.4. *The content of legal argumentation*

The most general wording can be defined as the presentation of arguments – legal or non-legal, which can be both arguments in the literal sense, and explanations and arguments from the evidence. In addition, it is a question of presenting the arguments of the argumentator, and refuting the counter-arguments of the addressee of the argument, including presenting the counter-arguments of the addressee of the argumentation and refuting his counter-arguments by the argumentator. In this sense, legal argumentation is a discourse activity and must be subject to the rules of discourse.

The content of legal argumentation undoubtedly depends on the subject and object of legal argumentation, including on the type of argumentative situation in the legal activity in which legal argumentation is carried out. For example, the content of legal argumentation in lawmaking is to provide arguments regarding the content of legal regulation of public relations. The content of legal argumentation in legal interpretation can be considered to provide arguments regarding the understanding or interpretation of the content of a legal prescription or its other legal properties. The content of legal argumentation in law enforcement can be considered to provide arguments about the possible content of facts, law, operative decision on facts and law. The content of legal argumentation in law enforcement, we believe, is to provide arguments about the need to implement or comply with the prescription, the usefulness or necessity of implementation (use) of the prescription. The content of legal argumentation in law enforcement can be specified depending on the argumentative situation in law enforcement. The content of legal argumentation in legal doctrine is to present arguments in favour of the position of the argumentator on the issue to which a particular argumentative situation relates.

2.2. *Tools of legal argumentation*

We believe that the category “tools of legal argumentation” will best reflect the system of substantive and procedural means of legal argumentation. Therefore, it is expedient to talk about the tools of legal argumentation in the substantive and procedural aspects, which intersect in specific situations of argumentation and serve, first of all, for the reconstruction of argumentation, and for its evaluation.

Substantive aspect covers such means of legal argumentation as, in particular, arguments (legal and non-legal) and argumentative schemes, structures of argumentation. The general concept of argument is ambiguous. In post-Soviet works, it is often defined as “a statement that leads the subject of argument in support of his position or to refute the position of the opponent”; “statements used in the dialogue to confirm, substantiate or criticize the views expressed in this dialogue on the thesis” [8, p. 198; 18, p. 54]. Instead, Western sources have a broader approach. K. Tindale emphasised that in the European tradition, the argument covers both the basics of the argument (argumentation) and the conclusion – the standpoint, position [15, p. 45].

The concept of *argument* depends on the adopted approach to understanding argumentation [17, p. 45-46]. D. Walton considers the argument a sequence of justifications or a chain of conclusions that are used to address unresolved issues in the dialogue [10, p. 214]. J. Freeman with reference to J. Venzel stressed that the argument is related to the family of concepts. You can distinguish between *process*, *procedure* and *product*. The dialectical model of the argument also covers all three aspects of the argument [22, p. 44-45]. R. Alexy distinguishes the following forms of argument: 1) on interpretation, 2) on dogmatic argumentation 3) on the use of precedents 4) on general practical justification 5) on empirical justification 6) so-called special forms of argument. Each form of argument corresponds to certain rules of justification [16, p. 232]. Understanding the existence of certain types of arguments in itself can expand the arsenal of tools for creating legal argumentation in a particular argumentative situation.

The concept of argument is to some extent related to the concept of *argumentation scheme*. The latter is not identical with the concept of argument and reflects the internal connections between its elements. Consider this concept in more detail. “Argumentation scheme” is a term introduced by X. Perelman to denote conventional means of expressing the connection between what is stated in the foundation and between what is asserted in the thesis. However, in some works argumentation schemes are understood as a means to evaluate the whole process of argumentation, as a means of identifying arguments and as a basis for describing the argumentative competence inherent in a native speaker of a language [20, p. 99]. The concept of “*implicit basis*” is connected with the reconstruction of the argument scheme [20, p. 24] – an unexpressed element of the argument that must be reproduced in the context. Argumentation scheme characterizes the *method of substantiation or refutation of the standpoint* in a single argument with the help of explicit basis [20, p. 25-26]. Each argumentative scheme contains a specific justification between the ground (or several grounds [foundations]) and the point of view [conclusion], which legitimises the transition of acceptability of the ground (grounds) put forward to support the standpoint [21, p. 12]. B. Garssen believes that each argumentation

scheme is a special way of maintaining the point of view and defines it as *the most common models of argumentation*, which have an indefinite number of options for substituting elements. They differ from logical schemes in that the transfer of acceptability from the basics to the conclusion is based not only on the formal characteristics of the scheme that uses it [20, p. 119], but also on other factors arising from the context.

As B. Garssen found out, in most classifications the following argumentative schemes are distinguished: causal argumentation, comparative argumentation, argumentation by authoritative opinion in many classifications, symbolic argumentation is also distinguished, but its content is different. The typology of argumentative schemes is considered acceptable if speakers use it to build their arguments and can recognise the scheme of argumentation [20, p.118]. However, arguments and schemes of legal argumentation should be the subject of a separate study and are mentioned briefly in this article.

E. Fetheris talks about *factual* and *legal* arguments. By *factual arguments* she means arguments about facts. In her view, the theory of legal argumentation should develop standards for evaluating factual arguments. For *legal arguments* (arguments about the law) it is necessary to establish what types of schemes of legal argumentation need to be distinguished. In addition, it is necessary to formulate relevant critical questions for different argumentation schemes. After all, the correct application of argumentation schemes depends on whether certain critical questions can be answered in the affirmative [13, p. 202].

Thus, the scheme of the argument is a methodological concept, which covers not only the means of argumentation, but also its inherent way to justify the standpoint (conclusion of argumentation), given that it reflects the internal structure of the argument and the relationship between its elements – explicit or implicit. It is methodologically important for the analysis of legal argumentation to distinguish between legal and factual arguments, which are based on different argumentation schemes and standards of certainty.

The structure of the argument should be distinguished from the scheme of *argumentation*. The scheme of argumentation is, according to F. Van Emurenat and K. Gruterdorst, the internal structure of argumentation, and the structure of argumentation – the external structure is not a single argument, and argumentative discourse. The structure of argumentation is determined by how the arguments are interconnected and how they allow to defend the standpoint. The structure of argumentation is single and multi-argument. In a single argumentation structure, only one argument is used, and in a multi-argumentation structure, many arguments are put forward for or against the standpoint, trying to anticipate the warnings of the opposite side of the argument. In a multi-argument structure, arguments can be presented in parallel (they can complement or reinforce each other hierarchically). The structure of argumentation can be determined by the content of arguments, context and other pragmatic factors [20, p. 26-27]. Let us give some typical examples. The parallel argumentative structure may look like this regarding the legal argumentation in the court decision: “*Considering the difficult financial situation of the accused, his positive characteristics at work, sincere remorse, the court considers it necessary to impose a suspended sentence.*” The hierarchical structure of the argument may look like this: “*The plaintiff did not appear in court, did not report the reasons for non-appearance, although he was duly notified of the time and date of the trial, evidence of which is in the case file.*”

Thus, the structure of the argument is a methodological concept, which includes the combination of arguments (argumentation schemes) in chains of arguments, and reflects the external structure of the argumentative construction and the relationship between arguments. To analyse the legal argumentation, it is important to find the structure of arguments and establish relationships between individual arguments in such a structure.

Process aspect legal argumentation tools cover the rules of argumentation. They depend on the type of legal activity in which legal argumentation is carried out and on the specific features of the argumentative situation. In this aspect, one should consider both the theoretical rules of general practical discourse and legal discourse (as a special case of general practical discourse, in particular in the research of R. Alexi [16, p. 211]), and procedural rules that establish the features and boundaries of such a discourse in a particular legal system.

In each of the forms of arguments mentioned above, R. Alexi talks about forms and rules of external argumentation. Let us clarify that the internal argumentation in R. Alexi wonders whether the conclusion follows logically from the foundations put forward in support of him. Whereas the correctness (correctness) of such foundations is the subject of external argumentation [16, p. 221]. In addition, R. Alexi talks about the rules of general practical and legal discourses, which include: basic rules, rules of rationality, rules of burden sharing justification, rules of justification, rules of transition [16, p. 206], rules of internal legal substantiation, rules of external legal substantiation (concerning forms of legal arguments) [16, p. 231-284]. Given the limited scope of this publication, here are just the *basic rules*: 1) no speaker can contradict himself; 2) each speaker can claim only what he really believes; 3) each speaker can assert only those value judgments and judgments about responsibilities in a particular case, which he wishes to assert in the same terms for each case, which is

similar to the present, in all relevant respects 4) different speakers can not use one and the same expression in different meanings [16, p. 188-191]. The set of substantive means in a particular argumentation, and the rules of argumentation, depends on both the subjective composition of legal argumentation and the peculiarities of their interaction in a particular argumentative situation, and the object of legal argumentation.

Summing up, we note that the minimum procedural rules of argumentative discourse, however, establish procedural acts that can be the subject of analysis to enshrine in them the theoretical rules of general practical discourse. In real argumentative situations, it is possible to analyse both compliance with procedural legal requirements and compliance with theoretical rules of discourse, provided that there is relevant information in the text with legal arguments and/or information about the context of the argumentative situation.

All these tools of legal argumentation in their entirety – arguments, argumentative schemes and structures, procedural rules of discourse – allow both to produce arguments and to reconstruct and evaluate it.

2.3. Reconstruction and evaluation of [effectiveness] of legal argumentation

Reconstruction and evaluation of [effectiveness] should be part of the theoretical model of legal argumentation. In our opinion, *the reconstruction of legal argumentation* is a reproduction of real legal argumentation, turning to the tools of legal argumentation, including to the context that allows to identify the features of legal argumentation, the result of which is. Despite the lack of definitions of this concept, it is one of the main works of dialectical and logical approaches to legal argumentation. Theoretical models of argumentation research in these approaches are based not on the creation but on the reconstruction of real legal argumentation.

Reconstruction of legal argumentation is carried out not only for theoretical purposes, but also for practical purposes. In our opinion, one way or another, the reconstruction of legal argumentation in legal activity can be a question of such cases. First, in lawmaking – when the addressees of a draft legal act, who can participate in the debate on its content and vote for it, study the rationale for this act. Secondly, in legal interpretation – when the subject of legal analysis analyses the arguments in the appeal on the need to resolve the issue of official interpretation of the rule of law or its compliance with the Constitution; when the addressees of the argumentation (but not only) study the argumentation that substantiates the decision of the Constitutional Court of Ukraine on the interpretation of a rule of law or on the conformity of a rule of law with the Constitution. Third, in law enforcement – when the court examines the arguments of the parties; when the parties study the arguments of the court, which is the basis of its operative decision in the case; when the appellate or cassation court examines the argumentation of the lower court's decision; when the European Court of Human Rights examines the argumentation of the decisions of the national courts of a certain state, which led to the appeal to this court, etc. Fourth, in law enforcement – when a lawyer examines the case file, analysing the motivated refusals of public authorities to satisfy appeals, selects the facts and the right to write a statement of claim. Fifth, in legal doctrine – scholars using a wide arsenal of arguments, depending on the approach to understanding legal argumentation, can reconstruct it to reach scientific conclusions about the peculiarities of legal argumentation, links in the scheme and structure of argumentation to assess legal argumentation.

Obviously, the set of tools for doctrinal and practical reconstruction of legal argumentation is different and depends on the characteristics of practical legal activities and doctrine, as well as the purpose of reconstruction and the needs of the reconstructor. For example, researchers representing the dialectical approach to legal argumentation reconstruct legal argumentation, using such means of argumentation as argumentative schemes, argumentative structures, hidden foundations. However, they are unlikely to use such tools in practical legal argumentation, where it is often sufficient to single out the arguments that underlie the conclusion (point of view, resolution, etc.).

The evaluation of legal argumentation can be considered in two aspects – as the actual evaluation of such arguments and as an assessment of the effectiveness of such arguments (the ratio of the result of such arguments to its purpose [23, p. 120]). However, criteria for such an assessment need to be proposed. And it is the dialectical approach to legal argumentation that we believe offers such criteria. Assessment of argumentation is part of its study either separately from the reconstruction of legal arguments or as part of the reconstruction.

E. Feteris talks about the evaluation model for evaluating legal argumentation. It serves as a critical tool for establishing the acceptability of argumentation. After all, the reconstruction of the argument itself does not answer this question. E. Feteris proposes to assess the substantive and procedural aspects of legal argumentation. To *the material aspect*, she included evaluation standards for the use of statements that can be considered common starting points, and standards for the use of evaluation methods for statements that are not common starting points [13, p. 202]. As indicated by E. Feteris and H. Kloosterhuis, to decide whether an argument is acceptable in accordance with legal standards, it is first necessary to check whether the argument

is a valid rule of law. Norms of current law are considered a specific form of common legal provisions. To check whether the argument is a valid rule of law and, thus, a common starting point, it is necessary to check whether a certain rule comes from a recognised legal source [24, p. 317]. With regard to *procedural aspects*, to adequately assess, it is necessary to specify which rules of discussion apply to a particular case. For different types of legal discussion (discussions in legal process, discussions in legal science) it is necessary to specify which general and special legal norms are relevant for a rational legal discussion [13, p. 202]. It follows from the above that to assess legal argumentation, it is necessary, first of all, to reconstruct the means of legal argumentation, and then to propose criteria for its evaluation.

R. Alexy does not distinguish between a separate component of the evaluation of the outcome of the discussion. In his view, the rationality of the result depends on whether the discussion took place in accordance with the rules of rational discussion. After all, the rules for discussions already require that the argument be acceptable in accordance with the common starting points. This ensures the coherence of the final result with the initial provisions and values shared by the legal community [16, p. 318].

From the standpoint of F. Van Eemeren, the analysis, evaluation and creation of argumentative discourse concerns both the beginning of argumentation (which includes explicit and implicit material and procedural principles that serve as its starting points) and the presentation of argumentation (reflected in the statement of principles implicitly or explicitly vision). Both the starting position and the presentation of arguments should be assessed using appropriate assessment standards that are consistent with all the requirements of a rational judge who judges reasonably [11, p. 12]. Representatives of the pragmodialectical approach in the theory of argumentation propose to evaluate the argumentation considering the following factors: 1) points of view that they put forward in the presence of different positions; 2) the positions taken by the parties and the material and procedural starting points; 3) the arguments put forward by the parties in support of each point of view; 4) the argumentative structure of all arguments put forward in defense of the standpoint; 5) argumentation schemes used to substantiate the point of view in each individual argument, which together constitute the argument; 6) the result of the discussion presented by the parties [11, p. 537].

To evaluate the argument and find errors and arguments, some researchers suggest asking critical questions to the arguments. H. Mercier proposes to use the typology of argumentative schemes and critical questions to them, developed in the theory of argumentation, as a starting point for assessing argumentation [25, p. 266]. D. Walton offers critical questions to each scheme of the argument [10, p. 327].

Thus, there are three different positions on assessing the admissibility of an argument. R. Alexy, F. Van Eemeren and other representatives of the pragma-dialectical approach link the acceptability of legal argumentation, and hence its persuasiveness, to the procedural aspect of the instruments of legal argumentation, namely, to the observance of the rules of discussion. The latter concern both general practical discourse and legal discourse, in particular the rules on the need to accept common starting points. It is no coincidence that the representatives of the dialectical approach to legal argumentation attach great importance to common starting points. For example, if the parties have different ideas about the presence or absence of a fact or about the applicability or content of a rule of law, it is unlikely that any bilateral legal argument will be convincing for them. In general, the conclusion on the acceptability or persuasiveness of the argument can be made by both the addressee of the argument, and the reconstructor, and the audience. H. Mercier, D. Walton proposes to evaluate the acceptability of arguments by assessing the acceptability of arguments by asking critical questions to them. E. Mehta and H. Kloosterhuis is talking about a comprehensive assessment, considering the assessment of substantive and procedural aspects of legal argumentation, including through the formulation of critical questions to the arguments. Probably, all these factors should be considered as criteria for assessing the persuasiveness of legal argumentation according to the dialectical standard of its acceptability.

CONCLUSIONS

According to the results of the study, it was found that legal argumentation should be considered as a process concept that reflects the legally significant activities to substantiate the statement by certain means – legal and non-legal arguments. Such activities are communicative, and are carried out in various types of legal activities, often in the form of discourse. Legal argumentation can reasonably be considered the result of legal argumentation or the result of the reconstruction of the argument, presented in writing, through the prism of the own consciousness of a particular subject (reconstructor). In this sense, legal argumentation is always the result of a certain activity of legal argumentation – its own or another subject.

It is substantiated that the general theoretical model of legal argumentation can be considered as a theoretical and analytical model of legal argumentation, which serves as a model of creation and a model of reconstruction and evaluation of legal argumentation in all types of legal activity. Such a model should cover

1) the composition (*corpus*) of legal argumentation; 2) tools of legal argumentation; 3) reconstruction and evaluation of the [effectiveness] of legal argumentation.

It is substantiated that the composition (*corpus*) of legal argumentation as a legal construction allows to give legal argumentation a holistic characteristic and show the transition from the activity – legal argumentation – to its result – legal argumentation. It is reasonable to include the following components: argumentative situation; subjective composition; goal; object of legal argumentation; the content of legal argumentation.

It is established that the tools of legal argumentation are a system of substantive (arguments, argumentative schemes and structures) and procedural means (rules of legal argumentation). Legal and factual arguments are based on various argumentation schemes and standards of certainty. As it was stated, the scheme of argument covers not only the means of argumentation, but also its inherent way of substantiating the standpoint (conclusion of argumentation) given the relationship between its other elements – the foundations (explicit or implicit). The structure of the argument covers the combination of arguments in chains of arguments, and reflects the relationships between arguments.

It is identified that the reconstruction of legal argumentation is a reproduction of real legal argumentation, turning to the tools of legal argumentation, including to the context, which allows identifying the features of legal argumentation, the result of which is. Assessment of legal argumentation allows drawing conclusions about the persuasiveness or acceptability of the result of legal argumentation, and possible errors in such arguments.

RECOMMENDATIONS

The scientific value of the article is explained by the fact that it contains substantiation of the general theoretical model of legal argumentation, which has not yet been studied with the help of such a methodological basis. Such a model has the heuristic potential for the analysis of legal argumentation in various types of legal activity. The author's definitions and visions of such a model based on the analysis of basic works on the theory of argumentation and legal argumentation are offered in the article.

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ВІДНОСНІ ПРАВА ЛЮДИНИ В УМОВАХ ОСОБЛИВИХ ПРАВОВИХ РЕЖИМІВ

Анотація. У статті досліджуються права людини, які можуть бути обмежені в умовах надзвичайного та воєнного станів, що є актуальним в умовах сучасності, виходячи з наявності локальних воєнних конфліктів, ситуації надзвичайного стану або можливості їх існування в багатьох країнах світу. Мета роботи полягає у з'ясуванні основних особливостей різних видів прав людини, що підлягають обмеженню в умовах особливих правових станів, висвітленні характерних порушень з боку органів державної влади та місцевого самоврядування при застосуванні того чи іншого виду обмежень. Для досягнення поставленої мети у роботі використовується система методів наукового пізнання, зокрема загальнонаукові, приватні, а також спеціально-юридичні. Практична цінність дослідження полягає у здійсненні класифікації прав людини за критерієм можливості їх обмеження в умовах особливих правових режимів. Так, під час дії особливих правових режимів тимчасово можуть обмежуватися такі права людини і громадянина: право на свободу та особисту недоторканність, право на житло, право на приватність, право на особисте та сімейне життя, свобода пересування, свобода думки, свобода на вільне вираження своїх поглядів і переконань, право брати участь у референдумах, право обирати і бути обраними, право на мирне зібрання, право на власність, право на працю та свободу підприємницької діяльності, право на освіту, право на захист персональних даних. Зроблено висновок, що в умовах особливих правових режимів існує велика кількість прав людини, що є відносиними, не абсолютними, і можуть бути обмежені державою та її органами, місцевою владою. Проте, для того, щоб такі обмеження були правомірними, відповідали принципу верховенства права, визнавалися допустимими вони повинні відповідати певним критеріям: мають передбачатися законом; не повинні торкатися основного змісту права; мають бути розмірними поставленій меті (принцип пропорційності); здійснюватися в законних цілях, перелік яких є вичерпним і не підлягає розширенню

Ключові слова: правовий режим, обмеження прав, право на особисту недоторканність, свобода пересувань, право на житло, свобода релігії

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RELATIVE HUMAN RIGHTS IN THE CONDITIONS OF SPECIAL LEGAL REGIMES

Abstract. *The article examines the human rights that may be limited in conditions of emergency and martial law, which is relevant in modern conditions, based on the presence of local military conflicts, states of emergency or the possibility of their existence in many countries. The purpose of the work is to clarify the main features of different types of human rights that are subject to restrictions in special legal situations, highlight the specific violations by public authorities and local governments in the application of certain types of restrictions. To achieve this goal, the work uses a system of methods of scientific knowledge, including general, private, and special legal. The practical value of the study lies in the implementation of classifications of human rights on the criterion of the possibility of their restriction in the context of special legal regimes. Thus, during the operation of special legal regimes, the following human and civil rights may be temporarily restricted: the right to liberty and security of person, the right to housing, the right to privacy, the right to private and family life, freedom of movement, freedom of thought, freedom to freely express one's views and beliefs, the right to participate in referendums, the right to vote and to be elected, the right to peaceful assembly, the right to property, the right to work and freedom of entrepreneurial activity, the right to education, the right to personal data protection. It is concluded that in the conditions of special legal regimes there is a large number of human rights, which are relations, not absolute, and may be limited by the state and its bodies, local authorities. However, in order for such restrictions to be lawful, consistent with the rule of law, and recognized as admissible, they must meet certain criteria: they must be provided for by law; should not affect the basic content of the law; must be dimensional to the goal (principle of proportionality); be carried out for lawful purposes, the list of which is exhaustive and not subject to expansion*

Keywords: *legal regime, restriction of rights, right to personal inviolability, freedom of movement, right to housing, freedom of religion*

INTRODUCTION

In modern society, there are many factors and criteria by which members of society differ and, as a result, distance themselves from each other. However, the challenges of nature in the form of insurmountable catastrophes (fires, floods, global warming, environmental threats, pandemics, etc.) and artificial threats to humanity (military conflicts, riots, man-made disasters, weapons of mass impression, etc.) forces humanity to seek unifying tools for the common good and world peace. Human rights are becoming such a unifying tool today. Those rights that everyone would have, being in a state of state, were called natural. These rights are not limited by anything and are the same for everyone. In the transition to civil status, people, mutually (by agreement) renouncing a number of their natural rights, pass on the benefits of their use to the whole society. These include rights, the exercise of which, even in the natural state, is not entirely in the power of man. These are mainly rights related to security and protection.

If possible, legitimate restrictions on human rights are divided into absolute and relative. Absolutes are not subject to restrictions under any circumstances (the right not to be held in slavery, the right not to be subjected to torture, other ill-treatment or punishment, the right not to be held responsible for acts not considered a crime at the time). Relative rights may be restricted if such restrictions are required by law, are necessary in a democratic society, and pursue a legitimate aim (protection of state security, public order, health,

morals, rights and freedoms of others). Moreover, the proportionality of the restriction of the right must be ensured [1, p. 303]. This classification is largely conditioned upon the problem of legal understanding, which is the dispute between legal positivism and natural law. In general, the discussion has not yet found its logical conclusion, because neither positivism nor natural law can fully embrace the idea of justice. Modern legal science is in constant search of an internally consistent concept of legal understanding, which has an integrative effect, capable of understanding the true essence of law. Integration jurisprudence can play such a role, as it has room for the conceptual positions of each of the known types of legal understanding. It creates a unique field for scientific dialogue, where the fierce conflict of supporters of different types of understanding of law is overcome and a tolerant environment is formed to defend their positions on the essence of law. Based on the integrative approach, we will try to find an answer to the question of which human rights may be limited in conditions of special legal status, and which – not.

Restriction of human freedom occurs under such conditions as violation of individual rights or arbitrariness in relation to others, ensuring the protection of society, the implementation of the preventive function of the state [2, p. 2452]. All these restrictions are clearly regulated at the level of legislation and cannot go beyond the established limits. In this context, special attention should be paid to the category of freedom. The value of freedom in its various manifestations is one of the most important determinants of human existence. However, the path to freedom is not the path to permissiveness. Each of the concepts differently assessed the role of the state in ensuring the functioning of society, but it is based on the idea of freedom as one of the most important values of the individual. Therefore, freedom should be understood not only as an abstract social value, but as a property of social relations, the legal order of which provides that the benefit of freedom for man – is not only his rights but also certain duties and responsibilities to others, society and state.

Legal restriction of freedom is defined as a deviation from the principles of legal equality by narrowing the scope of rights and freedoms or expanding the scope of responsibilities of a particular person. In addition, the need for such restrictions cannot be denied, but their scope and validity need attention. Given that state and municipal authorities use discretionary powers to restrict relative human rights in special legal regimes, the relevance of the study of restrictions on human rights in martial law and emergency situations is beyond doubt. In Ukraine, the regulation of public relations arising in connection with emergencies has become particularly important after the emergence of a military conflict on the territory of Ukraine and the spread of the severe acute respiratory syndrome-2 virus (SARS-CoV-2) [1, p. 176]. The study of restrictions on human rights and freedoms is an extremely relevant, necessary and important topic, conditioned upon the practical aspect of coexistence of members of society within the state and the global space, when it is necessary to determine how to ensure order in society and which rights can be restricted and which can not. Some aspects of the relativity of human rights became the subject of research O. Petryshyn [1, p. 303], S. Slyvka [4, p. 144], O. Bukhanevych and others. [5], N. Alivizatos [6], R. Ahdar [7], M. Stenlund [8], T. Berners-Lee and M. Fichetti [9], A. Kolganov [10, p. 442], B. Artiukh [11, p. 54] and in other international sources [12].

The purpose of the study is to classify human rights that are subject to restrictions in special legal conditions, to clarify the main features of each of their types, highlight the specific violations by public authorities and local governments in applying certain types of restrictions.

1. MATERIALS AND METHODS

To carry out the study, a system of methods of scientific cognition was applied, namely general scientific (analysis, synthesis), particular methods of scientific cognition used in the branches of many sciences (comparative analysis, quantitative and qualitative analysis, approximation), including special legal methods (formal legal, comparative legal). The authors of this study applied the general philosophical (universal) method of cognition at all stages of the cognitive process. The method of analysis revealed the characteristics and studied some features of the restriction of the right to liberty and security of person, the right to freedom of movement, freedom of expression, the right to housing, the right to personal data protection, the right to education, freedom of religion, access to the Internet. Comparative analysis provided an opportunity to identify different approaches to the procedure for determining the scope of restrictions on human and civil rights and freedoms under special regimes stipulated in the constitutions of foreign states. According to the method of generalization, the classification of human rights restrictions in the conditions of special regimes has been formed.

The method of deduction allowed drawing a general conclusion from the doctrinal views of scholars on the characteristics of restrictions on certain types of human rights (rights to liberty and security of person, rights to freedom of movement, freedom of expression, rights to housing, rights to personal data protection,

rights to education, freedom of religion, access to the Internet) in emergencies and martial law. The inductive method of cognition provided an opportunity to obtain a general conclusion about the characteristics of various types of restrictions on relative human rights in emergencies and martial law.

The article also used special legal methods, including formal-legal and system-structural, which were used in the development and study of the terminological apparatus of this issue, namely in clarifying and disclosing the features of legal instruments used to establish law and order under time of special legal regimes and characteristic features of restriction of the right to liberty and security of person. The normative base for this study includes normative legal acts of Ukraine and foreign states, decisions of the European Court of Human Rights, in particular: Code of Ukraine on Administrative Offenses of December 7, 1984 [13], Law of Ukraine “On Police” of October 11, 2011 ([14], Law of Ukraine “On the National Police” of July 2, 2015 [15], Decision of the Constitutional Court of Ukraine on the constitutionality of Article 263 of the Code of Administrative Offenses and paragraph 5 of Part 1 of Article 11 of the Law of Ukraine “On Police” of 11 October 2011 No. 10-rp/2011 [16], Decree of the President of Ukraine No. 393 of 26 November 2018 “On the Imposition of Martial Law in Ukraine” [17], Decision of the Grand Chamber of the Constitutional Court of Ukraine of 23 November 2017 No. 1-r/2017 [18], Judgment of the Constitutional Court of Ukraine of 13 June 2019 No. 4-r/2019 [19], Judgment of the European Court of Human Rights in the case of *Lawless v. Ireland* (1960) [20], Convention on the Protection of Human Rights and Fundamental Freedoms [21], Judgment of the European Court of Human Rights in *Austin and Others v. the United Kingdom* [22], Judgment of the European Court of Human Rights in *Dogan and Others v. Turkey* of 29 June 2004 [23], Resolution of the Cabinet of Ministers of Ukraine No. 211 of March 11, 2020 “On Prevention of the Spread of Acute Respiratory Disease COVID-19 caused by coronavirus SARS-CoV-2” [24], Criminal Code of Ukraine of April 5, 2001 [25], Judgment of the European Court of Human Rights in *Mokuti v. Lithuania* of 27 February 2018 [26], Judgment of the Constitutional Court of Latvia of 17 October 2005 in No. 2005-07-01 [27], Law of the Republic of Latvia “On State Secrets” of 17 October 1996 [28], Constitution of the Republic of Latvia [29], Law of the Federal Republic of Germany on the Conditions and Procedure for Inspections of the Federal Security Inspectorate [30], NATO Personnel Security Directive No. AC/35-D/2000 of 7 January 2013 [31], Judgment of the European Court of Human Rights “*Golder v. the United Kingdom*” [32].

2. RESULTS AND DISCUSSION

Human rights are a fundamental and fundamental phenomenon, their detailed study is needed to understand the essence of legal science. However, it is not only legal professionals who need to be aware of the importance and relevance of this phenomenon. Everyone should know and be able to exercise their rights. In democracies, the level of human rights is an indicator of the implementation of the principles of the rule of law, constitutionality and the rule of law. Constitutionally enshrined human rights and the means provided by the Basic Law for their protection are important components of a democratic state governed by the rule of law. At first glance, these rights belong to everyone from birth, they can not be taken away, transferred to another person. But on the other hand, the level of development of modern society, medicine, human consciousness may call into question the categorical nature of the first thesis.

2.1. *The right to liberty and security of person*

The right to liberty and security of person means the possibility of doing things that do not contradict the law and do not violate certain rules established in society. In the Decision of the Constitutional Court of Ukraine on the constitutionality of Article 263 of the Code of Administrative Offenses of December 7, 1984 [13] and paragraph 5 of the first part of Article 11 of the Law of Ukraine “On Police” of October 11, 2011 No. 10-rp/2011 [14] (the latter is currently repealed under the Law of Ukraine “On the National Police” of July 2, 2015 [15]), the court noted that the right to personal integrity is one of the defining and fundamental rights. However, it is a relationship and may be limited on the grounds and in accordance with the procedure clearly defined in law [16].

There is no doubt that freedom is based on the mutual responsibility of both man and state. The dialectical connection between necessity and freedom, their unity and opposite is traced. The state, protecting the law, thus protects human freedom. The responsibility of citizens lies in the freedom to choose behaviour, to make decisions, aware of the consequences of their actions. Freedom cannot be absolute and unlimited. Any legal norm defines the limits of human freedom, giving him the opportunity to choose a model of their behavior. In this regard, the law is not related to freedom in general, but to its specific degree, which exists within a society, according to which the law sometimes restricts the freedom of the individual.

Most scholars seek to find a positive meaning and an objective need to restrict freedom through legal means, because without this freedom can turn into arbitrariness, because there will be no legal limit to protect the freedom of others. S. Slivka, in general, does not object to the need to restrict freedom, calls for caution in this matter. This is conditioned upon the prevention of violence and aggression as a consequence of excessive oppression of individual freedom, because a reasonable person does not need external restrictions imposed by government agencies and officials [4, p. 144]. Probably, it is a question of sufficiency of internal restrictions of the reasonable person for a choice of a positive and useful model of behaviour. Thus, human freedom is not all-encompassing, it has certain restrictions, which are regulated by law and must be legitimate. Arbitrary restriction of human freedom is unacceptable. The legal regime of state of emergency and martial law significantly affects the realization of human freedom. Restrictions in these periods are primarily conditioned upon the need to protect the life and health of the individual, the humane values of society.

In the modern conditions of civilization development, the introduction of the principle of humanism in all spheres of social life, the restriction of human and civil rights and freedoms must be reasonable and proportionate. Restrictions related to the conduct of special legal regimes should not be excessive and such that are imposed in violation of procedural order [5, p. 55]. It should be remembered that the restriction of rights is not the only legal instrument used to establish law and order during special legal regimes. In general, there are three such tools:

1. Exceptions to human rights that exclude certain actions taken under special legal regimes. For example, the prohibition of forced labor does not apply to service required in the event of a natural disaster that threatens human life or the well-being of society.

2. The actual restriction of human rights – measures imposed on non-absolute human rights (the right to freedom of expression, the right to freedom of association or the right to privacy and family life). These restrictions are always subject to a three-level test: legality, legitimacy and necessity.

Restrictions on human rights should be distinguished from exclusion from the rules. For example, the prohibition of forced or compulsory labor implies that the worker should not be enslaved or enslaved, nor should he or she be involved in forced or compulsory labor. However, the term “forced or compulsory labor” does not include, in particular, any compulsory service in cases of emergency or natural disasters that threaten the life or well-being of society. In this case, it is not a question of restricting the right to prohibit forced or compulsory labour, but of excluding from the term a certain kind of legal relationship.

3. Deviation from rights – suspension for a certain period of time of guarantees of certain human rights and freedoms.

The category of restriction of human rights cannot be identified, considered as a part or, conversely, a generalised concept of the category of deviation from rights, because these terms reflect various legal phenomena of objective reality. When restricting rights, it is a question of temporarily narrowing the limits of realisation of one or another right to achieve the necessary goal of the law. Withdrawal from rights refers to the absolute impossibility of guaranteeing and ensuring human rights by state/municipal bodies to any extent in a certain territory.

Thus, according to paragraph 3 of the Decree of the President of Ukraine No. 393 of November 26, 2018 “On the Imposition of Martial Law in Ukraine” [17] in connection with the imposition of martial law in Ukraine may temporarily restrict such human rights as: the right to housing, the right privacy, the right to privacy and family life, freedom of movement, freedom of thought, freedom to express one's views and beliefs, the right to participate in referendums, the right to vote and to stand for election, the right to peaceful assembly, the right to property, the right to work and freedom of entrepreneurial activity, the right to education. The issue of restriction of the right to personal inviolability is considered in detail in the acts of interpretation of the Constitutional Court of Ukraine. In particular, the Decision of the Constitutional Court of Ukraine of November 23, 2017 No. 1-r/2017 [18] emphasises that:

1) the right to liberty and security of person is relative and is subject to restriction on the grounds and in the manner prescribed by current legislation of Ukraine;

2) such restrictions must be implemented in accordance with the guarantees of human rights protection;

3) the right to personal integrity is subject to protection against arbitrary restrictions through judicial review;

4) the restriction of the right to personal inviolability must be made on the basis of a court decision adopted in accordance with the procedure provided by current legislation.

In the Decision of the Constitutional Court of Ukraine of June 13, 2019 № 4-r/2019 [19] we find two more characteristic features of the restriction of the right to personal inviolability:

5) such restriction must comply with the principles of justice, equality, proportionality and ensure a balance of interests of the individual and society;

6) the restriction must take into account the provisions of international law and the doctrine of the European Court of Human Rights.

The right to personal liberty and security is revealed in the judgment of the European Court of Human Rights in the case of *Lawless v. Ireland* (1960) [20]. This act was the first court decision to interpret restrictions on human rights to personal liberty and inviolability in special conditions. The historical precondition for this decision was the existence in the Republic of Ireland of the Irish Republican Army (IRA), a paramilitary organisation whose members are united by the idea of irredentism through Irish Republicanism, which is the independence of Ireland from the British state, law and order. The case concerned the applicant's belonging or non-belonging to the said group, whose activities endangered the statehood, life and health of the country's citizens. During the proceedings before the European Court of Human Rights, the applicant's involvement in the IPA was confirmed.

The Court found that the military and underground nature of the IRA, as well as the fear they instilled in the population, the fact that they operated mainly in Northern Ireland outside the Irish Government's jurisdiction and the serious consequences for the general population required special rules of law and emergency provisions. Moreover, the country's exceptional laws were accompanied by guarantees of prevention of abuse in the form of administrative detention: constant parliamentary scrutiny, the establishment of a special commission of three experts, and, finally, the existence of a guarantee of public release. government of Ireland, and the legal obligation of the state to release all persons who have promised to respect the Constitution and laws of the country and not engage in illegal activities that are contrary to the legal provisions of the state of emergency.

In view of the above, although the applicant's detention without trial was not legally substantiated in Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms [21], it found its source in the right of derogation, which was duly exercised by the Government of Ireland and did not constitute a violation of the Convention.

We see that the right to personal integrity can be limited in special regimes only to those actions that may put him or others at risk. Such freedom is not revoked or revoked, but is limited only for a certain time, for example, during curfew.

2.2. The right to freedom of movement

The right to freedom of movement is restricted during quarantine in order to keep infected and/or potentially infected persons in a separate territory from other members of society. Certain regions, oblasts, cities, towns may be closed for entry and exit. Some diseases, such as COVID-19, pose a particular threat to certain categories of people (e.g., the elderly), so the right to freedom of movement may be restricted to isolate this category of people from the potentially infected. For example, in the Kingdom of Norway, to combat viral infection, public authorities have banned the use of country houses located in villages, in which a person does not live or is not permanently registered [6].

In some cases, the right to freedom of movement may be restricted not in conditions of martial law and state of emergency, but in terms of the need to maintain law and order, prevent harm to life, health, property, public safety. These restrictions have been the subject of proceedings before the European Court of Human Rights in the case of *Austin and Others v. The United Kingdom* [22]. The case dealt with the legal relationship that took place in London in 2001 during demonstrations in which a large number of participants took part. Intelligence told police there was a risk of injury and death, property damage. In order to save people's lives and health, to prevent damage to property, law enforcement agencies established a solid border, which limited the right of movement of citizens and people, as no one was able to leave the scene.

It is important to understand the nature of the restriction of the law in the context of mass demonstrations and the maintenance of law and order to differentiate between measures of restriction and deprivation of freedom of movement. The case of *Austin and Others v. The United Kingdom* concerned the restriction of human liberty, and the difference between the applicants, which was that one of the applicants was a demonstrator and the others were passers-by, was irrelevant in establishing the lawfulness of such a restriction. In this case, the court ruled that there was no illegal restriction on a person's freedom of movement, as a solid border had been set to keep people in the crowd and endanger their lives and health, and tougher deterrence could lead to a risk of injury. Given the circumstances of the case, the police had no alternative to prevent the risk of injury to protesters or damage to property, other than establishing a solid border. Its establishment was the smallest but effective means of interfering with the rights of movement of the individual.

2.3. The right to freedom of expression

Under special legal regimes, there are sometimes grounds for restricting freedom of expression. In particular, it is about spreading false information about the real state of affairs through social networks. Individuals commit offenses in order to create panic among the population (for example, false information about the planting of explosives). Such an act is punishable and may even, in some cases, be classified as terrorism. In this case, there is a right to require providers to remove false information and restrict access to such information. However, on the other hand, such powers can be abused by authoritarian and totalitarian governments in non-democratic countries in order to retain power. An example is the disconnection of the Internet in the Republic of Belarus during the presidential election in 2021.

However, the legal restriction of freedom of expression in emergencies and martial law must have its limits and not apply to all without exception, as citizens must remain levers of influence on the executive branch with discretionary powers. Collecting, disseminating and freely discussing information on existing threats, analysing expert opinions on coping strategies, and having a free “market for ideas” can help eliminate the negative effects of special situations. True messages about all the circumstances of the situation help members of society to make their own decisions and choose a model of behaviour. Therefore, the right to information should be ensured by the positive responsibilities of the state by creating back-up opportunities to obtain information in emergencies (eg, arranging and maintaining radio communications). In addition, countering false information and news is possible only by disseminating reliable and objective information that will prevent the spread of panic in society.

2.4. The right to housing

The right to housing may also be subject to restrictions under special legal regimes, for example, in the event of unforeseen man-made circumstances, a person may be forcibly evacuated. In this case, the state should provide other housing for such persons. Ownership of the home from which the person was evacuated does not end. State or municipal authorities may use the land of the community and legal entities to provide accommodation for evacuees in connection with an emergency, to organise temporary hospitals, etc.

It may be necessary to temporarily withdraw basic resources and stop exporting/importing goods. Discretionary powers may also include the closure of privately owned facilities (shopping malls, sports facilities) to prevent the massive outbreak of disease that has been observed in almost every country in 2020 to combat the COVID-19 pandemic. For example, in the United States, the Department of Defense on behalf of the President may carry out work to eliminate the consequences of emergencies, take measures to save lives and property of citizens [6].

An example of the restriction of the right to housing during special legal regimes is the case of the European Court of Human Rights “Dogan and Others v. Turkey” of 29 June 2004 [23]. The applicants also lived in a village in Turkey, which had a special legal regime. They owned houses and land, raised sheep and goats, and engaged in beekeeping. The main problem of the district was the conflict between paramilitary law enforcement agencies and the local population, which intended to create autonomy. Dogan and the other applicants were evicted from their homes without their consent. Their homes were deliberately destroyed by security forces. Current Turkish law stipulates that the governor of a region in a state of emergency cannot be held legally liable for such decisions. Moreover, such a decision cannot be appealed in court.

Here we return to the discretionary powers of the state administration of the region in which the state of emergency was in force, as it was endowed with special powers conditioned upon the need to maintain the safety of life and health of people in a state of emergency. Of course, a provision that precludes judicial review of acts issued by the governor of a state of emergency cannot be compared to the concept of the rule of law. The system of public administration in the event of a state of emergency is not arbitrary and can not but be subject to judicial review. Individual and regulatory acts issued by competent authorities during a state of emergency should be subject to judicial review. Violations of this principle are excluded in countries with democratic regimes based on freedom.

In many cases of restrictions on the right to housing due to emergencies or martial law, administrative courts award compensation for not being able to access their property due to insecurity in the region. It is worth mentioning the doctrine of “social risk”, which does not require a causal link between the harmfulness of actions and damages, and stipulates that the damage caused by terrorism must be common to society as a whole in accordance with the principles of “justice” and “social” states. Damage in such cases is paid for as a result of the authorities being held accountable for failing to prevent terrorist incidents and maintain security.

Ensuring property rights includes three different aspects:

1. The first is general in nature and establishes the principle of peaceful use of property.

2. The second aspect covers deprivation of property and makes its possibility conditional on certain conditions.

3. The third recognizes that states have the right, inter alia, to control the use of property in accordance with the common interest.

However, all three aspects are not separate from each other and in this sense the second and third aspects relate to specific cases of interference with the right to peaceful possession of property. Therefore, they must be interpreted in the light of the general first aspect. Speaking about the fact that the right to housing is not absolute, it is necessary to consider the circumstances of a particular situation, which necessitates the imposition of a state of emergency. Very often, events are characterised by brutal confrontations between state security forces and members of paramilitary groups, leading to double violence caused by the actions of both sides of the conflict. In such circumstances, some people are forced to leave their homes on their own, while others are forcibly evicted by the authorities to ensure the safety of the region's population. At the same time, cases when security forces deliberately destroy the houses and property of citizens, depriving them of their livelihood, do not indicate the relativity of the right to housing, but a violation of the right to peaceful possession of their property.

2.5. *The right to protection of personal data*

The right to protection of personal data in the context of the use and use of metadata in order to monitor the location of potential suspects, patients with pandemic diseases, etc. is also subject to restrictions. In this context, the protection of personal data cannot be higher in the value system than saving lives. To ensure that the right to data protection is respected, owners must be informed about the processing of personal data. When data is consolidated and separated from identifiable information, there is no restriction on the right to protection of personal data. However, the use of metadata at the personal level, such as the use of metadata to detain quarantine/isolation offenders, restricts the right to protection of personal data, in which case such restrictions should be necessary for society, as clearly defined in national law. goals.

For example, according to the Resolution of the Cabinet of Ministers of Ukraine No. 211 of March 11, 2020 “On Prevention of the Spread of Acute Respiratory Disease COVID-19 Caused by Coronavirus SARS-CoV-2” [24] persons crossing the state border of Ukraine may choose, in particular, fourteen-day self-isolation at the place of residence using the application “Action at home”, which confirms the place of self-isolation with the definition of geolocation. The person must confirm the decision to choose this model of behavior during the passport control – by stating his phone number and address of the place of self-isolation.

Self-isolation is monitored by checking the compliance of the photo of the person's face with the reference photo taken during the installation of the mobile application, and the geolocation of the mobile phone at the time of photography. This control is carried out by artificial intelligence. The location of the person is recorded only at the time of photo confirmation. Verification is considered unsuccessful after 5 warnings, after which the application sends a message to the police. Police officers check information about self-isolation during a personal visit. If a person commits an offense, he or she is subject to administrative (Article 44-3 of the Code of Administrative Offenses of Ukraine [13]) or criminal liability (Article 325 of the Criminal Code of Ukraine [25]).

2.6. *Freedom of religion*

The state and municipal authorities of the countries may also decide to restrict freedom of religion in conditions of martial law and emergencies by banning religious rites or establishing additional conditions for their implementation. Freedom of religion is not absolute. The right to freedom of religion and belief may, if necessary, be restricted in the interests of public security, public order, health and morals, or the protection of the rights and freedoms of others. Modern democratic legal order is based on the fact that religious organisations of any type exist in a certain legal field and are obliged to obey current laws. Religious freedom is a complex and multifaceted category that encompasses the internal aspect of freedom of religion (*forum internum*). This right protects the freedom to hold one's own convictions, the freedom to have or not to have religious beliefs and the freedom to change them. Internal freedom is inextricably linked to the right to express one's religion (*forum externum*). It is the freedom to carry out religious activities without hindrance.

At first glance, it may seem that only the external aspect of freedom of thought, opinion, religion is subject to restriction, but a more detailed analysis may lead to other conclusions. The terms *forum externum* and *forum internum* are commonly used in discussions of human rights related to the right to freedom of thought, conscience, religion and belief [7]. The dichotomy associated with discussions on the right to freedom of thought, opinion, religion and expression is explained by the division between external and internal rights. Human rights theory in general conceptualises freedom of thought, conscience, religion and belief, and

freedom of expression, offering absolute protection in the so-called *forum internum*. At the very least, it means the right to keep thoughts in one's mind, whatever they may be, no matter how others may relate to them.

However, if we take this position, it will mean that there is an absolute right to adhere to psychotic illusions [8]. This finding is ethically problematic in terms of psychiatric treatment and the rights of people with psychosis. In life, there may be a situation where the absoluteness of the *forum internum* is not necessarily correct. To confirm this, we can consider the current discussions in the field of human rights theory and political philosophy, which analyze psychotic illusions and ways to justify involuntary treatment. However, despite these arguments, in most cases the freedom of *forum internum* should be conceptualised as a negative freedom. And if *the forum internum* includes the right to certain inner possibilities, this right should remain with people with psychotic delusions. For example, in the case of the European Court of Human Rights *Mokuti v. Lithuania* of 27 February 2018 No. 66490/09 [26] the court ruled that there had been an interference with the applicant's right to respect for her religion when psychiatrists tried to correct the patient's religious beliefs. The case focuses on religious beliefs that are generally accepted in the society of the country (adherence to Catholicism), and not on the personal beliefs of a sick person, which are considered delusional. Thus, the question arises as to whether delusions or thoughts are protected from psychiatric intervention, and to what extent is such protection guaranteed if we consider that the purpose of psychiatric care is to treat a patient with a psychotic disorder and that such delusions or thoughts are understood as symptoms. It cannot be said that some human rights do not apply to patients with psychosis. Instead, the possibility of restricting *forum externum* rights in certain situations and limiting interference with *forum internum* rights, even during involuntary treatment, should be discussed.

In democratic societies where several religions coexist for the same population, it may be necessary to restrict freedom of thought, conscience and religion to reconcile the interests of different groups and ensure the observance of each other's beliefs. In this case, the state acts as a neutral and impartial organizer of the coexistence of different religions and beliefs. This function of the state should promote the establishment of the rule of law, religious harmony and tolerance in the societies of democratic countries. The duty of the state to neutrality and impartiality is incompatible with any action of the authorities to assess the legitimacy of religious beliefs or ways of expressing these beliefs. The state, exercising its discretion, is limited by law and its fundamental principles and must convincingly prove good reasons that justify any interference with individual freedom. Such activities of the state should be carried out under the supervision of independent and impartial courts.

2.7. *The right to access the Internet*

The right of the fourth generation today is the right to access the Internet, which may also be limited in emergencies. Given today's conditions, the Internet plays an important role in everyone's life, is an everyday part of it. The inventor of the World Wide Web T. Berners-Lee emphasizes: "The most common goal of the Web is to support and improve our existence in the world..." [9, p. 107]. At present, the Internet provides citizens with the necessary mechanisms to participate in the activities of public authorities, discuss political issues and issues of common interest.

Unfortunately, in today's world there are cases of illegal restrictions on Internet access, thus distracting people from the opportunity to inform and be informed. For example, during the presidential election in Belarus on August 9, 2020, the Internet was completely disconnected for several days [10, p. 442]. The declared purpose of the restriction of power was to ensure the non-interference of external forces in the elections [11, p. 54]. Although the actual goal was to limit the interference of civil society institutions in the impartial elections of the President. On December 20, 2019, in New Delhi, India, amid mass protests, Internet services were shut down, limiting the ability to exchange voice and text messages. It happened with the help of local police. Local, regional and national authorities regularly disconnect the Internet in India during riots: according to the Software Freedom Law Center, a digital data protection group, in 2019 there were 96 such disconnections [12].

Such actions of the authorities of a number of countries of the modern world testify to the application of imperative methods of the right to access the Internet, which leads to the inability of man to communicate with the outside world. This indicates the use of discretionary powers of the government contrary to the principle of the rule of law, without respect for the balance of public and private interests. However, when referring the right to access the Internet to fundamental rights, it should be understood that it is subject to restrictions, i.e. not absolute. The exercise of the right to access the Internet is subject to duties and responsibilities and may be subject to limitations or sanctions established by law and necessary in a democratic society in the interests of national security, territorial integrity or public security, to prevent riots or crimes, to protect health or morals, to protect the reputation or rights of others, to prevent the disclosure of confidential

information, or to maintain the authority and impartiality of the court. Thus, in conditions of martial law or state of emergency, certain restrictions on Internet access rights may be imposed.

2.8. Restrictions on rights that apply only to certain subjects of law or special restrictions

It should be recalled that in addition to the general restrictions on human and civil rights and freedoms, in the context of special legal regimes, there may be special restrictions on the rights that apply only to certain subjects of law. Here is an example of the legal relationship set out in the Judgment of the Constitutional Court of Latvia of 17 October 2005 in the case No. 2005-07-01 [27]. Pursuant to Articles 9-11 of the Law of the Republic of Latvia “On State Secrets” of 17 October 1996 [28], the law allows access to state secrets only to persons who, in accordance with their official duties or specific tasks, are required to perform work related to use or protection of state secrets and who have received special permits. Verification of persons for access to classified information of foreign and international organisations and their institutions is carried out by the National Security Office of the Republic of Latvia. The procedure and term of the inspection shall be determined by the Director of the Bureau for the Protection of the Constitution. The decision of the Director of the Office for the Protection of the Constitution on access to classified information of foreign and international organisations and their institutions is final and cannot be appealed. In his constitutional complaint, Guido Ivanovs (the applicant) asked to assess whether the impugned norm prohibiting appeals against the decision of the Director of the Bureau contradicts Article 92 of the Constitution of the Republic of Latvia, which enshrines the right to a fair trial [29].

It should be noted that the state has exclusive rights to objects of state secret and they are under special state protection to avoid harm to national security. The status of a state secret is fully covered by classified information of NATO, the EU, foreign and international organisations and institutions. In the interests of national security, access to state secrets is not guaranteed to everyone. To obtain a special permit for access to state secrets, a person must meet the requirements established by law.

Since joining NATO, Latvia has committed itself to protecting restricted, confidential, secret and top-secret information in accordance with NATO's standards for the protection of classified information. Access to any classified information is a special privilege granted to a person after the standard verification procedure. Access is provided only for certain types and amounts of information required for the performance of professional duties. For example, the Law of the Federal Republic of Germany on the Conditions and Procedure for Inspections by the Federal Security Inspectorate [30] stipulates that the person whose case is being considered may be present at a hearing with a lawyer. The hearing shall be conducted in such a way as to ensure both the protection of the sources of information and the protection of the legitimate interests of the person to be audited. A hearing shall not be held if it could cause significant harm to the security of the federation or the state, in particular during the investigation by the federal intelligence service.

The NATO Personnel Security Directive No. AC/35-D/2000 of 7 January 2013 [31] obliges NATO or a competent national authority to evaluate all available information to decide whether to issue a certificate to the person being audited. The Directive, in particular, emphasises that the mere indication of a potential impact should not be a reason for refusing to issue a certificate. However, the degree of risk must be assessed individually to decide whether a certificate can be issued. The aim of the legislator in protecting the provisions of Articles 9-11 of the Law of the Republic of Latvia “On State Secrets” of 17 October 1996 was to protect not only the interests of the state and public security, but also other NATO member states in this field. The European Court of Human Rights has recognized in a number of its rulings that the protection of national security is a legitimate aim that may restrict a person's right to go to court. Therefore, a person's right to go to court is not absolute and may be limited.

The right to a fair trial has both substantive and procedural aspects. This means that everyone has the right not only to a fair trial but also to access to justice. Substantive and procedural aspects are inextricably linked: insignificant justice of the court, if the existence of the court was not ensured, and vice versa. Thus, in the judgment of the European Court of Human Rights “Golder v. The United Kingdom” [32], the court was called upon to resolve two issues arising from the facts of the case:

1) Is Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms [21] limited to the right to a fair trial in ongoing trials, or does it further provide the right of access to a court for anyone wishing to bring an action?

2) Are there any indirect restrictions on the right of access to court?

Answering the first question, the court concluded that the right of access to court is a component of a fair trial along with an impartial court, reasonable time, presumption of innocence. These constituent elements are different, but are the result of the same basic idea of a fair trial, and, taken together, constitute a single right. Explaining the content of the article, the court applied the principle of unity and integration, setting

different elements on one plane. The terms of the article, taken in their context, give reason to believe that the right of access to court is included in the number of guarantees set out in the article. Attributing Article 6 exclusively to legal relations beginning after a court case, literally understanding the text of the article, can lead to state arbitrariness, when public authorities abolish courts altogether or refer cases to the jurisdiction of state bodies dependent on the government. It seems illogical and absurd that Article 6 of the Convention describes in detail the procedural guarantees provided to the parties to the proceedings, while not protecting what in itself actually allows the use of such guarantees, i.e. access to justice. The fairness, publicity and efficiency of the trial are of no value if the trial is not conducted.

However, in exercising the right of access to court, there are justified restrictions due to certain legal circumstances, as the right of access to court is not absolute. In addition to the limits set by the very content of any right, there is room for restrictions that are allowed indirectly. The right of access to court, by its very nature, requires such regulation by the state, which may vary in time and place depending on the needs and resources of society and individuals. It goes without saying that such regulation should never harm the essence of the right of access to court and should not contradict other rights guaranteed by the state.

CONCLUSIONS

In general, we see that in the context of special legal regimes there are a large number of human rights that are relative, not absolute and may be limited the state and its bodies, local authorities. During the operation of special legal regimes, such human and civil rights may be temporarily restricted, such as: the right to liberty and security of person, the right to housing, the right to privacy, the right to privacy and family life, freedom of movement, freedom of thought, freedom of liberty. expression of their views and beliefs, the right to participate in referendums, the right to vote and to be elected, the right to peaceful assembly, the right to property, the right to work and freedom of entrepreneurial activity, the right to education, the right to personal data protection.

However, in order for such restrictions to be lawful, consistent with the rule of law and recognized as admissible, they must meet certain criteria: they must be provided for by law; should not affect the basic content of the law; must be dimensional to the goal (principle of proportionality); be carried out for legitimate purposes, the list of which is exhaustive and not subject to expansion, to be necessary in a democratic society. In a state of war or emergency, human rights may be restricted in the interests of public order, public health and morals, or the protection of the rights and freedoms of others. In some cases, the exercise of a right may be restricted not only to ensure public order, but also for the safety of the person whose rights are being restricted (paternalistic approach to restriction of liberty).

Restrictions on rights are not the only legal instrument used to establish law and order during special legal regimes. In addition, exceptions to human rights may be used, which exclude from the sphere of human rights certain actions taken during the operation of special legal regimes and derogations from rights – the suspension of certain human rights and freedoms for a certain period.

Today, the European Court of Human Rights makes a great contribution to the protection and guarantee of human rights in the face of their restriction, checking each time for compliance with the values of law specific restrictions in European countries in martial law and state of emergency, while forming a separate doctrine of restrictions on human rights in special legal regimes.

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ПРАВОВИЙ СТАТУС СОЮЗНИХ РЕСПУБЛІК ЗА ЧАСІВ ПЕРЕБУДОВИ (1985–1991 рр.)

Анотація. *Актуальність теми статті обумовлюється самою специфікою співіснування та взаємодії центральних і місцевих органів державної влади, що виражається в об'єктивній необхідності пошуку у кожному конкретному випадку дієвих механізмів балансування і взаємоузгодження їх інтересів. Мета статті полягає у дослідженні складних та суперечливих процесів періоду перебудови в СРСР, пов'язаних зі здійсненням управлінської реформи М.С. Горбачова, зокрема, такої важливої її складової, як розмежування повноважень між союзними і республіканськими органами державної влади і управління. За допомогою використання формально-юридичного, логіко-юридичного та історико-генетичного методів робляться ґрунтовні висновки про причини невдачі М.С. Горбачова у здійсненні розмежування влади між центром та місцями. На підставі застосування порівняльного історико-правового методу виокремлюються особливості проведення управлінської реформи в деяких радянських республіках. Із широким залученням нормативно-правового матеріалу поетапно аналізується діяльність правлячої верхівки СРСР, спрямована на трансформацію державного механізму шляхом перерозподілу повноважень між союзними і республіканськими органами влади. Розглядаються конкретні кроки союзних республік по декларуванню власного суверенітету в умовах погіршення внутрішньополітичної ситуації в СРСР. Всебічно досліджується процес підготовки до прийняття радянськими республіками нового Союзного Договору як способу подолання кризових явищ, що охопили СРСР наприкінці перебудови М.С. Горбачова. Практична цінність наукової роботи проявляється у наступних положеннях: процеси децентралізації через перерозподіл повноважень між центральними і місцевими органами влади повинні бути комплексними, ґрунтовно спланованими та проводитися на підставі науково розроблених моделей; критично значущим чинником в умовах проведення масштабних управлінських реформ стає професіоналізм і загальна компетентність еліт; категорія часу є найважливішим ресурсом під час проведення державно-правових перетворень в умовах інтенсивного технологічного розвитку*

Ключові слова: *СРСР, період перебудови, управлінська реформа, М.С. Горбачов, розмежування повноважень, УРСР, Прибалтійські республіки, Союзний Договір*

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LEGAL STATUS OF THE UNION REPUBLICS DURING THE REBUILDING (1985-1991)

Abstract. *The relevance of the topic of the article is determined by the very specific features of coexistence and interaction of central and local authorities, which is expressed in the objective need to find in each case effective mechanisms for balancing and reconciling their interests. The purpose of the article is to study the complex and contradictory processes of the rebuilding period in the USSR, related to the implementation of administrative reform by M.S. Horbachov, in particular, such an important component as the separation of powers between the union and republican bodies of state power and administration. With the use of formal-legal, logical-legal and historical-genetic methods, thorough conclusions are made about the reasons for the failure of M.S. Horbachov in the separation of powers between the center and the seats. Based on the application of the comparative historical and legal method, the peculiarities of administrative reform in some Soviet republics are singled out. The activities of the ruling elite of the USSR aimed at transforming the state mechanism through the redistribution of powers between the union and republican authorities are gradually analysed with the involvement of normative and legal material. The concrete steps of the union republics to declare their sovereignty in the conditions of deteriorating domestic political situation in the USSR are considered. The process of preparation for the adoption by the Soviet republics of the new Union Treaty as a way of overcoming the crisis that engulfed the USSR at the end of the perestroika M.S. Horbachov. The practical value of scientific work is manifested in the following provisions: decentralisation processes through the redistribution of powers between central and local authorities should be comprehensive, well-planned and conducted based on scientifically developed models; professionalism and general competence of elites become a critical factor in the context of large-scale managerial reforms; the category of time is the most important resource during the state and legal transformations in the conditions of intensive technological development*

Keywords: *USSR, rebuilding period, administrative reform, M.S. Horbachov, delimitation of powers, the Ukrainian SSR, the Baltic republics, the Union Treaty*

INTRODUCTION

In the early 1980s, the discrepancy between the governing contour of the USSR, which had been formed in the 1930s in the mode of mobilising socio-economic development, and the socio-political relations that had developed in the country became objective. Problems were added by the scientific and industrial base, which became much more difficult in conditions of constant competition with the bloc of Western countries. Despite the fact that a full-fledged transition to a new technological system in the USSR did not take place, however, the emergence of new sectors of the economy with sophisticated innovative production technologies required a corresponding complication of the mechanism of state power and renewal of the ruling elite. The situation was exacerbated by the fact that the world was entering a new phase of technological development, and therefore there was critically little time for administrative reform in the USSR. The arrival of M.S. Horbachov to power in 1985, in addition to the internal party hardware struggle, was conditioned by these challenges of the time, becoming a symbol of the necessary changes that are long overdue.

The main chronic problem of the USSR, which hindered the harmonisation of the governing and controlled circuits, was the excessive centralisation of all power functions and powers. The immediate negative consequences of the huge concentration of power in a single command center were: the growth of the

bureaucracy, the deterioration of basic economic indicators and slowing economic growth, the general imbalance of the economy, the degradation of production assets and others. Under such conditions, the goal of the planned transformations was to preserve the Soviet system as a whole by modernising and liberalising those of its elements that had long since ceased to meet modern requirements. M.S. Horbachov and his associates were the first generation of politicians who were not directly associated with the Stalinist regime, and therefore in this regard could be the initiators of the implementation and successful completion of all necessary reforms in the USSR. To achieve their goals MS Horbachov chose a new, democratic style of leadership, based on two new principles: “publicity” and “broad democracy”.

It is noteworthy that from the very beginning of the reforms M.S. Horbachov faced fierce resistance from the party apparatus, which, seeing the policy of “rebuilding” as a threat to their interests, began to actively oppose it. The policy of publicity and democratisation also quickly spiraled out of control. The development of political pluralism led to the spread of multipartyism in the Soviet republics and the rapid displacement of the CPSU monopoly in the political sphere. The growth of political activity of the population led to a pronounced polarisation in the ideological sphere and seriously destabilised society. Subsequently, these negative phenomena and processes acquired their own dynamics, proving the inability of the new government to cope with the crisis that began to unfold in all spheres of socio-economic and political life. The immediate consequence of this was the rapid collapse of the USSR and the declaration of independence of the former Soviet republics. Describing the dramatic processes that unfolded in the 80-90's of XX century on the Eurasian continent, Z. Bzhezinskii quite aptly noted that “like many previous empires, the Soviet Union eventually exploded from within and split into pieces, falling victim not so much to direct military defeat as to a process of disintegration accelerated by economic and social problems. The collapse at the end of 1991 of the world's largest state contributed to the formation of a “black hole” in the heart of Eurasia. It was as if the central and geopolitically important part of the land were erased from the map of the Earth” [1].

Given all the above, it is clear that the problem of separation of powers between central and local government is extremely relevant. The pronounced bias in one direction or another is fraught with excessive centralisation with the blocking of local political life and further stagnation of economic activity, and pronounced centrifugal processes with the progressive disintegration of a single state body. Creating an effective system of balancing and reconciling the interests of the center and places is a non-trivial matter and depends on many factors – which is why scientific research in this area will always be very relevant. Interestingly, the issue of delimitation of powers between the USSR and the Union republics during the rebuilding period has repeatedly been the subject of attention of foreign and domestic experts in the field of history of state and law. Thus, changes in the legal status of the union republics and their highest authorities were considered by such domestic scholars as V. Honcharenko [2] and A. Omarova [3]. The problem of forming a general balance in the construction of state power was dealt with by O. Skrypniuk [4]. The issues of decentralisation of the administrative-territorial system in the conditions of the constitutional process in modern Ukraine were well covered by Yu. Shemshuchenko [5] and others. Foreign scientists, such as L. Holmes [6], S. Grybkauskas [7], R. Ruutsoo [8], R. Vebra [9] and others, studied the issues of democratic processes that took place in the USSR during the perestroika, as well as the issues of Soviet federalism and its transformation.

Given the wide use of the comparative historical and legal method in the article, we must also mention the work of those modern scholars who, although engaged in scientific research in another area, nevertheless provided greater concretization and adaptation of general scientific comparative method to the needs of historical legal science. The results of their comparative scientific work were used in writing this article. Among the mentioned works, in particular, we can name the research of R. Kazak [10], D. Lukianov, H. Ponomariova and A. Tahiiiev [11], D. Lukianov, V. Steshenko and H. Ponomariova [12], V. Ermolaev [13], O. Lutsenko [14], R. Shapoval, Yu. Bytiak, N. Khrystynchenko and Kh. Solntseva [15], Yu. Vystavna, M. Cherkashyna and M. van der Valk [16] and so on.

The purpose of this scientific article is to study, with a careful analysis of the relevant legal framework, the attempts of the ruling elite of the USSR in the second half of the 80's of XX century to carry out the much-needed administrative reform by separating the powers between the allied and republican bodies of state power and administration.

1. MATERIALS AND METHODS

The scientific novelty of the article lies in the analysis and generalization of normative and legal material, which was the basis for the redistribution of powers between the central and republican authorities of the USSR during the perestroika period. The practical value of the study is manifested in a number of provisions that are critical during such state and legal transformations, the content of which is disclosed in the final conclusions.

In the course of scientific research, a number of special scientific methods were used, in particular, formal-legal, logical-legal, historical-genetic and comparative historical-legal. The complex application of these means of scientific knowledge in accordance with the research task allowed to obtain results with a high degree of reliability and to carry out the necessary theoretical generalization.

The use of the formal-legal method made it possible to analytically study the legal framework laid down by the party nomenclature of the USSR, headed by M.S. Horbachov as the basis for the implementation of the necessary transformations associated with the distribution of power between the center and the Soviet republics. Thanks to this tool, it became possible not only to study the relevant Soviet legislation in general, but also to interpret its specific legal requirements, which allowed at a higher research level to clarify the specifics of state and legal changes during the perestroika period. Purposeful application of the logical-legal method based on forms of thinking and the laws of formal logic, helped to obtain reliable and meaningful conclusions in the analysis and further explanation of those rules of law governing the redistribution of powers between the USSR and the Union Republics. In addition, the logical analysis of the content of historical and legal norms allowed to establish the scope of their content, and to identify the real motivation of the union and republican legislative bodies. The importance of the logical-legal method is manifested in the fact that its use allows to restore and reconstruct state and legal phenomena and processes without violating the structure that is inherent in them.

With the help of the historical-genetic method, the causal relations and regularities that accompany the processes of reforming the administrative apparatus of supercentralised state formations were reflected. The value of the historical-genetic method is manifested in the selection and fixation of specific historical states of the studied object with their subsequent reproduction as certain structures. Separation conditioned upon its use of historically consistent stages of transformation of the USSR state mechanism during the rebuilding period allowed to fully restore the complex and controversial process of separation of powers in this country in the second half of the 80s of XX century.

Generalisation of the results of the study became possible through the use of comparative historical and legal method. Since the contradictory processes of decentralisation initiated by M.S. Horbachov, received their significant specificity in each of the Soviet republics, then, accordingly, their comparison allowed to achieve greater concretization of the identified patterns, and to record objective significant links between related state and legal phenomena and processes. The transition from the empirical to the theoretical stage of the study with its generality, abstractness and systematicity was also due to the use of a comparative approach. In general, the comparative historical and legal method occupies a special place among other means of scientific knowledge. This is primarily conditioned upon the specific features of the subject of historical and legal science, which inextricably includes the historical perspective with its retrospective and legal, which consists in the formalisation of legal dogma.

In this context, it should be noted two aspects of the comparative historical and legal study of state and legal phenomena, which have become quite relevant during our research. First, the special cognitive role of such a study is conditioned upon the fact that it involves the consideration of phenomena in their development and the disclosure of their diverse properties in the process of this development. And, secondly, the advantages of applying the comparative historical and legal method are the breadth of coverage of the studied phenomena. Explained by the fact that this tool of scientific knowledge involves the parallel study of at least two phenomena or processes, the researcher gets a very unique opportunity to trace the complex nature of their relationship both with each other and with other phenomena and processes. The consequence of this is to minimise the risk of interpreting the studied state and legal objects as isolated and completely isolated manifestations of historical and legal reality.

2. RESULTS AND DISCUSSION

2.1. Implementation of administrative reform in the USSR in the conditions of rebuilding

Rebuilding put on the agenda the issue of radical reform of the existing national-state system of the USSR, including such an important component as the division of powers between the USSR and the union republics. And this is quite natural. At the same time, it is impossible not to agree with V.A. Mikhalevych, who argues that “the key issue of any federation is the question of the separation of powers between the federation and the subjects of the federation” [17]. At the legislative level, this issue has been most active since the beginning of 1989. Thus, on March 13, 1989, the Presidium of the Supreme Soviet of the USSR adopted a resolution “On the Draft General Principles of Restructuring the Management of the Economic and Social Sphere in the Union Republics on the Basis of Expanding Their Sovereign Rights, Self-Government, and Self-Financing” No. 10210-XI. And on April 11, 1989, the Presidium of the Supreme Soviet of the USSR heard information

from a working group of deputies on the implementation of the order of the Supreme Soviet of the USSR related to the preparation of a proposal to delimit the competence of the USSR and republics and adopted the relevant resolution No. 10292-XI. This working group was formed by the Presidium of the Supreme Soviet of the USSR on December 28, 1988. As a result, the Presidium in its resolution “On the Establishment of a Working Group of Deputies of the Supreme Soviet of the USSR to Prepare Proposals for Delimitation of Jurisdiction of the USSR and Republics” No. 9968-XI decided to submit proposals to the working group of the USSR and interethnic relations. In this approach, T. Remington considered the possibility of eliminating tensions between nationalities as a result of “a new balance between the respective powers of the republics that are part of the federal center” [18].

On May 25-June 9, 1989, the first Congress of People's Deputies of the USSR took place in the Kremlin Palace of Congresses in Moscow. This new highest body of power was provided by the Constitution of the USSR in 1977 in the wording of the Law of the USSR of December 1, 1988. The Congress, in particular, elected the Supreme Soviet of the USSR, and its chairman – M.S. Horbachov, who at that time also held the post of General Secretary of the CPSU Central Committee. The Congress also established a Constitutional Commission to prepare a new Constitution of the USSR [19]. The deputies of the Congress heard and discussed the report of M.S. Horbachov “On the main directions of domestic and foreign policy of the USSR”. Resolution No. 39-I, adopted on this issue, did not ignore the issue of the federal system of the USSR. The Congress recognised the need for strict observance and significant expansion of the rights of the union republics. The resolution also stressed that the constitutional provision, according to which the competence of the USSR is to establish the foundations and general principles of law, and the adoption of laws of direct effect is the prerogative of the republics, must be observed as one of the basic principles of the federal state. The resolution of the Supreme Soviet of the USSR “On the organisation of work on the implementation of instructions given to the Verkhovna Rada by the Congress of People's Deputies of the USSR” of July 24, 1989 No. 257-I contained a paragraph according to which the Council of Nationalities of the Supreme Soviet proposals for a clearer delimitation of the competence of the USSR and the union republics, based on the fact that the union republic independently exercises state power on its territory, resolves all issues that are not transferred to the USSR.

While at the union level they continued to study the question of delimitation of powers between the USSR and the union republics and thus leave intact the full power of the union center, in the country some union republics began to expand their powers independently, regardless of it. Thus, the Decree of the Presidium of the Supreme Soviet of the USSR “On Inconsistency of Certain Provisions of the Law of the Estonian SSR “On Amendments to the Constitution (Basic Law) of the Estonian SSR” and the Law of the Estonian SSR “On Elections to Local Councils of People's Deputies of the Estonian SSR” of August 16, 1989 No. 399-I declared inconsistent with the Constitution of the USSR and the international legal obligations of the USSR the provisions of these laws on the residency requirement for participation in elections and elections to the Soviets of People's Deputies, including restrictions on military participation in elections. It should be noted that the Presidium of the Supreme Soviet of the USSR also accused the Estonian SSR of violating human rights enshrined in international legal acts ratified by the USSR, including the International Covenant on Civil and Political Rights, which provides that every citizen should have the right and the opportunity, without any discrimination and without undue restrictions, to vote and to be elected in genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot and guarantee the free expression of the will of the electorate. It is believed that the Estonian SSR's accusations of human rights abuses were intended to discredit the Baltic republic before the international community and thus warn it against further constitutional action contrary to Union law.

At the same time, it became clear that to leave without motion the question of rational separation of powers between the USSR and the union republics was no longer possible. At the same time, we must agree with the opinion of R. Dorff, who emphasised that without a willingness to negotiate and compromise, and a desire for open negotiation and a desire for adaptation, it may not be possible to achieve true federalism or even maintain it incompletely [20]. One of the first steps towards increasing the role and legal status of the union republics was the Law of the USSR “On the Economic Independence of the Lithuanian SSR, the Latvian SSR and the Estonian SSR” No. 232-I adopted on November 27, 1989. However, if you carefully analyse the content of this law, it becomes clear that the declared “independence” of the union republics was quite limited, as it had to be carried out without departing from the Constitution of the USSR. The word “USSR” appears in most articles of this Law.

The question of the division of powers between the USSR and the union republics was in the field of view of the Second Congress of People's Deputies of the USSR, which began its work in Moscow on December 12, 1989. Thus, the resolution adopted by the Congress on December 19, 1989 “On Instructions to the Supreme

Soviet of the USSR and the Constitutional Commission on Certain Issues” instructed the Supreme Soviet of the USSR to accelerate the adoption of the law “Separation of Powers between the USSR and the Union Republics” No. 951-I.

On March 12-15, 1990, the Extraordinary Third Congress of People's Deputies of the USSR was held in Moscow. After a sharp, intense discussion on the introduction of the post of President of the USSR in the USSR, the deputies of the Congress adopted the Law of the USSR “On the Establishment of the Post of the President of the USSR and Amendments to the Constitution (Basic Law) of the USSR” No. 1360-I on March 14, 1990. The law provided for the establishment of the post of President of the USSR and established the provisions on the absence of changes in the legal status and competence of the Union and Autonomous Republics, enshrined in the constitutions of the Union and Autonomous Republics and the USSR Constitution. Thus, the law, so to speak, preserved the existing legal status of the union republics, which fully suited the union center and provided it with the supremacy of power in the USSR. However, this state of affairs did not suit some union republics. This is evidenced by the decision of the Verkhovna Rada of the Lithuanian SSR “On the Restoration of Independence of the Lithuanian State” No. I-12, which announced March 10-12, 1990 on the restoration of independence of the Lithuanian state, repeal of the Constitution of the Lithuanian SSR and the Constitution of the USSR. This decision of the Supreme Soviet of the Lithuanian SSR on the part of the union center was quite operative. Thus, on March 15, 1990, the Extraordinary Third Congress of People's Deputies of the USSR adopted a resolution “In connection with the decision of the Supreme Soviet of the Lithuanian SSR of March 10-12, 1990” No. 1366-I, which, in particular, stated that the Congress considers these unilateral decisions of the Verkhovna Rada of the Lithuanian SSR to be without legal force, contrary to Articles 74 and 75 of the Constitution of the USSR, and therefore invalid. In addition, the Congress recognised that, in accordance with these articles of the Union Constitution, the sovereignty and validity of the USSR Constitution continued to extend to the territory of Lithuania as the Union Soviet Socialist Republic.

The analysed resolution also instructed to ensure the protection of the legal rights of every person living in Lithuania, and the observance of the rights and interests of the USSR and the union republics in the territory of the Lithuanian SSR. This resolution contained another provision that was of a cautionary nature not only for the Lithuanian SSR but also for other union republics. This provision enshrined that, having the constitutional right to self-determination, the union republic, however, can not, both when entering and leaving the federation, ignore the political, socio-economic, territorial and other problems that arise. However, the Resolution of the Congress of People's Deputies of the USSR of March 15, 1990 did not stop the leadership of the Lithuanian SSR from actions that, according to the union bodies, went beyond the powers of this union republic. This was stated in the Decree of the President of the USSR “On Additional Measures to Ensure the Rights of Soviet Citizens and Protect the Sovereignty of the USSR in the Lithuanian SSR” of March 21, 1990 No. 3 and in the Resolution of the Supreme Soviet of the USSR “On Legal Status People's Deputies of the USSR from Lithuania” of March 26, 1990 No. 1383-I.

The USSR Law “On the Establishment of the Post of the President of the USSR and Amendments to the Constitution (Basic Law) of the USSR” of March 14, 1990 No. 1360-I excluded from the preamble of the USSR Constitution provisions on the leading role of the Communist Party. Instead, the new provision of Art. 6 stipulates that the Communist Party of the Soviet Union, other political parties, including trade unions, youth, other public organisations and mass movements through their representatives elected to the Soviets of People's Deputies and in other forms participate in Soviet policy-making, government and public affairs. Thus, the long-standing monopoly of the CPSU on power in the USSR was destroyed, which could not but weaken the influence of the union center on the union republics. Dzh. Bleni and M. Hfoler emphasise that some scholars have pointed to “Horbachov's weakening of the Communist Party as a key cause of the collapse of the USSR”. This law supplemented the Constitution of the USSR with a new chapter 15-1 “President of the USSR”. Extraordinary Third Congress of People's Deputies of the USSR elected President of the USSR M.S. Horbachov.

One of the first Union legislative acts, which brought some clarity to the issue of delimitation of powers between the USSR and the Union republics, was adopted by the Supreme Soviet of the USSR on April 10, 1990. The Law of the USSR “On the Fundamentals of Economic Relations of the USSR, Union and Autonomous Republics” No. 1421-I, which came into force only on January 1, 1991. The preamble to the Law declared that it was based on the principles of federalism, economic independence and mutual responsibility of the USSR, union and autonomous republics, and stated that the law delimits the powers of the USSR and republics in the economic sphere. A careful analysis of the content of this law gives grounds to assert that the USSR retained much broader powers in the economic sphere than those assigned to the union republics. Analysing the content of the law of April 10, 1990 and some other union laws, G. Gleason argued that these

regulations “caused public discontent because people began to perceive them as nothing more than a bureaucratic maneuver before the impending crisis” [22].

The statement of N. Lynn and A. Novikov that “the rights of the union and autonomous republics were subject to the national interests of the USSR” is quite correct [23]. The next step on the way to legislative regulation of the division of powers between the USSR and the union republics was the adoption of the Law of the USSR “On the Delimitation of Powers Between the USSR and the Subjects of the Federation” for No. 1450-I by the Supreme Soviet of the USSR on April 26, 1990. This law was constitutional in nature. Thus, in Part 1 of Art. 1 of the Law enshrined that the USSR is a sovereign socialist state, and it has powers that the subjects of the federation jointly attributed to the jurisdiction of the USSR.

The second part of Article 1 of the Law defines the union republics as sovereign Soviet states that voluntarily, based on free self-determination of peoples and equality, united in the USSR. It was emphasised that the union republics had all the power in their territory outside the powers delegated by them to the USSR. The law also stated that the territory of the union republic could not be changed without its consent. The law delimited the powers between the USSR and the union republics, first of all, assigning to the exclusive jurisdiction of the USSR in the person of its highest bodies of state power and administration the most important issues of state, socio-economic construction, issues of national defense, foreign policy and the conclusion of international treaties of the USSR, representation in international relations. The law was not limited to the list of exclusive powers of the USSR. Article 8 of the Law defined the powers of the highest bodies of state power and administration of the USSR in the sphere of joint jurisdiction of the USSR and the union republics. The Law also included in this area a rather large list of issues of state, economic, socio-cultural construction, in the solution of which the decisive role belonged to the union bodies, as they had the right of, using the terminology of the Law, “establishing the foundations”, “establishing general principles”, “establishing legal bases”, “establishing general order”, etc. in the exercise of powers in the sphere of joint jurisdiction of the USSR and the union republics.

Thus, the content of the articles of the Law on the exclusive powers of the USSR and its powers in the field of joint jurisdiction with the union republics allows us to conclude that the USSR Law “On the Delimitation of Powers Between the USSR and the Federation” of April 26, 1990 for No. 1450-I, delimiting these powers, gave the union center ample opportunities to govern the country. Therefore, the Law does not accidentally lack a list of powers of the union republics. As rightly noted by I. Isaev and N. Kuvyrchenkov, functions that were not included in the exhaustive list of exclusive powers of the Union only “presumed to be assigned to the Union Republic” [24]. If the Union Republic dared to resolve an issue independently, regardless of the powers of the USSR, such a decision was blocked by Article 11 of the Law, as according to it, in case of conflict with the Constitution of the USSR, the Constitution of the USSR and in case of conflict bodies of state power of the union republics of the Constitution of the USSR, laws of the USSR and other acts of the highest bodies of state power of the USSR were acts issued by the relevant bodies of the USSR. Analysis of the content of the USSR Law of April 26, 1990 gives grounds to assert that the transformation of the USSR into a true federal state he did not provide, but, on the contrary, contributed to maintaining the status of a centralized state in the USSR.

2.2. Sovereignty Parade

The Union Republics, having lost hope of obtaining the consent of the Union Center to expand their powers, took decisive steps to fill their sovereignty with real meaning by adopting the Declaration of State Sovereignty. Thus, on June 12, 1990, the Supreme Soviet of the RSFSR adopted the Declaration of State Sovereignty of the RSFSR. The Declaration of State Sovereignty was adopted on July 16, 1990 by the Verkhovna Rada of the Ukrainian SSR. It proclaimed the supremacy, independence, completeness and indivisibility of Ukraine's power on its territory, which meant giving the republic a high level of sovereignty. At the same time, it should be noted that the Declaration did not proclaim the independence of the USSR and its withdrawal from the USSR. This feature of the Declaration draws the attention of Yu. Shemshuchenko and O. Skrypniuk, noting that “the Declaration adopted in the conditions of the USSR was affected by its compromise nature: it significantly limited the power of the union state, but did not abolish it” [25]. L. Kryvenko noted that, unlike the Russian Declaration, the Declaration of State Sovereignty of Ukraine did not speak of the supremacy of all-Union laws in the republic [26]. The adoption by the republics of acts of state sovereignty, which lasted from November 1989 to December 1990, V. Vasylenko considers the “war of sovereignty” of the union republics with the sovereignty of the USSR [27].

The Declarations adopted by the union republics did not go unnoticed by the union bodies. T. Raun notes that the Declaration of Sovereignty adopted by the Supreme Soviet of the Estonian SSR in November 1988 “was immediately condemned by Moscow” [28]. The issue “On the practice of the highest bodies of state

power in the light of the Declarations of State Sovereignty and Independence adopted by the republics” was included in the agenda of the fourth session of the Supreme Soviet of the USSR No. 1657-I, which began work in Moscow in the Kremlin on September 10, 1990. These Declarations were also discussed in the Law of the USSR “On Ensuring the Effect of Laws and Other Acts of Legislation of the USSR” No. 1748-I adopted by session of the Supreme Soviet of the USSR on October 24, 1990. Thus, in the preamble of the Law it was stated that the legislative activity of the highest state authorities of the union republics on the basis of the adopted Declarations of State Sovereignty strengthens the political and economic independence of the republics, fills their sovereignty with real meaning. At the same time, the preamble provided detailed information on cases of refusal of state bodies of the union republics to implement all-Union laws and other acts of the highest bodies of state power and administration of the USSR, issued within their competence. The law contained rules designed to regulate the relationship between the union and the republican highest bodies of state power and administration in order to prevent the so-called “war of laws”, which began to flare up between these bodies. B. Ebzeev, noting the provisions of the Declarations of State Sovereignty that the union republics had the right to nullify the acts of the USSR on its territory, concluded that this undermined the federal basis of the USSR, which in this case is transformed from a state-legal union into an international legal association [29].

2.3. *Coup d'etat and the collapse of the USSR*

The USSR Law “On Ensuring the Effect of Laws and Other Acts of Legislation of the USSR” of October 24, 1990 No. 1748-I emphasised that it contained resolutions in force until the conclusion of a new Union Treaty. The fact is that the Union leadership understood that it would no longer be possible to preserve the USSR in its current status. Therefore, it was proposed to develop a draft of a new Union Treaty, which would harmonise the relationship between the union center and the subjects of the union state on the basis of proper separation of powers between them. At that time, the thesis that the Union Treaty “allows to optimally solve an important and at the same time complex problem – the division of competence between the republics of the union and the union, to consider the specific interests of each participant and the general” [30].

The signing ceremony of the Union Treaty was scheduled for August 20, 1991. But it did not happen, because on August 19 this year there was an attempted coup in the USSR. The establishment of the State Committee for Emergency Situations in the USSR (SCES) was announced. And although the coup attempt failed, it had a number of consequences. According to V. Rzhnevskii, “the events of August (1991) allowed to recognise the full, uncut, without any palliatives independence of the republics, which was tantamount to the final verdict of the Soviet federation” [31]. According to H. Hill, an attempted coup in Moscow in August 1991 meant that the concept of the USSR could no longer be maintained.

Another consequence of the attempted coup d'etat in the USSR in August 1991 was that “trust in the Union Center fell to almost zero.” Some researchers attribute the collapse of the USSR to the coup. Yes, V. Lytvyn notes that “between the coup of close associates of M.S. Horbachov and the collapse of the Soviet Union into 15 independent states, there is a direct and immediate connection” [34]. T. Roun adheres to the same standpoint, who believes that “the failed coup significantly accelerated the decentralization of the Soviet Union and indeed its collapse.” A. Senn states that “in late summer 1991, the empire disintegrated from the center” [35]. The conclusion of I. Usenko that the direct political consequence of the creation of the SCNS was the failure to sign the Union Treaty is quite well-founded [36]. That is why the Constitution of the USSR and other union laws, which determined the division of powers between the union center and the republics, continued to operate formally.

The top leadership of the USSR made every effort to preserve itself. Thus, one of the means to achieve this goal was the USSR Law “On Bodies of State Power and Administration of the USSR in Transition” of September 5, 1991 No. 2392-I, adopted by the Extraordinary Fifth Congress of People's Deputies of the USSR. This law determined that in the transitional period the highest representative body of power of the USSR was the Supreme Soviet of the USSR, which consisted of two independent chambers: the Council of Republics and the Council of the Union. The State Council of the USSR was formed, which was formed on an inter-republican basis for the coordinated solution of issues of domestic and foreign policy that affected the common interests of the republics. The State Council of the USSR consisted of the President of the USSR and the highest officials of the union republics, named in the Constitution of the USSR. The law literally defined the powers of these bodies in a few words and did not say anything about the division of powers between the Union and the republics that were still part of it.

However, the development and activities of the new highest union authorities did not stop the process of disintegration of the USSR, which resulted in the removal from the agenda of the division of powers between the Union represented by its highest authorities and subjects of the union state, which ceased to exist. The

beginning of the process of disintegration of the USSR, for example, is clearly evidenced by the approval on August 24, 1991 by an extraordinary session of the Verkhovna Rada of the Ukrainian SSR Resolution “On Proclamation of Independence of Ukraine” of August 24, 1991 No. 1427-XII, which solemnly proclaimed the independence and creation of an independent Ukrainian state. On December 7-8, 1991, the heads of the three sovereign states – the Presidents of the RSFSR and Ukraine, the Chairman of the Verkhovna Rada of the Republic of Belarus – signed the Agreement on the Establishment of the Commonwealth of Independent States (CIS), which provided for the dissolution of the USSR, the termination of the laws of the USSR, the liquidation of its state bodies and the ratification of this document by the Supreme Soviets of these states [37].

CONCLUSIONS

Summing up the study of regulatory and legal support for the reform of the state mechanism of the USSR, initiated by M.S. Horbachov, several important conclusions can be drawn.

1. The transition of any complex system from one phase state to another is necessarily combined with the quantitative and qualitative growth of entropic processes within it, or, in other words, with a rapid increase in the disorder of its internal elements. The Soviet Union of the era of M.S. Horbachov, no doubt, was such a complex multidimensional socio-economic and political system, and, therefore, the reform was to be based on a number of models that would provide different scenarios. As can be seen from the analysis, most likely, this was not done. Inconsistent actions of the authorities led by M.S. Horbachov, when the domestic political situation in the USSR began to develop in a negative scenario, indicate a lack of appropriate modeling and forecasting of related social and political processes in preparation for the reform of the mechanism of state power.

2. As follows from the historical and legal analysis of the attempt of M.S. Horbachov to differentiate the powers of allied and republican authorities in the second half of the 80's of XX century, a critical factor in such transformations is time. And given the extremely rapid technological development of modern civilisation, time is also becoming the most valuable resource. It is safe to say (of course, with some caveats) that M.S. Horbachov could not use this resource. And, as you know, the right decision made late is not the right decision. The loss of M.S. Horbachov time in the process of transforming the cumbersome and archaic Soviet state and legal system into a more democratic, and therefore more adequate to external and internal challenges, functioning quickly led to the loss of his initiative, which intercepted other actors of those dramatic events.

3. Evaluating the attempt of M.S. Horbachov to redistribute power between the central and republican authorities, it should be noted that in itself it should be perceived unequivocally positively. Successful implementation of the reform was guaranteed to be a powerful impetus to the social, economic and political recovery of the national republics, and thus the renewal of the entire Soviet statehood. However, the paradox of the transformation of the era of rebuilding is precisely that the failure of M.S. Horbachov turned for each of the Soviet republics, including Ukraine, a historic chance to build a truly sovereign, independent, democratic, social and legal state outside of any federation.

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КОНЦЕПТУАЛІЗАЦІЯ ЦЕРКОВНОГО ПРАВОВОГО ПОРЯДКУ В СУЧАСНІЙ ДЕРЖАВІ

Анотація. У статті аналізується церковний правовий порядок як складник загальносоціального правового порядку. Визначено, що унікальна природа церковного права та церковного правового порядку є основою для нового прочитання проблеми співвідносності духовного та юридичного начал життя суспільства. За допомогою комплексу сучасних методологічних підходів проаналізовано Святе Письмо та Святе Передання, кодекси канонів та соціальні концепції православної та католицької церков, твори богословів, національне законодавство та міжнародні правові акти, дані соціології, матеріали преси. Церковний правовий порядок, як і загальносоціальний, сполучається з духовністю у тому, що до сфери духовного відносяться усі інтелектуальні і моральні сили людини, її прагнення до свободи та порядку. Осягаючи духовні витoki права і правового порядку, автори виходять з того, що вони є, перш за все, духовною цінністю. Функціонування церковного правового порядку є аргументом у протистоянні тим доктринальним позиціям, які виводять правовий порядок із закону і законності, та акцентує апеляцію до права як його дійсного і надійного підґрунтя. Тому поняття правового порядку і церковного правового порядку співвідносяться як взаємопов'язані, але при тому й відмінні явища. Правове регулювання церковних правовідносин має подвійну природу. Воно здійснюється як правовими актами церкви, так і законодавством держави. Така подвійна залежність створює вразливість церковного правового порядку від характеру і якості світського законодавства. Так само амбівалентний характер має суб'єктна структура церковного правового порядку. В Україні, як у поліконфесійному суспільстві, окремий (автономний) церковний правовий порядок є властивим кожній конфесії. Взаємовідносини, відмінності між конфесіями, взаємодія чи протиріччя між ними так чи інакше впливають на стан церковного правового порядку у суспільстві, а також – на загальносуспільний правовий порядок у цілому

Ключові слова: міжнародний правовий порядок, церковний правовий порядок, церква, канонічне право, церковне право, духовність

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CONCEPTUALISATION OF THE CHURCH LEGAL ORDER IN THE MODERN STATE

Abstract. *The article analyses the church legal order as a component of the general social legal order. It is determined that the unique nature of ecclesiastical law and ecclesiastical legal order is the basis for a new reading of the problem of the relationship between the spiritual and legal principles of society. With the help of a set of modern methodological approaches, the Holy Scriptures and Holy Tradition, codes of canons and social concepts of the Orthodox and Catholic Churches, works of theologians, national legislation and international legal acts, sociological data, press materials are analyzed. The ecclesiastical legal order, and the general social one, is combined with spirituality in that the sphere of the spiritual includes all the intellectual and moral forces of man, his desire for freedom and order. Comprehending the spiritual origins of law and the legal order, the authors assume that they are, above all, spiritual value. The functioning of the church legal order is an argument in opposition to those doctrinal positions that derive the legal order from the law and legality, and emphasises the appeal to the law as its real and reliable basis. Therefore, the concepts of legal order and church legal order are correlated as interrelated, but at the same time different phenomena. Legal regulation of church relations has a dual nature. It is carried out both by legal acts of the church and by the legislation of the state. Such a double dependence creates a vulnerability of the church legal order to the nature and quality of secular law. The subjective structure of the church legal order is also ambivalent. In Ukraine, as in a multi-confessional society, a separate (autonomous) church legal order is inherent in each denomination. Relationships, differences between denominations, interaction or contradictions between them in one way or another affect the state of the church legal order in society, including – the general legal order*

Keywords: *international legal order, church legal order, church, canon law, church law, spirituality*

INTRODUCTION

The stable life of society, organised on the principle of the rule of law, is a goal for a modern state organisation and a reference point for the development of the legal system. In the legal dimension, such an organisation of public life can be called a legal order. The objective content of the legal order is set by the whole system of social relations, the system of values of society, which, refracted through the law, become legal values. In turn, the spiritual origins of the legal order lie not only in purely legal matters, but also in other socially supported social regulators and values. Among them, religion and related phenomena, processes and relations continue to play an important role. In Ukrainian society, the church traditionally retains a high authority: according to the latest sociological research, 64% of Ukrainian citizens trust it [1]. Therefore, adherence to religious norms and norms of church law plays a significant role in shaping the legal order in Ukraine. The ecclesiastical legal order arises and functions within the framework of the general social (national) legal order, and, consequently, receives from it defining features and characteristics. The development of the legal system in the Ukrainian lands, as well as in other regions of Europe, is integral to ecclesiastical law. If the legal norms based on customs differed significantly in different regions, the norms of ecclesiastical law were the same everywhere, which laid the foundation for the development of a single legal system with common ideas about the legal order.

At the same time, the fact of the church legal order illustrates the diversity of manifestations of the legal life of society, allows the understanding of law beyond its positivist vision, characterises the legal system of modern society as a complex, multilevel phenomenon. The functioning of the ecclesiastical legal order is an argument in opposition to those doctrinal positions that derive the legal order exclusively from law and legality, and emphasizes the appeal to law as its real and reliable basis. Therefore, it is important to correctly correlate these interconnected, but also different phenomena – the legal order and the church legal order.

The topic of the article stated by the authors corresponds to several categories of jurisprudence, namely such as: formal and informal legal order, religious legal system, church law. Research on these categories of

jurisprudence in recent years has to some extent addressed the issue of ecclesiastical law. In the monograph "The Catholic Church and International Law" [2] proves that the Catholic Church, as a social structure and a special legal order, plays an important role in international law. In particular, he highlighted the legal nature of the Catholic Church and its international legal doctrine, the activities of Catholicism in the international arena and its impact on the development of international law and international relations. However, the issue of canon law and order in the monograph is devoted to relatively modest attention [2]. About canon law as a separate legal order, correlated with international public law, and church law as a legal order, correlated with state law, writes V. Lastovskiy [3, p. 150]. However, these works give the impression that their authors identify the concept of legal system and legal order.

The dissertation of O. Melnychuk does not directly analyse the phenomenon of church law, but the author draws an important conclusion about the most favourable model of state-confessional relations, which will not have a devastating effect on national cultures, and at the same time will ensure the individual's right to freedom of religion, namely, the model of autonomy of the state and the church, where the church by its status is an institution of civil society [4]. The rule of law as a component of the religious legal system is to some extent covered by D. Lukianov in his monograph, however, outside the study of this scholar remained specific features of church law and order [5]. It is worth noting that in more than 60 dissertations defended during the independence of Ukraine on church law, church-state relations, etc. [6], the question of the essence, components or features of the church legal order was not raised.

Canon law in most European countries is an integral part of the European legal order. At the same time, the concept of the legal order in the Western legal tradition is somewhat different from that in the national legal doctrine. It is often narrowed down to a set of legal guidelines in force in a given society, or to an analysis of the sources of law. In particular, this is how the church law is represented by C. Gallagher, who studies the doctrinal foundations of the church law on the example of Rome and Byzantium [7]. The historical and legal context of the role of the Roman Catholic Church in the formation of the rule of law based on the rule of law is studied by Ch. North, C. Gwin [8, p. 127]. The question of the limits of the church's intervention in the formation of normative bases of the legal order, in particular, in lawmaking and precedent lawmaking [9], remains debatable. However, in general, the problem of determining the nature, foundations and features of the church legal order in foreign jurisprudence was not raised. In the situation of the existence of church schism in the Orthodox Church in Ukraine, the issue of the church legal order becomes especially important.

The purpose of this article is to define origins, nature and manifestations (signs) of the church legal order – determined the complex nature of the research methodology.

1. MATERIALS AND METHODS

The ecclesiastical legal order, like the general social one, must be based on the pluralism of legal sources, first of all on those that have their origins in natural law, on the standards of human rights and freedoms recognised by the civilized world. Therefore, the source of the research presented in this article was the Holy Scriptures and Holy Tradition, codes of canons and social concepts of the Orthodox and Catholic Churches [10], works of theologians, national legislation and international legal acts, sociological data, press materials.

The methodological basis of the study is a combination of classical (historical, formal-legal, comparative-legal, theological-philosophical methods) and modern (phenomenological, anthropological and synergetic approaches and hermeneutic, statistical and systemic methods) methodology. Understanding the church legal order in Ukraine, a phenomenon that has deep socio-cultural and historical origins, requires reference to its historical roots, which leads to the use of the historical method, which uses the techniques of retrospection, historical comparison, historical analogy, historical typing and historical periodisation. The formal-legal method is necessary to clarify the provisions of national law and international law, and also allows to clarify the content of ecclesiastical law, as the basis of ecclesiastical law, in particular, the Code of Canon Law of the Latin Church in 1983, Books of the Rules of the Holy Apostles, the Holy Ecumenical and Local Councils, and the Holy Fathers, including concordats and other international treaties concluded in the interests of the church.

The comparative law method was used to identify common and different in understanding the legal order in the doctrines of different Christian churches. The axiological approach was useful for understanding the values and social significance of the church legal order. The hermeneutic method is an assistant in clarifying the content of ecclesiastical and legal guidelines in their historical and modern context for understanding both ecclesiastical and public legal order. In addition, to clarify the content of the provisions of ecclesiastical law used the method of exegesis, used in the interpretation of Scripture, reference to the works of the holy fathers. The phenomenological approach unfolds the legal order as a specific legal reality, the form

of existence of which is characterised by the overflow of the legal order (system of established in society, dominant legal relations) in the public consciousness.

Anthropological approach puts the subject of law at the center of legal development and is the basis for the formation of modern legal order. Synergetic approach was useful for characterising the self-organising nature of the legal order as a socio-legal system. It is the synergetic projection of the legal order that is able to reveal its new substantive aspects, which can thoroughly update the modern theory of the legal order, including the ecclesiastical one. The use of methods of analysis and synthesis allowed analysing the theological and legal nature of the church. Theological and philosophical method has opened up the possibility of analyzing the social teachings of the Catholic and Orthodox Churches, which are the substantive basis of the Church's activities in the international arena and its doctrinal approaches in international law, which means and regulates relations between participants in international communication. Within the framework of the theological and philosophical method, the principles of building an international order on the basis of natural international law and ethical guidelines of Christian churches are also considered. The systematic method was used in the study of the peculiarities of the status of Christian churches in international law. The statistical method was used to generalise the processes associated with the existence of the church legal order, to illustrate the facts of international treaties, the participation of representatives of Christian churches in international organizations, the peaceful settlement of international disputes and interreligious dialogue.

2. RESULTS AND DISCUSSION

2.1. Category of church law and order in the context of law and order

The ecclesiastical legal order, as a component of the general legal order, is a necessary precondition and a real legal background for the civilised functioning and development of human society. Like the whole order in society, the legal order is not only proper or possible, but most importantly – the actual quality of everyday legal life of society. The factuality (i.e. the presence here and now) of the legal order is evidence of the implementation in real life of the categorical legal imperative of Kant, according to which “it is necessary to act so that the free expression of your will is compatible with the freedom of everyone in accordance with universal law.” (Since I have deprived the will of every impulse that could arise for it from obeying some law, nothing is left but the conformity of actions such as with universal law, w which alone is to serve the will as its principle, that is, I ought never to act except in such a way that I could also will that my maxim should become a universal law) [11, p. 14-15]. As established in the coordinates of law order, security and predictability of social life of individuals, social groups and society as a whole, the legal order is an important social and personal need, and hence value. In the conditions of correlation of human existence in the coordinates of the proper and the existing, the legal order unfolds from the proper (law) to such a real being, which is real, embodied in the dominant human societal law-abiding behavior, and constitutes a certain, law-based system of social life. “Law and order – says Yu. Oborotov – acts as a semantic purpose of law, which is achieved by ensuring the stability of human existence” [12, p. 6]. As a real state of the legal order achieved by the society of its vital activity, the legal order permeates all its spheres, reveals the most important aspects of the influence of law on social life. It is through the legal order is the interaction of law and other spheres of public life – economic, social, political, and even spiritual. Being constantly under pressure from these areas, the legal order, due to the recurrence of certain models of human behavior, transforms single and to some extent random lawful behavioral acts in the established matter of social interaction on a legal basis. Thus, the legal order is formed under the influence of all components of public life, as a point of intersection of legal interests of social communities, individuals and other various subjects of law, as a result of interaction of different types of legal behavior and relations of participants.

The modern legal order is a complex structured, multilevel, infrastructurally branched socio-legal phenomenon. It covers all aspects of the legal life of society, consolidating its fragmented parts and aspects into a relatively unified and holistic picture of the structure and functioning of the legal sphere. The legal order manifests itself in the coordinates of the state (national legal order), as well as at the interstate level – integrative and international legal order. In modern conditions, the interaction, flow, and even combination of these legal orders is increasingly manifesting itself. The national legal order is closely related to the legal and institutional infrastructure of a particular state-organised society, and reflects the historical and social features of its legal development.

The state of the legal order serves as a certain background, or “legal climate”, in which the life of individuals and society as a whole takes place. Lack of proper legal order, chaos and the dominance of various manifestations of disorder have a destructive effect on life, consciousness, and even human health. Therefore, because in the period of wars, interethnic conflicts or other social disturbances, the established order of society

suffers, the quality of life achieved by society decreases sharply, and the spiritual sphere of life suffers. Negative results can affect the minds of several generations of people, and overcoming them takes many decades. Therefore, the legal order with good reason can be attributed to the phenomena that are vital to man and society. This means that the legal order is related to the vitality of man, as a set of innate qualities and abilities that ensure his life in nature. Taken in the vital dimension, man acts as a living, corporeal being, as an organism under the rule of natural laws and subject to the mechanisms of biological determination. As an individual, i.e. as an indivisible part of nature, man does not have freedom in the socio-ethical sense, but depends entirely on the requirements of natural necessity, which affects the natural processes occurring in the body and human consciousness [13]. In this sense, natural processes are the most powerful determinants of the organisation of human life and society, including in the legal sphere. Therefore, law and the legal order will be perceived by man as necessary when they are defined as “natural”, i.e. those that do not contradict the natural imperatives of human existence. It is in this capacity that the legal order becomes relevant to the functioning of the spiritual sphere. According to the apt remark of I. Ilyina, the legal order embodies “law in its main essence, and is necessary for man the image of his spiritual life on earth, or otherwise: it is a necessary form of” meeting “the supreme good and the human soul” [14, p. 232]. And it is clear that such a search for the spirit of all and for all forces the will to focus with special force on creating a general and legal order [14, p. 236]. Progress, human approach to law and free existence in its parameters are not a one-time act: “It is possible for an animal to completely renounce the law; it will carry out the triumph of naive power. It is impossible for a person as a creator of the economy to live outside the law, but it is possible to limit one superficial appearance of law, one scheme of law, cultivating and applying bad and unjust “positive norms”. Only a person as a creator of spiritual life has access to normal legal consciousness, only he is given the search and finding the right law, because only he is open to the purpose of law and its living source [14, p. 236].

2.2. The spiritual nature of the church law and order

The ecclesiastical legal order, and the general social one, is combined with spirituality in that the sphere of the spiritual includes all the intellectual and moral forces of man, his desire for freedom and order. Comprehending the spiritual origins of law and order, we must proceed from the fact that they are, above all, spiritual value. And although the material form (texts of laws, constitutions, other legal acts – what is called “letters of the law”) the existence of law is an important feature of it, no less important is what constitutes the “spirit of law” – all that does not always have textual-material embodiment, but, thanks to the expression of the ideals of goodness and justice serves as a reliable means of distinguishing between right and wrong. Similarly, according to Maximus the Confessor, the ideals of the righteous life of man, created in the image and likeness of God, are articulated in commandments, rules and laws. They are not imposed by some foreign force, external to humanity [15, p. 42, 52].

From this will receive the spiritual origins of law and the legal order – those interrelated moral principles on which the law is based, and according to which the legal order is formed. Therefore, the preservation and maintenance of the rule of law does not violate the autonomy of the individual: fulfilling the requirements of the law, he does not force himself and is not afraid of coercion, because she seeks the same goal, which serves the law. The issue of the spiritual in relation to law is unfolding and deepening in the context of understanding the unique nature of ecclesiastical law and ecclesiastical legal order. The church as a social institution is a subject of legal life in various forms and manifestations. As noted by L. Skene and M. Parker, the role of the church, for example, in the development of law is manifested in the fact that some politicians vote for a bill according to their religious preferences, or the church acts as a lobbyist for certain bills, or even interferes in the judiciary [9, p. 215]. And the limits of such interference are quite sensitive matter. An example of this is the reaction of Polish society to recent changes in abortion legislation, which were introduced under pressure from the Catholic Church [16].

Functioning in the coordinates of secular law gives rise to a wide range of legal relations of the church, its components with state institutions in the public law sphere, as well as with other subjects of law – in private law. The nature of the ecclesiastical legal order derives from the uniqueness of ecclesiastical law – its special subject, which does not coincide with the subject of national law, inherent in ecclesiastical law extraterritoriality of legal regulation. Another “ordering” feature of church law – the specific methods of rule-making and the nature of the impact of its rules on social relations in order to streamline them. Internal ecclesiastical law, and the legal order created under its influence, do not have a close relationship with state power, as is inherent in secular law. However, the church legal order is an integral part of the general legal order, and if internal relations and processes in it do not conflict with secular law, the state does not interfere in this area.

The status of ecclesiastical law has another aspect that manifests itself not only in terms of influence on the church, but also on the general legal order. This is a phenomenon called “external” ecclesiastical law. History has known that the church was outlawed, as was the case in ancient Rome under Emperor Nero or in communist Albania under the 1976 Constitution. However, the norm was the existence of religion in the legal field, which was formed by state legislation, which enshrined the legal status of the church in society. The legal order both in society and within the church largely depends on the extent to which state legislation accurately and adequately regulates the church's relations with the state and society. This is evidenced by the legislative experience of post-Soviet countries, which were forced to start a “new page” in relations between the state and the church after their independence. Different, rather different vectors of creating a normative-legal basis for the functioning of denominations were reflected here: if in the former Baltic Republic the legislative models that existed there before the Soviet annexation were used, in Ukraine the legislator focused on the USSR law. “On Freedom of Conscience and Religious Organisations” [17]. Such different starting positions largely determined the nature and content of the legal consolidation of the legal status of the church, its functions in society and the specific features of its relations with the state.

Interestingly, the legislation of Ukraine has not used the term “church” for a long time, giving different meanings to religious communities. The peculiarities of the attitude to the church in the conditions of sovereign Ukraine had the specificity that the negative consequences of the religious (more precisely – anti-religious) policy of the Soviet period acquired special significance here. The specificity of the legislation of Ukraine is manifested in the fact that the state registration of the statutes of religious associations in general (churches, dioceses) is not provided. Certain rights of churches are ensured by the registration of the statutes of their centers (metropolitanates, diocesan administrations, consistories, centers). The current model of state-church relations in Ukraine demonstrates the weakness of the power vertical, and the concentration of powers to regulate the religious sphere in the hands of local administrations has identified marked regionalism in the development of relations between government and religious denominations, which also manifests itself in different ways through the state of the legal order in this area.

2.3. The ratio of ecclesiastical and secular law

The problem of the relationship and interaction of ecclesiastical and secular law is of great importance in the context of the formation of the legal order in society. The situation in this area cannot yet be described as optimal. The shortcomings of secular law do not contribute to the optimal organization of social relations in the functioning of the church, and, consequently, affect the state of law and order in society as a whole and in the church-legal sphere. With regard to lawmaking in the religious sphere, the following should be emphasized: this activity requires not only high professional and legal competence, “jewelry” use of legal techniques and technologies, but also deep knowledge of the religious situation, as well as wisdom and tolerance. The principle of “do no harm” by analogy with medicine is just as important in the extremely sensitive area, which is the religious and ecclesiastical sphere.

The specificity of the church legal order is determined by the following: the church as a special social organism is a complex structural entity consisting of believers, church ministers, its self-government and administration, and therefore seeks internal unity, integrity and order. Church law as a set of norms and rules aims to ensure these characteristics of church life. The internal legal order in the church is legal in nature and ecclesiastical in form. The church legal order is a multilevel, multi-element development that combines legal orders in parishes, monasteries, fraternities, sororities, and spiritual educational institutions. The primary creator and bearer of the church legal order is a parishioner (believer), including a clergyman – a minister of the church. Church law in Ukraine is a long-term factor in state-and-law-making, and the church itself is an important subject in the development of original cultural and spiritual foundations of consciousness and existence of Ukrainian society. In the orbit of ecclesiastical law there are a large number of organizations, institutions, individuals who in one way or another influence the state of the legal order in a particular territory of the country or region. But ecclesiastical law also applies extraterritorially. The canonical territory of the church often goes beyond the territory of the country, which also characterises both the configuration and features of the functioning of the church legal order.

Speaking of the legal order, it should be considered from a teleological standpoint. And here the whole church and secular authorities diverge. The main goal of the church is not to achieve social justice, but to warn people about divine justice. The purpose of the church is not to call for righteousness, but to tell of the divine righteousness of Jesus Christ, not to point out who to choose in elections, but to point out the One who chose many for eternal life. An important feature of the ecclesiastical legal order is that the norms and principles of ecclesiastical law are moral and imperative, and can not, as is typical of legal precepts, be provided by physical coercion or means of economic (fines, etc.) coercion. Observance of the norms of church law is ensured by

their authority, and by moral and spiritual means. Nevertheless, being a law in the true sense, ecclesiastical law is a system-forming factor both in relation to the ecclesiastical and in relation to the general legal order. As a special independent system of law that is different from the law of the world and is not related to it, church law has its own structure. To characterise the ecclesiastical legal order, the division of ecclesiastical law into internal and external ecclesiastical law is decisive.

For the development of the legal order – both ecclesiastical and public, it is important that ecclesiastical and secular law have a significant common history: they exist as organic components of mononorms in pre-state society. Further distinction and transformation of each type of social norms has its own special trajectory, which is determined by their specific nature, purpose and functional characteristics. However, this “primordial”, “genetic” connection of religious and legal norms is crucial in understanding the ordering of public life, including modern. For secular law, and thus to achieve the desired level of general legal order, of great importance is preserved by ecclesiastical law, its close connection with moral and spiritual values and norms. This feature of ecclesiastical law should be used as a potential for law enforcement influence on public life. A striking example of the “integrative” nature of religious norms are the Ten Commandments, which combine “religious imperatives”, “moral imperatives” and the most important imperatives of law.

Extremely interesting in terms of the peculiarities of the influence of ecclesiastical law on the development of ecclesiastical legal order are the ways of formulating (legal technique) legal prescriptions in ecclesiastical law. This is in line with the essence of the church as a union based on religious faith and sustained by the power of persuasion. Church laws are usually drafted and formulated not so much in the imperative tone of secular laws as in the form of rules that persuade and instruct, that is, affect the will through conscience. This way of formulating church law corresponds to the unique sanctions used here, which threaten the offender – the wrath of God, heavenly punishment or disciplinary punishment imposed by the church itself (excommunication from its community).

2.4. Church law as a component of public law

To understand the nature and complex structure of the ecclesiastical legal order, it is necessary to proceed from the classification of the right to civil (secular) and ecclesiastical (canonical) formed in the Middle Ages. At the same time, church law itself, depending on the source, is divided into Divine law, based on a clearly expressed Divine will, and positive, or ecclesiastical, law in the narrow sense of the word, based on legislative acts of the Church itself. In addition, depending on whether the law regulates the internal life of the Church or its relations with other social and political entities, distinguish between internal and external ecclesiastical law. The division of ecclesiastical law into written (written by the legislature) and customary (unwritten, which is preserved by tradition and custom) is used. Finally, ecclesiastical law is divided into general law, which includes laws binding on the World Church, and private law, which constitutes legislation that applies to individual local churches. These components of church law are likely to be reflected in the structure of church law.

Thus, the church legal order, which arises and operates in society, is an integral element, part of the general (national) legal order. As a component of the general legal order, the church legal order bears the imprint of history, culture, morals, customs and traditions of a particular society. This becomes obvious when comparing the realities of Ukraine and its immediate surroundings. On the other hand, the peculiarities of the development of church life in Ukraine in the absence of national statehood for a long time also left its mark on its configuration. And despite the fact that polyconfessional Ukraine in modern conditions sometimes leads to social tensions and conflicts, such a model of institutionalisation of the church system is one of the safeguards against the spread of totalitarianism and autocratic political and legal regime in government.

The ecclesiastical legal order receives the distinction of sacredness, which comes from all the specifics of the church life of clergy and the community of believers, internal and external relations in the church, the specific features of legal regulation and others. For example, the special composition of the subjects of ecclesiastical law and legal order, their unique legal status is brightly colored by the fact that obtaining ecclesiastical legal personality is preceded by the performance of certain religious sacraments (baptism, anointing, ordination). These sacraments, conditioned upon their special procedure and design, are deeply engraved in a person's mind, and significantly affect his future life and behaviour. Therefore, all relations between the subjects of ecclesiastical law, not only within the church life, but also outside it, are marked by these features of attachment to the religious community. The presence in the minds of religious beliefs and knowledge, which modifies communications and relations between participants in church relations, affects the meaningful behavior, and as a result – the formation of both ecclesiastical and secular legal order. The sacredness of religious sacraments has a dual nature – on the one hand, they belong to dogmatic theology, and

on the other hand, the procedure for their implementation belongs to church law, has a legal nature, and, embodied in the lawful conduct of church life, is already an element of church legal order.

CONCLUSIONS

Thus, the church legal order has the following characteristics and features that distinguish it from other types of legal order:

1. Legal regulation of church relations has a dual nature. It is carried out both by legal acts of the church and by the legislation of the state. Such double dependence creates vulnerability of the church legal order to the nature and quality of secular legislation, and sometimes leads to aggravation of conflicts in relations between denominations. This requires a special sensitivity of the “secular” legislator to the processes that are developing in the church life of the country.

2. Another feature is the partial influence of the state and its law enforcement institutions on the formation and maintenance of the church legal order. The main burden of ensuring the church's legal order is borne by the institutions of the church – its bodies, clergy, the community of believers and others. The role of state institutions in ensuring the rule of law is manifested in the external relations of the church with society, as well as in the observance by believers of the laws of the country.

3. The subjective structure of the church legal order is ambivalent. As noted, the subjects of ecclesiastical law are believers, church ministers, its officials and church self-government bodies. On the one hand, these are, as a rule, citizens of Ukraine who must observe secular law, and thus create a general legal order. On the other hand, a significant part of their lives takes place in the field of functioning of church law, i.e. against the background of the church legal order. Thus, those social roles that carry certain social strata, manifest themselves in the various legal orders that they create at this time.

4. The subjective composition of the church legal order forms its horizontal-vertical structure. “Horizontally” the church legal order is a set of legal orders of its bearers – believers, ministers, hierarchs of self-government bodies and other structural entities. The prevailing opinion in the literature is that ecclesiastical law, in contrast to public law, is not territorial but personal. At the same time, the legal order has a certain connection to the territory – the boundaries of the church community, the diocese, etc.

5. The lawful behaviour of the subjects of ecclesiastical legal relations is of a dual nature for the ecclesiastical legal order: observance and execution of secular law by believers and clergy are a factor in maintaining both the general legal and ecclesiastical legal order. On the other hand, the “secular” offenses of the faithful have a negative impact on both the state of public law and the church.

In Ukraine, as in a multi-confessional society, a separate (autonomous) church legal order is inherent in each denomination. Relationships, differences between denominations, interaction or contradictions between them in one way or another affect the state of the ecclesiastical legal order in society, as well as – the general legal order in general.

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ЗАБЕЗПЕЧЕННЯ ПРАВ ЛЮДИНИ В ЗЕМЕЛЬНИХ ПРАВОВІДНОСИНАХ: СОЦІОЕКОНОМІЧНІ Й ПРАВОВІ ЗАСАДИ

Анотація. Відкриття вільного ринку землі та розширення масштабів її купівлі-продажу у сучасних умовах розвитку українського суспільства і держави є вкрай актуальною темою та потребує відповідного наукового опрацювання саме з позицій прав людини. Тому автори поставили за мету проаналізувати міжнародні правові документи у сфері регулювання процесів захисту прав селян на землю та запропонували науково-обґрунтовані пропозиції із вдосконалення відповідних процесів в Україні. У роботі із застосуванням загальнонаукових і спеціальних методів наукового пізнання (діалектичного, формально-логічного, системного, історико-правового та порівняльного аналізу) розглянуто правові засади та міжнародні підходи щодо захисту прав селян на землю у контексті роз'яснення та узагальнення основних положень правозахисних документів, особливо Декларації ООН про права селян та інших людей, які працюють у сільській місцевості, ухваленої Генеральною асамблеєю ООН у грудні 2018 р. Аналіз показав, що низка інших прав, закріплених у Декларації, є взаємопосилюючими та необхідними для реалізації захисту прав на землю, серед них – право на участь, право на інформацію та доступ до правосуддя. В результаті проведеного дослідження розроблено пропозиції щодо виконання Україною своїх зобов'язань як члена ООН та держави-учасниці Ради ООН з прав людини у сфері захисту земельних прав селян. Усі гілки влади в Україні, включаючи виконавчу, законодавчу та судову, мають бути залучені до виконання Декларації створивши для цього нові механізми правозахисних практик у сфері регулювання земельних відносин, та систему моніторингу гарантування прав селян у процесі функціонування вільного ринку землі на національному та локальному рівнях

Ключові слова: правозахисний підхід, право на землю, сільська місцевість, земельна реформа, Декларація ООН про права селян та інших людей, які працюють у сільській місцевості

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ENSURING HUMAN RIGHTS IN LAND LEGAL RELATIONS: SOCIO-ECONOMIC AND LEGAL FRAMEWORKS

Abstract. *The opening of the free land market and the expansion of its purchase and sale in the current conditions of development of Ukrainian society and the state is an extremely relevant topic and requires appropriate scientific study from the standpoint of human rights. Therefore, the authors aimed to analyse international legal documents in the field of regulation of protection of peasants' rights to land and proposed scientifically sound proposals to improve the relevant processes in Ukraine. The work with the use of general and special methods of scientific knowledge (dialectical, formal-logical, systematic, historical-legal and comparative analysis) considers the legal framework and international approaches to protect the rights of peasants to land in the context of clarifying and summarizing the basic provisions of human rights documents, especially the UN Declaration on the Rights of Peasants and Other Persons Working in Rural Areas, adopted by the UN General Assembly in December 2018. The analysis showed that a number of other rights enshrined in the Declaration are mutually reinforcing and necessary for the protection of land rights, including the right to participate, the right to information and access to justice. As a result of the study, proposals were developed for Ukraine to fulfill its obligations as a member of the UN and a member state of the UN Human Rights Council in the field of protection of land rights of peasants. All branches of government in Ukraine, including the executive, legislature and judiciary, should be involved in the implementation of the Declaration by creating new mechanisms for human rights practices in land regulation and a system for monitoring the rights of peasants in the free land market at national and local levels*

Keywords: *human rights approach, right to land, rural areas, land reform, UN Declaration on the Rights of Peasants and Other Persons Working in Rural Areas*

INTRODUCTION

On July 16, 1990, the Verkhovna Rada of the Ukrainian PCP adopted the Declaration [1] on State Sovereignty, “expressing the will of the people of Ukraine” and “seeking to create a democratic society” and “recognising the need to build the rule of law, with the aim of establishing the sovereignty and self-government of the people of Ukraine,” proclaimed the state sovereignty of Ukraine as the supremacy, independence, completeness and indivisibility of power within its territory and independence and equality in foreign relations. According to Section II of the Declaration: “citizens of the Republic of all nationalities constitute the people of Ukraine; the people of Ukraine are the only source of state power in the Republic; the sovereignty of the people of Ukraine is realized based on the Constitution of the Republic both directly and through people's deputies elected to the Verkhovna Rada and local councils of the Ukrainian PCP” [1]. The Declaration enshrined the right of ownership of the Ukrainian people: “The people of Ukraine have the exclusive right to own, use and dispose of the national wealth of Ukraine. Land, its subsoil, airspace, water and other natural resources within the territory of the Ukrainian PCP, natural resources of its continental shelf and exclusive (marine) economic zone, all economic and scientific-technical potential created in Ukraine is property of its people, the material basis of the sovereignty of the Republic and are used to meet the material and spiritual needs of its citizens” [1].

On July 1, 2021 in Ukraine in accordance with the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on the Circulation of Agricultural Land” No. 552-IX from 03/31/2020 opened a free market of purchase and sale of agricultural land for individuals, and from 2024 The participants of the

land market will be enterprises of various organisational and legal forms, including export-oriented agricultural holding companies, which today lease from 100 to 600 thousand hectares of land.

In many countries, the transition to large-scale export-oriented agriculture has led to significant increases in food prices, local food insecurity, forced evictions, and rural displacements, which in turn has increased migration from rural to urban areas and, as a result, contributed to increased migration from rural to urban areas and, as a result, increased pressure on access to urban land, communications and housing [2]. Much of this relocation is carried out in a way that violates human rights in many communities, further exacerbating their precarious situation and negatively affecting the country's spatial development.

The Office of the United Nations High Commissioner for Human Rights (Office of the High Commissioner for Human Rights – the main body of the United Nations for Human Rights, which represents international obligations to promote and protect the full range of human rights and freedoms) said that land is not just a commodity, but an important catalyst for the realisation of many human rights [3]. The right to land is pervasive, directly affects the exercise of a number of other human rights and therefore needs the highest recognition and protection of all UN member states.

The postulate is obvious – for many people the land is a source of livelihood and the basis for the realisation of their basic rights to food, water, habitat. It is closely linked to people's identity, their social and cultural rights. Aspects of human rights to land address a number of issues related to poverty reduction and rural development, building harmony in rural areas, and humanitarian development.

The issue of land relations is especially relevant in connection with the military conflict in eastern Ukraine, which began in 2014 and continues to this day. According to the Unified State Register, the number of companies, among the owners, founders or final beneficiaries of which there is at least one citizen or resident of the Russian Federation or the Republic of Belarus, as of January 1, 2022 was 16,896 companies. Among them, about 1,200, along with their main activities, also declared work in the agricultural sector by renting land. Under such conditions, this poses a threat to Ukraine's national security.

The aim of the work is to analyse the legal framework and international approaches to the protection of peasants' land rights in the context of clarifying and summarising the main provisions of the UN Declaration on the Rights of Peasants and Other Persons Working in Rural Areas adopted by the UN General Assembly in December 2018 and development based on scientifically sound proposals for improving the relevant processes in Ukraine in a free land market.

1. MATERIALS AND METHODS

The methodological basis of the study was taken in dialectical unity and contradictions of genetic and teleological principles of knowledge of socio-legal phenomena and concepts in terms of their causal relationship and interdependence, historical development and functioning; their value-target structure and social purpose.

The materials of the study are the main provisions of international legal acts of the UN in the field of human rights, as Ukraine as one of the founding members of the UN (Ukraine participated in the UN from 1945 to 1991 as the USSR, and since independence – as Ukraine) in the activities of this organisation one of the priority areas of foreign policy.

The Declaration on the Rights of Peasants and Other Persons Working in Rural Areas (hereinafter referred to as the Declaration) is a key study of international legal documents. In 2018, the United Nations, in the light of current challenges and the growing threat to peasants of their rights to land, has offered States an integrated human rights instrument, the Declaration of the Rights of Peasants and Other People Working in Rural Areas. With this tool, states can build national systems to protect the rights of peasants, especially during agrarian and land transformations. In developing the main provisions of the Declaration, experts have applied an integrated systematic approach to the protection of the rights of peasants to use and strengthen existing instruments for the protection of human rights [5]. With this in mind, the adoption of the Declaration at the UN General Assembly level has created a unique opportunity to recognise and protect the rights of peasants, local communities, indigenous peoples, fishermen, pastoralists, nomads, hunters, landless, rural women, rural youth and agricultural workers vision of solving the problem.

In the course of the research the materials and main provisions of the international documents related to the Declaration [6-8] were used, such as: Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; Convention on the Elimination of All Forms of Discrimination against Women for Youth; ILO Convention No. 169 concerning Indigenous and Tribal Peoples; UN Declaration on the Right to Development; UN Declaration on the Rights of Indigenous Peoples; Voluntary principles to support the progressive realisation of the right to

adequate food in the context of national food security; Voluntary principles for responsible management of land use, fishery resources and forests in the context of national food security; Voluntary principles for sustainable small-scale fisheries in the context of food security and poverty eradication.

The study includes an analysis of the main conclusions of the UN Special Rapporteur on the right to food, including land rights [9], and the provisions of the Joint Statement of Key Human Rights Advisers at the UN level, “Action to implement the UN Declaration on the rights of peasants and other people working in rural areas” [10], made by them on the occasion of the 1st anniversary of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas on December 17, 2019. The statement said that the Declaration on the Rights of the Peasant was drafted in the light of the provisions of binding international treaties, including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on Biological Diversity and its Protocols, and the International Treaty on Plant Genetic Resources for Food and Agriculture. Based on the fact that the Declaration summarises the basic provisions of binding international treaties, UN human rights experts have recognised the need for all states to better protect the rights of peasants and other people working in rural areas and called on states to implement the Declaration on the Rights of Peasants and Other People working in rural areas, as the widespread recognition of the new norms set out in this document is crucial to promoting a comprehensive human rights movement.

2. RESULTS

In the Declaration of the Rights of Peasants and Other People Working in Rural Areas, the rights of rural communities to land are argued in various articles (first, second, third, fourth, fifth, seventeenth, eighteenth, twenty-first, twenty-fourth) [4]. Land rights are set out directly in Articles 5 and 17, and in Article 4, which deals exclusively with women's right to land. The right to land includes freedoms and norms, including freedom from discrimination, protection against forced evictions, movement and exploitation of land, and the right to agrarian reform and the preservation and sustainable use of land. Other rights, such as the right to participate, information and access to justice, which are important for the protection of the rights of rural communities to land, are also enshrined in the Declaration [4]. Therefore, the Declaration is an important tool for synergetic interaction between the state and the peasants in protecting their legal rights in access to land and the realization of the public function of land ownership.

The Declaration defines the right to land and other natural resources along with the obligations of states to respect the legitimate rights of peasants in Articles 5 and 17. In particular, Article 5 provides:

1. Peasants and other people working in rural areas have the right to access and use natural resources in their communities in a sustainable way to ensure adequate living conditions [...]. They also have the right to participate in the management of these resources.

2. States should take measures to ensure that any exploitation affecting natural resources owned or used by peasants and other people working in rural areas is carried out based on:

(a) conducting appropriate social and environmental assessments;

(b) voluntary consultations in accordance with Article 2.3 of this Declaration;

(c) creating conditions for the equal and equitable distribution of the benefits of such exploitation, established on mutually agreed terms between those who use natural resources and peasants and other people working in rural areas.

Article 17 of the Declaration states:

1. Peasants and other people living in rural areas have the right to land, individually and/or collectively, [...] including the right of access, sustainable use and management of land, water bodies, coastal waters, fishery resources, pastures, forests to ensure a decent standard of living in security and peace and to develop their culture.

2. States should take appropriate measures to eliminate and prohibit all forms of discrimination related to the right to land, including those arising from marital status, incapacity or lack of access to economic resources.

3. States should take appropriate measures for the legal recognition of property rights, allowing for the existence of different models and systems. This includes ordinary property rights, which are not currently protected by law. States must protect legal property and ensure that peasants and other people working in rural areas are not evicted arbitrarily or illegally, and their rights are not diminished or violated. States must recognise and protect natural resources and related systems of collective use and management.

4. Peasants and other people working in rural areas have the right to protection from arbitrary and illegal movement from their land or place of residence, or from the deprivation of other natural resources necessary to meet decent living conditions. States should include protection against relocation in national legislation consistent with international human rights and humanitarian law. States should prohibit unauthorised and unlawful forced evictions, the destruction of agricultural land, and the confiscation or expropriation of land and other natural resources, including as a punitive measure or as an instrument or means of war.

5. Peasants and other people working in rural areas who have been arbitrarily or illegally deprived of land have the right, individually and/or collectively, together with others or as a community, to return to their land, which they have arbitrarily or illegally deprived of, including in cases of natural disasters and/or armed conflicts and to restore access to natural resources necessary to meet adequate living conditions or to obtain equal, fair and legal compensation in the event that their return is not possible.

6. If necessary, states should take appropriate measures to carry out agrarian reforms to facilitate comprehensive and equal access to land and other natural resources needed to provide peasants and other people working in rural areas with adequate living conditions and to limit excessive land concentration and control of land, considering its social function. Priority in the distribution of public lands, reservoirs and forests should be given to landless peasants, youth, small-scale fishermen and other rural workers.

7. States should take measures aimed at the conservation and sustainable use of land and other natural resources used in their production, including through agri-environment, and provide conditions for the restoration of biological and other natural opportunities and cycles.

Article 5 enshrines the right of peasants and other people working in rural areas – alone or in association with others or as a community – to have access to and use the natural resources available in their communities to ensure adequate living conditions, including land, in a sustainable way; and have the right to participate in the management of these resources (paragraph 5.1). Article 17 enshrines the right to land of peasants and other people living and/or working in rural areas and stipulates that this right may be exercised individually and/or collectively (paragraph 17.1), independently or jointly with others or as a community (in accordance with Article 1, paragraph 1.1) [4].

Therefore, according to the Declaration, the right to land of peasants and other people working in rural areas includes the right of access, sustainable use, management of land and water bodies, coastal waters, fishery resources, pastures and forests to achieve a decent standard of living to have a place to live in security, peace and dignity and develop their culture (p. 17.1).

Given the particular severity of the problem, a special place in the Declaration is given to the right of rural women to land (Article 4). According to the Food and Agriculture Organization of the United Nations, rural women around the world play a key role in local and global food systems – producing food crops and earning income for their families. However, women and girls make up 70% of the world's hungry people and face multiple discrimination in access to productive resources, including land [11]. Article 4 of the Declaration provides:

1. States shall take all appropriate measures to eliminate all forms of discrimination against rural women and other women working in rural areas and to promote their empowerment to ensure the full and equal enjoyment of all human rights and fundamental freedoms based on equality between men and women, including the realisation, free participation and benefit of rural development in the economic, social, political and cultural spheres.

2. States shall ensure that rural women and other women working in rural areas enjoy all the human rights and fundamental freedoms set forth in this Declaration and other international human rights instruments without discrimination. [4]

In international human rights law, in particular the Convention on the Elimination of All Forms of Discrimination against Women [12], the rights of rural women are recognised in Article 14, which is fully consistent with Article 4 of the Declaration [4]. This article states that States should take all appropriate measures to eliminate all forms of discrimination against rural women and other women working in rural areas, promote their rights and ensure that they enjoy all human rights and fundamental freedoms without discrimination, including the right to on equal access, use and management of land and other natural resources, including equal or priority treatment of land and agrarian reforms and resettlement schemes (Article 4, paragraph 4.1 and paragraph 4.2) [12]. To prevent discrimination against rural women's land rights from family conflicts, Article 17 provides that States must eliminate and prohibit all forms of discrimination relating to land rights, including those arising from marital status, incapacity or lack of access to economic resources (Article 17, paragraph 17.2) [12].

The right to land includes freedoms and rights that states must respect, protect and exercise without any discrimination [7], as the right to land is complementary to other human rights. In rural areas, the right to land

is a “portal” for the realisation of other vital rights and freedoms of rural communities. Among them, the most important are the following human rights and freedoms, which directly depend on the right to land, namely: freedom from discrimination; protection against forced eviction and relocation; protection against the negative consequences of land use; real participation in the benefits of agrarian transformations; conservation and sustainable use of land resources.

2.1. Freedom from discrimination

Peasants and other people working in rural areas have the right to full enjoyment of the right to land and have the right to be free from various forms of discrimination in respect of this right (Article 3.1, paragraph 17 and Article 17, paragraph 17.1) [12]. The Declaration stipulates that States should take appropriate measures to eliminate conditions conducive to the continuation of discrimination, including various and pervasive forms of discrimination against peasants and other persons working in rural areas (Article 3, paragraph 3.3) [4]. States should also eliminate and prohibit all forms of discrimination concerning land rights, including those arising from marital status, incapacity or lack of access to economic resources (Article 17, paragraph 7.2) [13, p. 1597; 14, p. 1187].

2.2. Protection against forced eviction and relocation

Peasants and other people working in rural areas also have the right to freedom from forced eviction (migration) and movement (Article 17, paragraph 17.3 and paragraph 17.4). States must ensure the legal recognition of property rights [15; 16], including customary land tenure rights, which are currently not protected by law, while recognising the existence of different models and systems of land use by peasant farms in the place of residence [17, p. 48-50]. States should protect the lawful residence of local people and those working in rural areas, ensure that peasants and other people working in rural areas are not evicted arbitrarily or illegally, and that their rights are not suppressed or violated in any other way. States must also recognise and protect the natural heritage of rural communities and related systems of collective use and management (Article 17, paragraph 17.3) [15].

To protect peasants and other people working in rural areas from arbitrary and illegal removal from their land, states must implement protection against displacement in national legislation consistent with international human rights and humanitarian law. States must prohibit the arbitrary and unlawful forced evictions of rural residents, the depopulation of rural areas and the confiscation or expropriation of land and other natural resources, including as a punitive measure or as an instrument or method of violent confrontation (Article 17, paragraph 17.4) [15].

The Declaration stipulates that those who have been arbitrarily or illegally deprived of land have the right, individually and/or collectively, together with others or as a community, to return to their land from which they were arbitrarily or illegally deprived, including in the event of natural disasters and/or armed conflict, and to restore access to the natural resources used in their activities and necessary to meet adequate living conditions or, where possible, to obtain equal, fair and legal compensation in the event that recovery is not possible (Article 17, paragraph 17.5) [4]. Article 24 on the right to housing also stipulates that States shall not arbitrarily or illegally, temporarily or permanently evict peasants or other persons working in rural areas against their will from the houses or lands they occupy without providing access to appropriate forms of legal or other protection (Article 24, paragraph 24.3). In the event that eviction is imminent, the state must provide or provide the peasants with equal and fair compensation for any material or other damage (Article 24, paragraph 24.3) [4].

2.3. Protection against the negative consequences of land use

Article 5 stipulates that States must take measures to ensure that any exploitation affecting natural resources traditionally preserved or used by farmers and other persons working in rural areas is based on a proper assessment of the social and environmental impact of such exploitation of rural communities and territories; bona fide consultations organised for rural residents in accordance with Article 2, paragraph 2.3, Declarations and methods of equal and equitable distribution of benefits from such exploitation, established on mutually agreed terms between those who use natural resources and rural communities (Article 5, paragraph 5.2) [18, p. 112].

2.4. The right to participate in the benefits of agrarian reform

The Declaration recognises the need for agrarian transformation for peasants to exercise their land rights. Article 17 stipulates that States must take appropriate measures to carry out agrarian reforms to guarantee rural communities wide and equal access to land and other natural resources necessary to provide peasants and other people working in rural areas with decent living conditions, and in order to limit the excessive concentration and control of land resources to a limited number of users, considering the social function of the land (Article 17.6). When allocating public lands, fish resources and forests, priority should be given to landless peasants, youth, small-scale fishermen and other rural workers (Article 17, paragraph 17.6) [4].

2.5. Conservation and sustainable use of land

The Declaration defines the right of peasants and other people working in rural areas to preserve and protect the environment and the productive potential of agricultural land, and other natural resources that they use and dispose of (Article 18, paragraph 18.1). Article 18 states that states must take effective measures to overcome the lack of safe storage and disposal of hazardous materials, substances and waste on the land of peasants and other people working in rural areas. Rural communities, in turn, will cooperate in addressing the threat to the exercise of their rights resulting from transboundary environmental damage (Article 18, paragraph 18.4). States should also protect peasants and other people working in rural areas from the abuse of non-state actors (private sector, corporations, agribusinesses and entrepreneurs), including by complying with environmental laws (Article 18, paragraph 18.5) [4].

States should also protect and restore water-related ecosystems in rural areas, including wetlands, forests, rivers, aquifers and lakes, from overuse and pollution by harmful substances, including industrial effluents and concentrated minerals and chemicals, which are slowly or quickly lead to poisoning of living organisms (Article 21.4). To realise this right, the Declaration stipulates that states must take measures aimed at the conservation and sustainable use of land and other natural resources used for production, in particular through agri-environment, and provide conditions for the restoration of biological and other natural opportunities and cycles (Article 17, paragraph 17.7) [4]. A number of other rights enshrined in the Declaration are interdependent and mutually reinforcing with the right to land and necessary for the protection of land rights. These are the right to participate, information and access to justice, which are enshrined in Articles 2, 10, 11, 16, 19, 27 [4].

2.6. Fundamental right to participate

The right to participate enshrined in Article 2, paragraph 2.3, Article 10 and Article 16, paragraph 3 [4] is fundamental to the exercise of the right to land, and the entire Declaration. A separate article 10, in particular, states:

1. Peasants and other people working in rural areas have the right to participate actively and free of charge directly and/or through representative organisations in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods.

2. States should promote the participation of peasants and other people working in rural areas, directly and/or through representative organisations, in decision-making processes that may affect their lives, land and livelihoods; this includes respect for the establishment and growth of strong and independent organisations of peasants and other people working in rural areas and their participation in the preparation and implementation of food, labour and environmental safety standards that may affect their lives, work and safety in the countryside.

States should promote rural communities and ensure their full and equal access to and participation in local, national and regional markets to sell their products at prices that ensure them and their families a decent standard of living (Article 16.3) [4].

According to the Declaration, states must also respect the creation and growth of strong and independent organizations of peasants and other people working in rural areas (Article 10.2). States promote their involvement directly and/or through their representative organisations in decision-making processes that may affect their lives, land and livelihoods. This involves the involvement of rural communities in the development of national and international agreements and standards (Article 2, p. 4), food safety, labour and environmental standards (Article 10, p. 2), legislation covering product evaluation and certification (Article 11, p. 3), seed policy, protection of plant varieties and other intellectual property laws, certification schemes and seed market laws (Article 19, item 8) and conducting research and development in the field of agriculture (Article 19, p. 7) [4].

The Declaration also stipulates that States, in partnership with peasants and other people working in rural areas, must pursue public policies at the local, national, regional and international levels to promote and

protect the rights to adequate nutrition, food security and food sovereignty, steel and fair food systems (Article 15, paragraph 5). Specialised institutions, funds and programmes of the UN system and other intergovernmental organisations, including international and regional financial organisations, are also considering ways to ensure the participation of peasants and other people working in rural areas in the implementation of the Declaration (Article 27, paragraph 1) [4].

2.7. The right to housing

The right to information is enshrined in Article 11, p. 1 and 2:

1. Peasants and other persons working in rural areas have the right to seek, receive, develop and transmit information, including information on factors that may affect the production, processing, marketing and distribution of their products.

2. States shall take appropriate measures to ensure that peasants and other people working in rural areas have access to appropriate, transparent, timely and adequate information in a language, form and means appropriate to their cultural traditions, to promote their empowerment and ensuring effective participation in decision-making in matters that may affect their lives, land and livelihoods.

The right to information is the right of peasants and other people working in rural areas to seek, receive, develop and transmit information, including information on factors that may affect the production, processing, marketing and distribution of their products [19, p. 101; 20, p. 2055]. To guarantee this right, states should take measures to ensure access to relevant, transparent, timely and adequate information in the language, form and means appropriate to their cultural methods, to promote their empowerment and ensure effective participation in decision-making in cases that may influence their life, land and livelihoods [21, p. 3; 22, p. 1535].

2.8. Access to justice

Access to justice is key to upholding the right of peasants to land and protecting defenders of the right to land [23]. This fundamental right of the peasants is reflected in Article 12, paragraphs 1 and 12, paragraph 5:

1. Peasants and other people working in rural areas have the right to effective and non-discriminatory access to justice, including access to fair dispute resolution procedures and effective remedies against all human rights violations. Such a decision must take due account of their customs, traditions, norms and legal systems in accordance with the relevant obligations under international law.

2. The State shall provide to peasants and other persons working in rural areas effective mechanisms to prevent and compensate for any action aimed at or leading to human rights violations, the unauthorised deprivation of land and natural resources or deprivation of livelihoods, and to any form of forced relocation of the rural population.

These articles of the Declaration recognise the right of peasants and other persons working in rural areas to effective and non-discriminatory access to justice, including access to fair dispute resolution procedures and effective remedies against all human rights violations (Article 12, paragraph 1). It is also stipulated that such decisions must take due account of the customs, traditions, norms of peasants and other people working in rural areas and legal systems in accordance with the relevant obligations under international human rights law (Article 12, paragraph 1) [4].

To guarantee the right of access to justice, and the right to land, Article 12, paragraph 5, requires the state to provide peasants and other people working in rural areas with effective mechanisms to prevent and compensate for any actions aimed at or leading to the violation of human rights, unauthorized deprivation of land and natural resources, deprivation of livelihood, and any form of forced displacement [24, p. 431; 25, p. 12].

3. DISCUSSION

In today's world, when the problem of human rights has gone far beyond the borders of a single state, there is a need to create universal international legal standards, which are also recognised as fundamental human rights. These standards are reflected in a number of important international legal acts that have established universal standards of human rights and interests, defining the limit beyond which the state can not go [26, p. 8]. The Declaration of the Rights of Peasants is a universal international legal standard in guaranteeing the rights of peasants to land. The implementation of the Declaration is a unique opportunity to set precedents for the redress of various forms of discrimination, violations and historical injustices that have affected peasants and other people working in rural areas for decades. Particular attention should be paid to developing appropriate measures to eliminate all forms of discrimination against women farmers and other women working in rural

areas, promoting their rights and ensuring that they enjoy all human rights and fundamental freedoms without discrimination in the Declaration.

At the international level, the main provisions of the Declaration will be included in the strategies aimed at achieving the Sustainable Development Goals. UN human rights experts in their respective positions will implement the provisions of the Declaration of the Rights of Peasants in the course of their mandates; available methods will protect the rights of peasants and other people working in rural areas and provide recommendations to states on the directions, mechanisms and tools for implementing the provisions of the Declaration of the Rights of Peasants at the national level [10].

Specialised UN agencies, funds and programmes and other intergovernmental organisations, including international and regional financial organisations, will contribute to the full implementation of the Declaration, including through mobilization, assistance and cooperation; promote respect for and full application of the provisions of the Declaration; will monitor their effectiveness. These include the United Nations World Food Security Committee (FAO) and UN specialised agencies, funds and programmes. The International Monetary Fund (IMF), the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO) should consider the need to implement the UN Declaration on the Rights of Peasants and Other Persons Working in Rural Areas.

The UN Human Rights Council is currently establishing a new Special Procedure for Monitoring the Rights of Peasants and Other People Working in Rural Areas; monitoring the implementation of the Declaration will be included in the Universal Periodic Review. It is also planned to establish a UN Voluntary Fund for peasants and other people working in rural areas to support their participation in the UN human rights system [10].

At the national level, states must play a key role in implementing the Declaration of the Rights of Peasants. This role is emphasised in numerous UN regulations that define and detail the obligations of states [27]. States parties to the UN Human Rights Council must report on the implementation of the rights of peasants and other people working in rural areas, and, above all, the rights to land. The UN Council also has the right to consider individual complaints from peasants about violations of their rights in the process of land reform in accordance with the rights guaranteed to them by the Declaration. Following the consideration of individual applications, the Council makes recommendations to the authorities.

Ukraine, which is a member of the United Nations and a member state of the UN Human Rights Council, has opened a real land protection instrument, approved by the UN General Assembly. To transform the Declaration from a human rights document into a real tool, the state of Ukraine must implement a number of measures:

- to involve all branches of government, including the executive, the legislature and the judiciary, in the implementation of the main provisions of the Declaration on the Rights of Peasants and Other Persons Working in Rural Areas;
- to ensure the coherence of international agreements and standards to which Ukraine is a party with the rights of peasants enshrined in the UN Declaration, and to develop mechanisms to ensure their coherence with national agricultural, land, regional, economic, social and cultural policies;
- to consolidate at the legislative level the status of peasants and other people working in rural areas as agents of change and key actors in local, national and international implementation of human rights protection. Effective implementation of the Declaration provides for the full and active participation of peasants and other people working in rural areas in all measures related to its implementation. Peasants should be involved directly or through representative organisations in decision-making processes that may affect their lives, land, resources and livelihoods. To this end, the creation and development of strong independent organisations of peasants and other people working in rural areas must be supported at the state level;
- to develop a number of measures of state regulation of the activities of private sector entities (large land users, agricultural holdings, transnational corporations and other economic entities), aimed at their observance of the rights of peasants enshrined in the Declaration. Such measures include the need to protect peasants from landlessness, forced migration, arbitrary or illegal evictions and relocations; ensure that no hazardous materials, substances or wastes are stored or disposed of on their land, and prevent risks arising from the development, transport, use, transfer or release of any living modified organisms;
- create a rural network of legal aid to peasants, especially landless people, youth, small producers and other rural workers in the sale of land, distribution of state lands, forest and water resources for agriculture and fisheries, support for peasant seed production and agrobiodiversity;
- introduce new mechanisms for monitoring the protection of peasants' rights in the process of introducing a free land market at the national and local levels, prepare regular public reports on the state of affairs in the field of respect for peasants' land rights and other rights set out in the Declaration;

- ensure the implementation of appropriate and effective measures to promote international cooperation in support of national efforts to realise the rights of peasants in accordance with the Declaration, including in partnership with relevant international and regional organisations and civil society, including organisations of peasants and other rural workers.

CONCLUSIONS

The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas is an important tool for synergistic cooperation between the state and peasants in protecting their legal rights to land and realising the public function of land ownership. According to the Declaration, the right to land of peasants and other people working in rural areas includes not only the right to sell land. In the international interpretation, it is the right to access, sustainable use, management of land and water bodies, coastal waters, fishery resources, pastures and forests to achieve a decent standard of living, to have a place to live in security, peace and dignity, to develop their culture.

In legal theory and practice, land law should be considered not only from a purely technical standpoint, but also on a systematic basis, as the right to land is a “portal” for the realization of other vital rights and freedoms of rural communities. Among them, the most important are the following human rights and freedoms, which directly depend on the right to land – the right to food, water, spatial livelihood; freedom from discrimination; protection against forced eviction and relocation; protection against the negative consequences of land use; real participation in the benefits of agrarian transformations; conservation and sustainable use of land resources, etc.

The Declaration summarises the main provisions of binding international human rights treaties, indicating the need for Ukraine to better protect the rights of peasants and other people working in rural areas, as wide recognition of the new norms set out in this document is crucial to promote inclusive human rights movement.

The primacy of human rights enshrined in the Declaration of the Rights of Peasants over other international instruments, including those governing trade, investment and intellectual property rights, is based on the priority given to human rights in international and national law under UN Charter – Article 1, paragraph 3, Articles 55, 56 and 103.

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ЗАГАЛЬНОДОЗВІЛЬНИЙ ТИП ЮРИДИЧНОГО РЕГУЛЮВАННЯ І ПРАКТИКА ВЕРХОВНОГО СУДУ В УКРАЇНІ: ОСОБЛИВОСТІ ОБ'ЄКТИВАЦІЇ

Анотація. У статті представлено можливі форми реалізації свободи людини у її стосунках із державою, зокрема, через юридичне регулювання загальнодозвільного типу. Мета статті полягає у дослідженні такого типу регулювання на матеріалах практики Верховного Суду в Україні, як одного з найдієвіших органів у сфері забезпечення належного балансу інтересів особи та держави, що формує методологічну основу механізму захисту прав людини. В якості методологічних підходів застосовано антропосоціальний – для встановлення сутнісної основи загальнодозвільного регулювання, що пов'язана з самовираженням особи в межах існуючого правопорядку, та аксіологічний – для забезпечення ціннісної природи права. Виявлено загальнодозвільну основу взаємодії особи та держави, яка обумовлюється законодавчим закріпленням їхніх стосунків за схемою «дозволено все, що не заборонене законом». Зазначену загальнодозвільну основу проаналізовано на базі актів Верховного Суду, що дозволило виявити пряму і непряму об'єктивацію загальних дозволів як основи досліджуваного типу регулювання. Запропоновано пряму об'єктивацію пов'язувати з фіксацією у постановках Верховного Суду повної загальнодозвільної конструкції («можна все, за винятком») або її елементів – основних обмежувачів загального дозволу (юридичних заборон і юридичних зобов'язань). Встановлено, що функцію об'єктиватора загального дозволу виконують і спеціальні юридичні дозволи, які адресуються фізичним особам і відображені поняттями «суб'єктивне право» і «законний інтерес». Непряма об'єктивація констатується за посередництвом спеціальних дозволів, які відображені конструкцією «дозволено прямо передбачене законом». У цьому аспекті набули подальшого розвитку питання дискреції держави

Ключові слова: юридичні дозволи, юридичні заборони, юридичні зобов'язування, законні інтереси, дискреція, Верховний Суд

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GENERAL TYPE OF LEGALREGULATION AND PRACTICE OF THE SUPREME COURT IN UKRAINE: FEATURES OF OBJECTIFICATION

Abstract. *The article presents possible forms of realisation of human freedom in its relations with the state, in particular, through legal regulation of the general permit type. The purpose of the article is to study this type of regulation based on the case law of the Supreme Court in Ukraine, as one of the most effective bodies in ensuring proper balance of interests of the individual and the state, which forms the methodological basis of human rights protection mechanism. The methodological approaches used are anthroposocial – to establish the essential basis of general regulatory regulation, which is associated with self-expression of the individual within the existing legal order, and axiological – to ensure the value nature of law. The general permissive basis of interaction between a person and the state has been identified, which is conditioned by the legislative consolidation of their relations under the scheme “everything that is not prohibited by law is allowed”. This general permitting basis was analysed on the basis of acts of the Supreme Court, which allowed to identify direct and indirect objectification of general permits as the basis of the studied type of regulation. It is proposed to link direct objectification with the fixation in the decisions of the Supreme Court of the full permit structure (“everything is possible except”) or its elements – the main limiters of the general permit (legal prohibitions and legal obligations). It is established that the function of the objectifier of general permission is performed by special legal permits, which are addressed to individuals and are reflected in the concepts of “subjective right” and “legitimate interest”. Indirect objectification is stated through special permits, which are reflected in the construction “allowed directly provided by law.” In this aspect, the issue of state discretion was further developed*

Keywords: *legal permits, legal prohibitions, legal obligations, legitimate interests, discretion, Supreme Court*

INTRODUCTION

The phenomenon of common life of people continues to excite scientists in various fields of knowledge to this day. Such coexistence, according to Aleida Asman, is fragile, constantly balancing on the brink of disaster, carefully drawn red lines washed away by waves of violence, and therefore need to work thoughtfully and carefully with ethical principles, seeking the initial support that will serve to build human relationships [1, p. 4]. According to the practice of the European Commission for Democracy through Law (Venice Commission), the legal field (and not only) as such a fulcrum currently considers human dignity [2] and human rights and freedoms, which allows building relationships between participants in public life as free and equal subjects, to provide them with a proper standard of living [3; 4], and also determines the scheme of relations between man and the state. This scheme is constantly in the field of view of legal science and practice and is studied mainly in two directions.

The first concerns the freedom of the individual and related social mechanisms, such as civil society, socially oriented economy, human rights and their limits [5-7].

The second is devoted to the restriction of such freedom, in connection with which the problem of the limits of state power, the possibilities of its discretion (discretionary powers) is constantly discussed [8-10]. In

particular, as German lawyers point out, the discretionary powers of the administration are as important in German law as in common law or in any legal system today, and are no longer considered incompatible with the notion of a just society. In their view, on the contrary, there is a growing awareness that such powers are necessary to achieve a just social order and turn the rule of law into a positive reality, although this does not mean that administrative bodies should have unlimited or unnecessary discretion and that the administration should be free from all restrictions on the exercise of such powers [11].

The scientific literature also shows that the courts have a leading role in this area, in particular: “autonomy of judges” is called “the main means of protection against poor law or erroneous legislation” [12, p. 52], and judicial control over the exercise of discretion by other bodies is considered the most effective guarantee against an unreasonable decision (i.e. a decision in which the person making it is dishonest, arbitrary, improper, based on irrelevant facts, used its discretionary powers) [13].

The above testifies to the constant search for optimal principles of interaction between the individual and the state. It should be noted that within the Romano-Germanic legal family such interaction (cooperation) was justified from the standpoint of the general type of legal regulation, given the reception of the Roman model of law, in which the legal status of the individual was determined by “everyone's natural ability to do he needs it, if it is not prohibited by force or law” [14, p. 311]. The essence of such regulation is manifested in ensuring the maximum freedom of the individual within the existing legal order, which, in turn, will serve the progress of democracy. As rightly noted by F. Fucuiama, the success of democracy depends not on the optimisation of its ideals, but on the balance – between individual freedom and effective, legitimate state power and legal institutions [15, p. 55].

The question of general legal regulation rose mainly in the context of the corresponding principle of law of the same name, especially in the 90s of XX century, in the transition of post-Soviet states from command-administrative, authoritarian-volitional methods of government to democratic mechanisms of government, from planned economy to market relations, when the institution of private property, personal initiative of citizens and their responsibility for their own destiny and well-being began to acquire leading importance in the worldview scale of values. First of all, socio-economic human rights have acquired a new color. At the same time, there were some reservations about possible “permissiveness”, which would lead to this principle in the weakening of economic, political, spiritual foundations of society and the state, and therefore this principle was not considered universal and fundamental, applicable to all cases of legal life [16; 17]. In this regard, the study of issues of general licensing by type of legal regulation has not received its proper further development.

However, today the active assertion of the rule of law as the rule of natural human rights, the rule of law, i.e. the law that meets the ideals of freedom, social justice and equality as a prohibition of state arbitrariness, the study of this type of regulation becomes very relevant [18]. Since the courts are the most effective bodies in the field of ensuring the proper balance of interests of the individual and the Ukrainian state, whose mission is to ensure respect for constitutional human rights and freedoms [19], such regulation, appropriate social communication in view of the European and Euro-Atlantic course of Ukraine, especially since the model law-abiding and law-enforcement practice of the highest judicial body acquires a source status in Ukraine.

The purpose of the article is to search for legal tools for the implementation of the main achievements of natural law in Ukraine, in particular the study of the permissive provision of human rights standards in the jurisdictional practice of the Supreme Court.

1. MATERIALS AND METHODS

The methodological basis of the study is a system of scientific approaches and methods of cognition. Among the research approaches used: *axiological* – to ensure the value nature of law, as a normative expression and regulator of individual freedom, free will in the framework of social communication; *anthroposocial* – to establish the essential basis of the studied type of regulation, which is associated with ensuring the maximum possible realization of individual freedom within the existing legal order, *dialectical* – to identify the general basis of interaction between person and state, clarify the substantive characteristics of general type of legal regulation.

Among the methods of cognition used *general and special-scientific*. From a number of general scientific it is possible to allocate: *structural-functional method* by means of which possible communications of the basic ways of legal regulation in the course of development of the general permission as a legal design were found out; *descriptive method*, which directed the research in the direction of identifying the characteristics, immanent properties of the studied type of legal regulation and the main components of the general design, i.e. legal prohibitions, legal obligations and legal permits, their specificity conditioned upon

classification varieties, for further generalisation, and this, in turn, contributed to the presentation of research results in a clearly defined logical sequence; *methods of qualitative and quantitative analysis*, which allowed to form an idea of the content and scope of the general permit as the basis of the relevant type of regulation, determined by the content and scope of relevant legal prohibitions, legal obligations and legal permits, to determine the limits of state discretion and freedom individual, private person, to characterise the relationship between subjective law and legally protected interest; *the method of synthesis* allowed solving the research tasks conditioned upon its application to primary sources, materials of international and Ukrainian normative and judicial practice on important socially resonant issues related to human rights protection, laid the foundation for activation in legal material; *the method of classification* facilitated the differentiation of special permits according to their addressees and functions for the implementation of legal regulation of the general permit type, as well as allowed distinguishing between direct and indirect forms of positivization of such regulation; *socio-deterministic method* has identified causal links between two types of legal regulation – general and special, and thus – between general legal permits and special legal permits, as the main pillars of these types of regulation, served to justify the discretion of other government agencies and subjects of power; *concrete-historical method* allowed to trace the evolution of philosophical and legal interpretation and normative recognition of general legal regulation; *The method of factor analysis* prompted a multifaceted study of possible options for direct and indirect forms of objectification of general permits, taking into account all conditions and means for formalizing such permits, which corresponds to the humanistic orientation of law, its essential orientation.

As special-scientific methods are used: *formal-legal method*, which was used to demonstrate the content and form of the subject, possible ways and specifics of expression of permissive legal phenomena in the national legislation of Ukraine, law enforcement and law enforcement activities of the highest judicial body of Ukraine; *comparative law*, which allowed comparing the legal regulation of certain aspects of the subject at international and national law levels, in particular in view of the jurisdictional practice of the European Court of Human Rights, the Supreme Court of Ukraine, the Constitutional Court of Ukraine, people in Ukraine to their international legal, including European standards, namely, in the field of implementation of the right to housing, the rights of road users, guaranteeing protection from arbitrariness of the state, working to strengthen general legal regulation in the relevant area of public relations. The applied methods allowed obtaining reliable and reasonable conclusions and results.

2. RESULTS AND DISCUSSION

2.1. General permissive basis of interaction between the individual and the state

The general permissive type of legal regulation is traditionally defined by the formula “*a person is allowed everything that is not prohibited by law*”. It was declared in the French Declaration of the Rights of Man and of the Citizen (Articles 4, 5), through the normative definition of freedom and its limits [20]. Subsequently, in the philosophical and legal doctrine, this idea-principle was substantiated in the context of solving the problem of the limits of state power. Such borders, as the representatives of liberalism emphasised, can be conditioned only by the need “to protect citizens from internal and external enemies”, “and no other goal should violate the freedoms of citizens” [21, p. 49].

With the development of the institute of human rights, the effect of the general permissive principle has shifted to the plane of “restriction of law”, in particular its legality, legitimacy, proportionality, the need for a democratic society. The above mostly reflects the content of general permits new structure provided by the relevant type of legal regulation. However, a more detailed study of the legal scheme of interaction between the individual and the state (on the example of Ukraine) allows tracing other manifestations of this type of regulation. Such a scheme is represented by traditional postulates for democratic societies.

1. *Man, his life and health, honor and dignity, inviolability and security are recognised as the highest social value* (Article 3) [22], which provides for the joint duty of the state and its citizens to show the necessary respect for each person [23]. At the same time, a person's *life is* associated with the right to protect him from unlawful encroachments (Article 27) [22] *by any means not prohibited by law* (Article 281) [24]; b) *the prohibition of “arbitrary deprivation of life”* (Article 27) [22], *the prohibition of “satisfying the request of an individual to terminate his life”* (Article 3) [24], the abolition of the death penalty [25; 26], and thus – b) with the right to human dignity (“the right to life and the right to human dignity determine the possibility of realisation of all other human rights and can be neither restricted nor abolished” (paragraph 6) [27]); d) with the duty of courts in cases of crimes against life and health of a person “to establish the guilt of defendants and assign them the *necessary and sufficient* punishment for their correction and prevention of new crimes” [28] – which traces the consistent assertion of absolute value prohibition of discretion to terminate it.

Health is defined in the broadest sense as a state of complete physical, mental and social well-being [29]. Understanding of *dignity* is explained by the recognition of the nature of the individual as a unique biopsychosocial value, and *honor* – a positive social assessment of the person in the eyes of others, based on the conformity of his actions to conventional notions of good and evil [30]. *The inviolability of the person* is identified primarily with the right to liberty and security of person (Article 29) [22], which allows stating one of the options for a narrow understanding of freedom in the legislation of Ukraine. The security of a *person* is the state of his protection from the risk of harm) [31]. At the same time, they discuss the *security of freedom and human development* [32, p. 34], which becomes methodologically decisive for the construction of “national interests of Ukraine” [33].

2. *Human and civil rights and freedoms are the main criteria of the state*, which determine the content of laws and other regulations (paragraph 1) [34]. The *openness* of the constitutional list of rights and freedoms and *the prohibition of reducing* their content and scope are sanctioned (Article 22) [22].

3. *Man and the state are responsible to each other*, which is *concretised* by the positive and negative responsibilities of the state [35], and the responsibilities of each person to society [36].

4. *The basic principles of domestic policy of the state*, among others, include: freedom and creative self-realization [37]. At the same time, constitutional practice declares a broad understanding of freedom as an inalienable and inalienable constitutional human right, which provides the opportunity to choose their behaviour for free and comprehensive development, act independently according to their own decisions and intentions, set priorities, do everything not prohibited by law, which also means that a person is free in his activities from outside interference, except for restrictions imposed by law [38].

As can be seen from the analysis of Ukrainian legislation, freedom in this – broad – sense is guaranteed, and therefore – and indirectly objectified by the tasks, principles and basic institutions of various branches of law, for example:

– *civil* – through *inadmissibility of arbitrary interference* in the sphere of personal life, *deprivation of property rights*, except in cases provided by the legislation of Ukraine; *freedom of contract*, business activities *that are not prohibited by law*; *judicial protection of civil rights and interests* (Article 3) [24];

– *family* – through the regulation of family relations *only insofar as it is permissible and possible* in terms of the interests of their participants and society, *considering* the right to privacy of their participants, their right to personal liberty and *inadmissibility of arbitrary interference* in family life, based on of justice, good faith and reasonableness, in accordance with the moral principles of society [39], associated with the rules of conduct established in society based on traditional spiritual and cultural values, ideas of goodness, honor, dignity, civic duty, conscience, justice [40].

5. *The rule of law is based on the principles according to which no one can be forced to do what is not provided by law* (Article 19) [22].

These guidelines for social interaction are aimed at maximizing the freedom of the individual, in particular in its relations with the state. As you can see, this is achieved through objectification:

1) appropriate behavioral model: “everything is possible, not prohibited by law”;

2) legal tools for its provision. For the state, these are various “deterrents” from interfering with a person's freedom, for a person, these are both appropriate opportunities and appropriate restrictions on freedom. In both cases, they are reflected through the main methods of legal regulation. Since *its general permit type* is defined as one *that is based on a combination of general legal permission in the form of recognition of the right with the establishment of certain restrictions (exceptions) through legal prohibitions* [41, p. 140; 42, p. 99], then, accordingly, we will consider legal permits and legal prohibitions as the main legal means of mediating general permissive behaviour. However, only the analysis of legislation in combination with the practice of its interpretation and application from a given angle allows you to comprehensively track how the general permit is formed, which is the basis of this type of regulation, identify possible options for its reflection in legal material identifies possible forms of *objectification of general resolution – direct and indirect*.

We substantiate this with specific examples. The permissive ideology was declared in the Resolution of the Plenum of the Supreme Court of Ukraine “On the Application of the Constitution of Ukraine in the Administration of Justice” [34]. The Resolution emphasised the establishment of the principle of the rule of law proclaimed by the Constitution of Ukraine, and the constitutional rights and freedoms of man and citizen were recognised as directly applicable, determining the content and direction of legislative and executive bodies, local governments and protection of justice. Also, the focus of judicial activity on the protection of constitutional rights and freedoms *from any encroachment* through timely and quality consideration of specific cases, the inexhaustibility of the constitutional list of rights and freedoms (paragraph 1) [34]. Thus, the recognition of the *originality* of constitutional rights and freedoms of man and citizen in Ukraine (in

particular, as a guide and limiter of the legislature), *openness of their list and* guarantee by the court from *any encroachment* is fully consistent with the permissive idea.

Analysis of the activities of the Supreme Court in the judicial system of Ukraine after the reform of 2016 allows stating the consistent implementation of the outlined legal values. Thus, in the decisions of the Supreme Court it is possible to trace the direct use of the general permissive construction – directly or indirectly.

2.2. “Everything is allowed, except” as a model of direct embodiment of the general permit design

“Everything is allowed, except” as a model of direct implementation of the general permit structure in the practice of the Supreme Court in Ukraine: 1) is associated with the degree of formalisation of law “if not provided, then...”, “in all cases unless otherwise specified” etc); 2) used when it comes to the realisation of individual rights, features of contractual regulation, the separation of private and public interest.

First of all, it concerns the issue of *appealing in court against decisions, actions or omissions of public authorities, their officials and officials*. Thus, in accordance with Part 3 of Article 392 of the Code of Criminal Procedure of Ukraine, decisions of the investigating judge may be appealed in the cases provided for by this Code. There are no appeals against the decision of the investigating judge to grant permission for an unscheduled inspection. However, based on the conclusion of the Constitutional Court of Ukraine that an appeal against a court decision *is possible in all cases, except when the law prohibits such an appeal* (paragraph 2, item 3.2 [43]), the Supreme Court ruled that the appellate courts are obliged to open appellate proceedings on appeals against the above-mentioned decisions of investigative judges [44].

This Resolution is important in view of the coherence of the positions of the Supreme Court and the Constitutional Court of Ukraine, and even more so in terms of strengthening the guarantee of implementation of decisions of the body of constitutional jurisdiction. It is a question of criminal punishment for intentional non-fulfillment or non-observance by the official of acts of the Constitutional Court of Ukraine (art. 382) [45]; proclamation by the Constitutional Court of Ukraine of its legal positions as direct regulators of public relations [46].

Another example of the general permissive right to appeal is the position of the Supreme Court, according to which “any member of the territorial community whose rights have been violated has the right to appeal the relevant action or decision of the subject of power in court, as violation of local rights self-government inevitably leads to a violation of the rights of every resident of the municipality” [47].

A similar (permissive) approach is used to guarantee *access to justice*. In clarifying the issue of the credentials of the representative of the candidate for President of Ukraine, it was noted that “*it is necessary to avoid too formal attitude to the requirements of the law, as access to justice must be not only factual but also real*”, and the supra-world formalism under the hour of decision nutrition should accept the call to declare also complaint violations of the right to a fair judge's defense [48].

We trace the general permit construction in the Resolutions of the Grand Chamber on:

1) *realisation of the right to professional legal assistance*. It is noted that the inclusion in the costs of legal aid services for the preparation and submission of documents *not expressly provided by the Civil Procedure Code of Ukraine, does not indicate* an artificial increase in the work of a lawyer by submitting such documents. Based on the circumstances of the case, the lawyer independently determines the strategy of protection of the interests of his client and the algorithm of actions to meet the requirements of the latter and his best protection [49];

2) *application of contractual regulation*: provided that if the law and the contract regulate differently the issue of foreclosure on the subject of the mortgage, *the requirements of the contract apply, if such do not contradict the law or are not prohibited by law* [44];

3) *jurisdiction of the dispute*: determined based on Art. 19 of the Civil Procedure Code of Ukraine criteria for delimitation of cases, the Grand Chamber summarised that in civil proceedings *can be considered any case in which at least one party is a natural person, if their decision is not attributed to other types of proceedings* [50].

In the context of the case under investigation, it is important for the European Court of Human Rights to conclude that proceedings classified as part of “public law” under national law may fall within the “civil” part of Article 6 if the outcome of the case is decisive for private rights and responsibilities when it comes to, for example, the sale of land, the management of a private clinic, property interests, the granting of administrative permission in terms of professional practice or a license to serve alcoholic beverages [51-53]. And more and more state intervention in the sphere of everyday life, for example, in the field of social protection, requires the European Court of Human Rights to analyse the characteristics of public and private law before concluding a classification of the claimed right as “civil” [54-56].

2.3. Legal prohibitions and legal obligations as a means of direct objectification of the general permit type of legal regulation

Legal prohibitions are passive legal obligations that are implemented in the form of compliance with relevant legal norms [42, p. 99]. As exceptions to the general permit, such prohibitions define the scope of legal freedom of the individual, serve as “building material” of the general permit type of legal regulation. The study of the nature of such legal prohibitions on the materials of the practice of their interpretation and application by the Supreme Court allows tracing the effect of the whole mechanism of general legal regulation, and hence – the specific features of its external consolidation. Here it is necessary to consider a number of factors determining the following study: 1) the sources of prohibitions, which are only prohibitive rules of law; 2) features of dissemination interpretation; 3) the task of the court in Ukraine.

First of all, we should pay attention to the example of the Supreme Court's *approval of a legal ban* (as a general restriction): “It’s more than the fence of the subject of the state at the night time to decommission the vigilant activity in the uninhabited accommodation, put into a rich apartment booth, in an effective way, to defend the right of the bagger’s booth to win the wet life and calm” [57]. This example is also important in view of ensuring the balance of private interests of different entities that simultaneously exercise their freedom, i.e. there is competition between general permits – the business entity and the occupant of the house.

The Supreme Court also determines *the content and scope of the ban*. An illustration here is the legal position on determining the *content and scope of the ban* on the alienation of agricultural land in a way other than “share-by-share” [58]. In this context, we consider the Resolution, which contains an interpretation of the prohibitions provided by the Rules of the Road [59]. The position on the effect of the sign “stopping is prohibited” on the whole road (the side of the road where the sign is installed), the element of which is the sidewalk, led to the conclusion that the plaintiff's actions were to leave the car on the sidewalk in the area of the road sign 3.34 “Stopping is prohibited” constitute the objective side of the administrative offense provided for in part one of Article 122 of the Code of Ukraine on Administrative Offenses [60].

Ensuring freedom of campaigning in the election of the President of Ukraine, the Supreme Court pointed to the rebuttal of the plaintiff's representative (according to which the President of Ukraine cannot be a candidate for President of Ukraine and perform his functions or powers) and stressed that “campaigning does not include official notification during the election process about the actions of candidates for President of Ukraine related to the performance of their official (official) powers under the Constitution or laws of Ukraine” [48], which defended the general type of legal regulation of public relations by *establishing the content and scope of the ban*.

In the practice of the Supreme Court there is an indication of the *specific features of the application of legal prohibitions*, for example, as restrictions: 1) business activity: “To qualify the actions of a person under Art. 213 of the Criminal code of Ukraine it is necessary to establish, whether activity which is carried out by the person, business or other economic, whether it is systematic” [61]; 2) the right to privacy: “In deciding on the application of a restrictive provision, the court... must assess the proportionality of the service of the rights and freedoms of the person, considering that these measures are related to the wrongful conduct of such person.”

Equally important is the Supreme Court's *finding* that there is *no prohibition*, which automatically leads to an increase in freedom and, consequently, the recognition of a generally permissible type of regulation in this area of public relations: “The law does not prohibit the agreement provided by Articles 407-412 of the Civil Code of Ukraine and Article 102-1 of the Land Code of Ukraine” [63]; “Current legislation does not establish prohibitions and conditions for the use of the owner of a residential building, apartment for business activities, trade activities” [64]. In this context, it is important to mention the Resolution of the Grand Chamber of the Supreme Court, which declares the norm unconstitutional to decriminalise the act, namely, the official statement of inconsistency with the Constitution of Ukraine annuls its legal force, what is behind the change is equal to the inclusion of such a norm on the legislator's level [65].

Legal obligations, which are an active form of a person's legal obligation, also perform the functions of a general permit limiter. The point is that the limits of a person's legal freedom are set not only by prohibitive principles and norms of law, but also by principles and norms of a binding nature.

This broad approach to understanding the limiters of general permission is quite consistent with one of the proposed in legal doctrine definitions of “type of legal regulation”, namely, as the most important type of combinations (combinations) of basic methods of such regulation – prohibitions, obligations, permits [66, p. 308].

In the practice of the Supreme Court we find examples:

– *approval of a legal obligation*, and at the same time an example of protection of the general permit type of legal regulation. This is the conclusion on setting the amount of monthly installments for the

maintenance of an apartment building: “given the lack of an imperative rule on the establishment of the same amount of contribution for owners of apartments and non-residential premises, the decision of the general meeting of the association of co-owners of an apartment building to establish a contribution to the owners of non-residential premises in a larger amount than to the owners of apartments, does not contradict the law” [67];

– *determining the content and scope of legal obligations* as restrictions on legal freedom. In particular, this is a legal position according to which, although a pet is not a source of increased danger, its owner must fully compensate the damage caused to another person or his property in accordance with Article 12 of the Law of Ukraine “On Protection of Animals from Cruelty” [68]. In the context of determining the content and scope of the legal obligation as a limiter of the general permit, we assess the position of the Supreme Court that enforcement of the obligation to submit an electronic declaration of a person authorized to perform state or local government functions alternatives to the right to choose to file such a declaration by a believer violates his rights and freedoms [69].

An example of *the absence of legal obligation* is the legal position on the lack of legal obligation of the new apartment owner to pay the debts of previous owners (tenants) of the apartment for their previously received housing and communal services, unless provided by the contract of sale [70].

2.4. *Special permits as a means of objectification of the general permit type of legal regulation*

Special permits as a means of indirect objectification of the general permit type of legal regulation are associated with providing subjects with opportunities to take certain positive actions or refrain from them. Such permits form the basis of another type of legal regulation, which is reflected in the formula: “Only what is expressly permitted by law is allowed”, which means that they are logically related to general prohibitions and are exceptions – limiters of the general prohibition. The analysis of the described legal permits in the practice of the Supreme Court allows tracing the trends in the implementation of permissive ideas, among which the following.

Determining the content and scope of individual legal permits “works”, on the one hand, to narrow the capacity of subjects of power and other entities that fall within the scope of special legal regulation, and on the other – to expand the legal freedom of the individual, and therefore – and the general type of legal regulation.

For example, it is possible to observe restrictions of the special permission for termination of the employment contract at the initiative of the employer with separate categories of workers. This is a Resolution stating that “the publication of a work of art by a researcher and pedagogical worker, regardless of its content and individual perception of this work by others, cannot be considered an immoral misdemeanor and therefore cannot be grounds for his dismissal under paragraph 3 of part one. Article 41 of the Labour Code of Ukraine” [71]. Another example of narrowing the special permit is the legal position that “the presence of an act of examination by a commission of psychiatrists on signs of mental disorder in a patient, in the absence of other relevant and acceptable evidence of appropriate health, is insufficient to decide on involuntary hospitalisation of such a person to a psychiatric institution without his or her informed consent” [72].

No less important in the context of special permits is the problem of state discretion (discretionary powers). The Constitutional Court of Ukraine connects them primarily with the principle of legal certainty as an important component of the rule of law, which “does not preclude the recognition of public authority certain discretionary powers in decision-making, but in this case there should be a mechanism to prevent abuse” [73]. Such considerations of the Constitutional Court of Ukraine are fully consistent with international legal standards, the sources of which are, in particular, the Report on the Rule of Law approved by the European Commission for Democracy through Law (paragraphs 41, 45) [74]. The conclusion that the constitutional principle of the rule of law requires legislative consolidation of the mechanism to prevent arbitrary interference of public authorities in the exercise of their discretionary powers in the rights and freedoms of the individual [73], corresponds to paragraph 52 of the Report.

The European Court of Human Rights has not overlooked the issue of the exercise of discretionary powers. The Decisions “Chorherr v. Austria”, “Kokkinakis v. Greece” note that “Contracting States enjoy a degree of discretion in determining the existence and limits of necessary intervention, but it is inextricably linked to European oversight of both law and law” [75], “adopted by independent courts. The task of the European Court of Human Rights is to determine whether a measure applied at national level is justified in principle and whether it is proportionate to a legitimate aim” [76]. As you can see, the European Court of Human Rights draws attention to the limits of state power in carrying out all types of legal activities of the state, including legislative.

The Supreme Court also examined state discretion. The “Scientific Opinion on the limits of discretion of the subject of power and judicial control over its implementation” sets out a number of theoretical provisions that may claim the role of doctrinal, concerning the nature of discretion as: 1) power not related to the concept

“Subjective right”, and therefore – not applicable to individuals, but only to the relevant competent authorities; 2) “legal obligation”, which can and/or should be realised in the public interest. It consists in choosing a certain action or omission, and in choosing a solution or action among the options that are directly or indirectly enshrined in law. The formal basis of such authority is a relatively defined rule of law (alternative rule or rule with evaluative concepts) [77].

For our study, the considerations in the Conclusion constitute an important methodological basis, as they allow: 1) to distinguish the discretion of a person within the general resolution: “can be directly prohibited” (outlined by relevant legal prohibitions and legal obligations), powers under the general prohibition: “only the permitted is permissible” (although this permission will be relatively definite); 2) to analyse the practice of the Supreme Court from the standpoint of explaining valuation concepts as formal grounds for discretion and, consequently, proper exercise of such powers in accordance with the requirements of ensuring the content of constitutional rights and freedoms of a person, which is a kind of protection (objectification) of the general permit type of legal regulation. As an illustration, we can mention the provisions of the Supreme Court's rulings on the content of the concept of “sincere repentance” [78], “pardon” [79], the principles of less lenient punishment than provided by law [80], the definition of “abuse of procedural rights” [81].

It should be noted that the Supreme Court, exploring the limits of discretionary powers, uses the concept of “legally protected interest”, and at the same time relies on the relevant decision of the Constitutional Court of Ukraine. Interestingly, this Decision establishes a methodology for understanding both “subjective law” and “related interest” *as permits*. But the first, according to the Constitutional Court of Ukraine, is a special permit, i.e. a permit reflected in the well-known formula: “All that is provided by law is allowed”, and the second – a simple permit, i.e. a permit to which no less well-known rule can be applied: “Everything that is not prohibited by law is allowed” [82]. Thus, we get for analysis another kind of special permission, namely, in the form of subjective rights of the person, including the category of “legitimate interest” as the embodiment of the general permissive idea. When analysing special permits, it is necessary to keep in mind their differentiation according to the addressee (subjects of power; subjects covered by the rule “allowed only expressly provided by law”; individuals, reflected in the concept of subjective law), as this will determine their ability to provide a general type of legal regulation.

In the case law of the Supreme Court, there are examples of *approval* (with subsequent development) of such *special permits*, such as: within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and therefore its subsequent eviction from the relevant housing is an unjustified interference in the private sphere, a violation of the right to respect for housing [83]. As you can see, here the understanding of the concept of “housing” is expanded, and thus – the scope of legal freedom of the individual. In its position on this issue, the Supreme Court facilitated the implementation of the European standard of housing law set out in the judgment of the European Court of Human Rights in “Chapman v. The United Kingdom” [84], and also strengthened the general legal type of legal regulation in a certain area of public relations.

One can also trace the Supreme Court's *finding* that *special permits are not required*, as a result of which it directly defends the general permit type of legal regulation. Thus, defending the general permit regime in the field of public relations introduced by the Civil Code of Ukraine under part two of Article 383 “Rights of the owner of a house, apartment”, the Supreme Court pointed out that “the person's redevelopment of the apartment owned by him, which does not involve interference in the structural elements of the building, does not require obtaining appropriate permits for such work” [64].

Otherwise, the Supreme Court ruled that there was no special permit, which should signal the existence of an obstacle to the exercise of a person's right, the realisation of his legitimate expectations: “The legislation of Ukraine does not contain a special procedure for compensation for damage to non-residential real estate damaged during the anti-terrorist operation, therefore, Article 19 of the Law of Ukraine “On Combating Terrorism” does not create a legitimate expectation of receiving such compensation from the State of Ukraine, regardless of the territory – controlled or uncontrolled Ukraine – the act took place” [85].

The category of “legitimate interest” is understood by the Supreme Court in view of its “permissive interpretation” by a body of constitutional jurisdiction. In addition, the Supreme Court formulated the definition of interest as an object of judicial protection in administrative proceedings, which in addition to the general features of interest, must contain special, defined by the Code of Administrative Procedure of Ukraine [86]. If the first group of features is necessary for the assignment of a category to the “interest”, the second – allows qualifying such an interest as an object of judicial protection in administrative proceedings.

It is emphasised that since it is a question of restricting the right of access to justice, the obviousness of the plaintiff's lack of legitimate interest must be beyond reasonable doubt. If there is such doubt, it must be

interpreted in favour of the plaintiff, and therefore the court must consider the case on the merits. This issue should be decided, first of all, by the court of first instance, which has a wide discretion [86]. The above illustrates that the Supreme Court has declared an understanding of the legitimate interest in the context of the general permit structure, as well as the scope of the court's discretion. This understanding of the legitimate interest is consistently reproduced and developed by the Supreme Court in its further work [87].

CONCLUSIONS

From the above it can be seen that the general permit structure (“everything is allowed, not prohibited by law”) is conditioned by the legislative enshrinement of the basic principles of building human-state relations and potentially forms the methodological basis of state human rights and freedoms. In the practice of the Supreme Court as a component of the system of the most effective guarantees of human rights in Ukraine, such a construction is associated with certain features of the formalisation of law and is objectified:

– *directly* (with the help of legal tools to mediate the general permit as a basis for the relevant type of regulation (we are talking about the implementation of certain rights, in particular, the right to protection, features of contractual regulation, separation of private and public interest) and/or its limiters – legal prohibitions and legal obligations);

– *indirectly* (through special permits, the addressees of which are entities that are “obliged to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine”).

As the practice of the Supreme Court demonstrates, the following issues are of great methodological importance for the study of the legal implementation of general permits:

1) *discretionary powers*, which allows: a) distinguishing the discretion of the person within the general permit from the discretion of the subject of power within the general prohibition; b) analysing the legal interpretation of Ukraine in terms of explaining valuation concepts as formal grounds for discretion, and hence the proper exercise of such powers, in accordance with the requirements of ensuring the content of constitutional rights and freedoms, which is a kind of protection of general legal regulation;

2) *special permits related to the subjective right of a person* (from the standpoint of the general permissive type of legal regulation, the degree of possible – from the point of view of law – a person's behaviour seems to be determined not only by the negative aspect (“everything but”), but also by the positive aspect (“everything, namely”). Accordingly, such special permits are able to “strengthen”, guarantee the permissive nature of human rights, promote its establishment. Since this is a sphere of realisation of human rights and freedoms, such permits cannot be essentially within the framework of the construction of a general prohibition, on the contrary, they must “function” in the area of a general permit;

3) *legitimate interests*, which, on the one hand, serves as a direct form of implementation of the general permit, and on the other – determines the limits of state discretion.

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ВИЗНАЧЕННЯ ПРАВОВИХ КАТЕГОРІЙ «ПУБЛІЧНА ВЛАДА», «ПУБЛІЧНА АДМІНІСТРАЦІЯ» ТА «ПУБЛІЧНЕ АДМІНІСТРУВАННЯ» В СУЧАСНІЙ ДОКТРИНІ АДМІНІСТРАТИВНОГО ПРАВА

Анотація. У статті досліджується сутність публічної влади, публічної адміністрації та публічного адміністрування як правових категорій, визначається їх співвідношення як основи для формування оптимальної моделі реалізації публічної влади в Україні відповідно до демократичних принципів державотворення, що є актуальним і сучасних умовах, враховуючи необхідність приведення організації роботи органів публічної влади до європейських стандартів у світлі євроінтеграційних прагнень України, її переходу до європейської цивілізаційної моделі функціонування публічно-правових інститутів. Метою цього дослідження було проаналізувати сутність понять «публічна влада», «публічна адміністрація» та «публічне адміністрування», а також дослідити співвідношення цих правових категорій у сучасній адміністративно-правовій доктрині. Для досягнення цієї мети у дослідженні були використані загальнофілософські, загальнонаукові методи наукового пізнання (діалектичний, аналізу, абстракції, системний), конкретні методи наукового пізнання (порівняльно-правовий (компаративний), історико-правовий), а також спеціально-юридичні методи (формально-правовий, системно-структурний, діяльнісний). У результаті проведеного дослідження сутності правових категорій «публічна влада», «публічна адміністрація» та «публічне адміністрування» запропоновано власні дефініції цих правових категорій і зроблено висновок, що категорія «публічна адміністрація» визначає, яким чином будується публічна влада, які суб'єкти наділені повноваженнями щодо її реалізації, тоді як категорія «публічне адміністрування» відображає змістовну частину публічної влади, тобто форми та порядок її реалізації

Ключові слова: види публічної влади, концепції сутності публічної адміністрації, здійснення публічного адміністрування, публічний інтерес, суб'єкти публічної влади, реалізація публічної влади

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DEFINITION LEGAL CATEGORIES “PUBLIC AUTHORITY”, “PUBLIC ADMINISTRATION” AND “PUBLIC ADMINISTRATING” IN THE MODERN DOCTRINE OF ADMINISTRATIVE LAW

Abstract. *The article examines the essence of public authority, public administration and public administrating as legal categories, defines their relationship as a basis for forming an optimal model of public authority in Ukraine in accordance with democratic principles of state formation, which is relevant in modern conditions, given the need to bring the organization of public authorities to European standards in light of Ukraine's European integration aspirations, its transition to a European civilizational model of public law institutions. The purpose of this study was to analyse the essence of the concepts of “public authority”, “public administration” and “public administrating”, and to investigate the relationship between these legal categories in modern administrative law. To achieve this goal, the study used general philosophical, general scientific methods of scientific knowledge (dialectical, analysis, abstraction, system), specific methods of scientific knowledge (comparative law (comparative), historical law), and special legal methods (formal legal, system-structural, activity). As a result of the study of the essence of the legal categories “public authority”, “public administration” and “public administrating” proposed their own definitions of these legal categories and concluded that the category “public administration” determines how to build public authority, which entities are endowed powers for its implementation, while the category of “public administrating” reflects the substantive part of public authority, i.e. the form and procedure for its implementation*

Keywords: *types of public power, concepts of essence of public administration, implementation of public administration, public interest, subjects of public power, realisation of public power*

INTRODUCTION

Ukraine's path to the European community, its transition to the European civilisation model of public law institutions, the ongoing reform processes encourage the reconsideration of the role of the state in regulating and implementing social relations, forming a politically organised society, building a legal, democratic European state, in which the person, his life and health, inviolability and security are recognised as the highest social value and citizens can freely and actively participate in public law matters. This requires a review of the relationship between the state and citizens, improving the organisation of public authorities, bringing it to European standards.

For the first time, the need to reform the system of public power was identified in the Concept of Administrative Reform in Ukraine, which was approved by the Decree of the President of Ukraine in 1998 [1]. However, this Concept had a number of shortcomings, in particular, it did not contain clear provisions on the division of powers between executive bodies vertically, did not enshrine the need for transparency in their decision-making processes, and therefore did not become a conceptual framework for solving all problems.

During 1999-2013, several projects were developed concepts of reforming public authorities, which provided for different options for the territorial organisation of public authorities and the principles of relations between such bodies on a horizontal and vertical basis. In particular, the main directions of public administration reform were set out quite clearly in the Concept of Public Administration Reform, which, in fact, officially used the term “public administration” [2]. Since 2015, the Ukrainian Parliament and the Government, with the participation of Ukrainian and European experts, have adopted a number of regulations

aimed at intensifying public administration reform in Ukraine. Such acts include the new Law on Civil Service [3] and bylaws aimed at its implementation, the Concept of the introduction of positions of reform specialists [4]; the concept of optimising the system of central executive bodies [5].

The importance of adopting the Public Administration Reform Strategy until 2021 should be pointed out separately [6]. This Strategy has been developed in accordance with European standards of good administration on the transformation of the system of public administration [6]. In addition, on July 21, 2021, the Cabinet of Ministers of Ukraine adopted an order “Some issues of public administration reform in Ukraine”, which approved the Strategy for Public Administration Reform of Ukraine for 2022-2025 and approved an action plan for its implementation. The main goal of this Strategy is to build in Ukraine a capable service and digital state that protects the interests of citizens based on European standards and experience [7]. Important areas of public reform in Ukraine are also identified in the Council of Europe's Action Plans for Ukraine, which have been implemented since 2005. The Council of Europe Action Plan for Ukraine for 2018-2021 is currently in force [8], which has been extended until the end of 2022.

Thus, modern Ukrainian administrative law is characterised not only by the adoption of new regulations, but also the introduction into legal circulation of new categories that are inherent in the administrative law of the European standard. The concept of “public authority” is becoming more common, and the concept of “public administration” is being replaced by the concept of “public administration” and “public administration” in administrative law doctrine and practice. Of course, these terms are interrelated. However, the question arises: how identical is their content?

In the Western administrative and legal doctrine, a large number of scholars have paid attention to the organization and exercise of public power, the essence of the concepts of “public administration” and “public administration”. In particular T.B. Jørgensen, B. Bozeman analyzed the legal and social nature of the public interest [9, p. 356-357]; P. Panagiotopoulos, B. Kliavink, A. Cordella studied the issues of public interest in the functioning of digital government [10]; J. Alford, K. Geuijen, S. Douglas, P. Hart devoted his research to the analysis of the essence of public administration and the role of individual subjects of public administration in government [11, p. 8]; C. Conteh, B. Harding, A. Pirannejad, M. Janssen, J. Rezaei studied the issue of ensuring the public interest at different levels of public administration [12, p. 5; 13]; The works of L. Kuitert are devoted to the problems of public administration in certain spheres of state and public life. L. Kuitert, L. Volker, M. Hermans, S. Douglas, A. Meijer, I. Criado, R. Gil-Garcia [14, p. 260-261; 15, p. 947-949; 16, p. 440]; M.B.S. Bojang in his research, focused on the problems of public administration in the public sector, analysis of the relationship between “public authority” and “state authority” [17, p. 5]. The work of these scholars is dominated by the principle of human-centeredness and mostly analyzes the issues of public values in public administration, considers the problems of public authority from the standpoint of public interests, while issues that are the subject of this study are touched upon only briefly.

In Ukrainian administrative and legal science to the problem essence of the categories “public authority”, “public administration” and “public administrating” many scientists also turned their attention to scientific research. For instance, V. Averianov analysed the essence of state power as a type of public power [18, p. 1-14]. A. Bukhanevych emphasised the role of public administration in the implementation of public control in civil society [19, p. 47-49]. O. Lialiuk defined the concept of public power and the main elements of its implementation [20, p. 84]. The work of T. Carabin is devoted to the issue of the powers of public administration [21, p. 8]. T. Carabin [21, p. 8]. S. Kovalchuk investigated the problems of defining the concept of public authority in the theory of state and law [22, p. 50-51]. V. Kolpakov paid considerable attention to the analysis of the legal nature of public administration [23, p. 28-31; 24, p. 13, 14], the analysis of the essence of public administration is devoted to the work of V. Malynovskyi, who defined the content of this category as a set of state and non-state subjects of public power [25, p. 168-169; 26, p. 18], and R. Melnyk [27, p. 125], I. Paterylo [28, p. 84] and A. Prykhodko [29, p. 71-73]. E. Taran thoroughly analysed the problems of the relationship between the concepts of “public authority”, “public administration” and “public administrating” in the modern conditions of state and legal development of Ukraine [30, p. 34-35]. However, the subject of research of Ukrainian jurists were mainly some issues of organisation and implementation of public authority, the nature and structure of public administration, understanding the content of public administrating. While systematic analysis of the relationship between these legal categories in the Ukrainian legal doctrine was not paid attention.

That is why the *purpose of the article* is analysis of the essence of the concepts of “public authority”, “public administration” and “public administrating”, and the study of the relationship of these legal categories in modern administrative and legal doctrine.

1. MATERIALS AND METHODS

The methodological basis for the study was system of methods of scientific cognition, including general philosophical, general scientific methods (dialectical, analysis, abstraction, system), specific methods of scientific cognition used in many branches of science (comparative law (comparative), historical law), and special legal methods (formal-legal, system-structural, activity), etc. General philosophical methods of cognition were used by the authors of this study at all stages of the cognitive process. The dialectical method was used in the analysis of doctrinal approaches to the definition of “public authority”, “public administration” and “public administrating”.

The use of the method of analysis in the study helped to determine the characteristics of public authority, analytical interpretation allowed to identify the components of this concept, which are state power, local government and direct democracy. In particular, to substantiate the thesis that, despite the presence of many common features between state and public authorities, the subjective composition of the latter is much broader. Using the method of abstraction, the authors define the categories of “public authority”, “public administration” and “public administrating”, based on the doctrinal achievements of legal scholars to draw a general conclusion about the characteristics of each of these concepts.

The systematic method was used in the analysis of the essence of public authority, its individual elements. Means of a systematic approach have become an important component of the general methodological basis of the study and contributed to a deep understanding of the structural and functional content of public power, the relationship of its components, namely state power, direct democracy and local self-government, which are designed to promote the public interest, and also allowed to define public power as the ability of individuals and legal entities, bodies and officials to influence public and public policy issues.

The comparative legal (comparative) method was used in the research process. This method was used in the analysis of doctrinal approaches to the concept of public administration and public administration in Western and Ukrainian administrative and legal doctrines, in particular, on organizational and functional concepts of public administration, identifying differences in approaches of foreign and Ukrainian scholars to understand public administration. The historical method of cognition was used by the authors in highlighting the chronological sequence of development of the legal framework for reforming the organization and implementation of public authorities in Ukraine. This identified the absence of the terms “public administration” and “public administration” in national legal acts, in contrast to foreign legislation, which helped to substantiate the relevance of the research topic. The method of formal logic became the basis for constructing their own definitions of the studied categories, i.e. in giving their own definitions of public authority, public administration and public administration, and the implementation of the substantive characteristics of these administrative and legal institutions.

Special legal methods were also used, in particular, formal-legal and system-structural methods were used in the development and research of the terminology of this article, namely in the study of the content of the categories “public authority”, “public administration” and “public administrating” definition of the specified legal categories. In the context of application of the activity method in the research the phenomenon of public administration is determined, which is related to its functional orientation and reflects the substantive part of public power, i.e. the form and procedure of its implementation. This approach to methodology allowed to present the author's vision of the essence of public authority, to define its components, to analyse doctrinal approaches to understanding the essence of “public administration” and “public administrating”, to distinguish these legal categories, to obtain scientifically sound results, to make reasonable and effective conclusions on the relationship between the concepts of “public authority”, “public administration” and “public administrating” in the modern doctrine of administrative law.

The source base of the study was the work of scholars in the field of administrative law and public administration, which highlight the content and features of the concepts of “public authority”, “public administration” and “public administrating”.

2. RESULTS AND DISCUSSION

2.1. *Concepts and types of public authority*

The organised functioning of society is ensured by the government. Thus, methods and forms of realisation of such power, its sources can be various. In the case where the source of power is the people, such power is by its origin public, i.e. public. The public nature of such power is manifested in the fact that the very ability to dominate is the result of the consolidation of individual powers of each member of society and their transfer to a new public entity. By creating a public entity, society determines the subject of its jurisdiction and transfers

to it part of its powers to address these issues. Thus, by its nature, public authority is derived from the will of each person – a member of an organised community. In this case, a person is simultaneously in two aspects: on the one hand, as part of the source of public power, the entity that delegates its powers; and on the other – as an object to which public power will later be directed [31, p. 8].

It should be noted that, despite the fact that the concept of public authority is well established in the legal conceptual apparatus, but it is rarely analysed in the scientific literature and therefore today, unfortunately, in administrative law doctrine there is no single approach to the essence and content of this category. In the Legal Encyclopedia, public power is defined as socio-political power, democracy, and its main types are, respectively – the power of the people as direct democracy, direct democracy (elections, referendums, etc.); state power (legislative, executive, judicial); local self-government – local public authority exercised, in particular, by territorial communities, representative bodies of local self-government (councils), executive bodies of councils, village, settlement and city mayors, etc. [32].

Some scholars emphasize the relationship of public authority with the concept of democracy, giving a fairly generalised definition. In particular, O. Lialiuk defines public power as a kind of power in the state, which is focused on managing all state infrastructure, implemented mainly through a specially created apparatus of government, considering the interests of the vast majority of the population, emphasising that such power is aimed at meeting the needs of economically dominant class [20, p. 84].

The definition given by S. Kovalchuk most accurately reflects all the essential characteristics of public power, who considers public power as a kind of socio-political, sovereign, legitimate power, which is based on public interest and impersonal nature, expressed in the system of public, public-political, volitional relations that arise between bodies and officials of the state (endowed authorities), individuals and legal entities, which are mostly subjects of civil society (who delegate their powers first) based on public law and law [22, p. 51]. That is, the concept of public authority is closely intertwined with the concept of public law, the purpose of which is to satisfy the public interest, which, according to S. Kovalchuk, is aimed at solving social, socio-political and volitional relations [22, p. 50]. In fact, the public interest is the basis for the activities of public authorities, so on the basis of this feature can determine the characteristics of individual public authorities, the main among which is the state, which, accordingly, implements state power as a kind of public authority. Therefore, the state interest can be considered only one of the elements of public interest [33, p. 141].

The concept of public power is often associated with state power. However, these concepts are not equivalent. As for the concept of state power, the Legal Encyclopedia defines state power as a type of public power exercised by the state and its bodies, the ability of the state to subordinate the behaviour and activities of people and associations in its territory to their will, i.e. power “organisation of the dominant part of the population, which (organisation), ensuring the integrity and security of society, manages it in the interests of this part of it and organises the satisfaction of social needs” [32].

Some scholars consider state power as a system of state powers of its bodies and officials. Thus, according to R. Pohorilko, state power is the will of the state, its bodies and officials to exercise their functions and powers by adopting legal acts within the limits and in the manner prescribed by the Constitution and laws of Ukraine [34, p. 9]. V. Averianov pointed out that the essence of state power is the ability of the “state to make binding decisions and enforce them” [18, p. 12].

Thus, state power is the realisation of the will of the state, which is expressed in the legally defined powers of state bodies and their officials aimed at implementing the tasks and functions of the state, ensuring stability and development of society and protection of human and civil rights and freedoms [35, with. 162].

As rightly noted by O. Halus, state power in form and content is always public power, but public power is not always exercised only by the state. It can also be implemented by other elements of civil society (people or part of it, territorial community, political parties, public organizations, etc.). Thus, public power is a broader concept than state power, because it is exercised by a wider range of subjects [36, p. 294; 37, p. 24]. After analysing the provisions of Art. 5 of the Constitution of Ukraine, which uses the term “power” and not “state power”, meaning public power in general, the author concludes that it enshrines such types of public power as direct democracy, state and municipal power [37, p. 29].

This position is expressed by S. Kovalchuk, pointing out that the system of public authorities is a set of authorities of the people, which have different forms of exercising this power, in particular, these are representative bodies formed by elections, namely parliament, president, local governments. Each public authority is created to implement the goals and programs that ensure the protection of rights, freedoms and legitimate interests of the people, security of state and society, addressing issues of socio-economic and cultural significance. In this sense, state power is a type of public power through which the powers of the people, the nation are realised and formally reflected in the law [22, p. 48-49].

So, despite the fact that state and public authorities have many common features, but they have many differences, the main of which, as can be seen, is the subject composition, which public authority is much wider than the state. The right to exercise state power has state bodies and officials, while the subjects of public power along with the state and its structural units are also other social institutions, including local government and direct democracy [35, p. 163].

2.2. Concepts of the essence of public administration

As for the essence of the category “public administration”, it should be emphasised that for the world administrative and legal theory and practice, the concept of “public administration” is one of the basic, key categories used in scientific and educational literature in most countries, namely administrative law has always been considered as a branch of law that regulates the organisation and functioning of public administration, establishes the boundaries of its activities, and establishes the basic forms and procedures for exercising control over such activities. Moreover, in a number of countries the concept of “public administration” is enshrined in law (UK, Spain, Italy, Costa Rica, Mexico, Germany, etc.).

This concept is defined at the international level. Thus, in the UN glossary, the term “public administration” is defined as a centralised organisation of public policy and programs, as well as coordination of personnel and has two interrelated meanings: 1) procedures, systems, organisational structures, personnel, etc.), which is financed from the state budget and is responsible for managing and coordinating the work of the executive branch, and its interaction with other stakeholders in the state, society and external relations; 2) management and implementation of the whole set of state measures related to the implementation of laws, decrees and decisions of the government and governing bodies aimed at providing public services [38].

In the doctrine of administrative law of democratic countries of the world, two main concepts of the essence of public administration have been formed:

1) organisational concept, for the conditions of which the decisive characteristic of public administration is its construction as a separate administrative organisation of the state [14, p. 33], the emphasis is on the interpretation of public administration as an administrative organisation of the state and the disclosure of its institutional characteristics. That is, in the subjective sense, public administration is understood as a certain system of administrative bodies and institutions that exercise administrative powers of executive power and service functions of the state; in this sense, public administration – a set of entities responsible for the implementation of the administrative function of public authority, including the provision of public services [11, p. 17].

2) functional concept, which is based on the understanding of public administration as a specific function of the state. Under this concept, the term “public administration” is identified with the term “public administrating”, i.e. a specific administrative activity carried out by a statutory system of bodies and institutions endowed with public authority to meet public interests. Thus, the German administrative doctrine uses the term “public administration” in the formal sense in two main meanings: to describe any activity of public administration, regardless of whether it is carried out by the executive or the administrative apparatus that serves the legislature or judiciary; as public administration through administrative procedures that give a legally formal nature of administrative activities and decisions taken during its implementation [16, p. 49-50].

With regard to the interpretation of the category of “public administration” in Ukrainian administrative law, it should be noted that for Ukrainian administrative law theory and practice, this concept is new, as more common in this area is the use of the term “management”. In regulations, the term “public administration” is not used today and is used only at the theoretical level. As rightly noted by B. Bevzenko and R. Melnyk, the emergence of this concept in research is associated with a change in the purpose of administrative law, which in the new realities is formed on the basis of the so-called “human-centric ideology” [27, p. 39].

The positions of Ukrainian scholars on this legal category vary: from the definition of this concept, which is similar to its understanding in Western administrative law, to the reduction of the essence of public administration to the functioning of public authorities at the local level. For example, V. Averianov defined the concept of “public administration” as 1) a set of bodies, institutions and organisations that perform administrative functions; 2) administrative activities carried out by this administration in the interests of society; 3) the sphere of public sector management by the same public administration [18, p. 1-14].

For their part, Yu. Deliiia defined the category of “public administration” as a new subject of local government, namely – the system of territorial formations of executive bodies of state executive power on the ground and relevant local governments, their officials elected by communities, empowered to decide local issues independently or through bodies formed by them within the Constitution and laws of Ukraine [39, p. 6]. It is difficult to agree with this position, as limiting the concept of public administration only to local public authorities and their officials is clearly erroneous.

According to V. Bevzenka and R. Melnyk, the form of exercise of legislative power is lawmaking, the judiciary – justice, and the form of executive power is public administrating. This position also significantly narrows the understanding of the essence of public administrating only within the executive branch. At the same time, scholars rightly point out that within the executive branch, along with the implementation of public administrating, political decisions are also implemented, which are the content of political activity that is not part of the public administrating, therefore not regulated by administrative law [27, p. 39-40]. A similar position is held by I. Paterylo, who points out that public administration can sometimes act either as a subject of public administration or as a subject of political activity. This fact, according to the scientist, affects the responsibilities of politicians and civil servants. In addition, the activities of public officials are determined by the rules of administrative law and fall under the jurisdiction of administrative courts in case of their illegality, while the principles of political figures are the rules of constitutional law and, consequently, its results are often removed from the jurisdiction of the judiciary [28, p. 84].

Quite a significant number of Ukrainian scholars define the content of this category as a set of state and non-state subjects of public power, the key structural elements of which are: a) the executive branch; b) executive bodies of local self-government [25, p. 168-169; 26, p. 18; 40, p. 319; 41, p. 209; 42, p. 13; 43, p. 62].

2.3. Public administrating: organisational-structural and functional approaches to understanding the legal nature

Some scholars in the field of administrative law and public administration consider the legal nature of public administration through the prism of the category of “public administrating”. Thus, according to V. Kolpakova public administrating is a set of bodies and institutions that exercise public power through compliance with the law, bylaws and other actions in the public interest. The scientist distinguishes two dimensions of this category: functional (the activities of relevant structural entities to perform functions aimed at realising the public interest) and organisational-structural (a set of bodies created for the exercise (realisation) of public power) [23, p. 28-31; 24, c. 13, 14].

However, if we consider the organisational and structural aspect of the understanding of public administration, highlighted by V. Kolpakov, it should be noted that the subjects of public administrating are not only “bodies” that exercise public power, as public power is exercised not only through the exercise of public authority powers, but also through the implementation of various forms of direct democracy. We believe that the content of the category “public administrating”, in addition to public authorities, should also include bodies and structures that are not organizationally part of it, but perform delegated functions of public authorities to pursue public interests in all spheres of society.

In addition, the position of V. Kolpakov's understanding of the essence of public administrating is somewhat controversial. On the one hand, the scientist defines public administrating as a set of bodies, institutions and structures that exercise public power, and on the other – highlighting the functional aspect of this concept, defines it as the activities of relevant structural entities. It should be emphasised that the functional aspect is decisive in characterising the essence of public administrating, as this concept involves the activities of relevant bodies, institutions and structures that exercise public power. Moreover, given the global trends in the institution of public administrating, such activities should be aimed not at achieving certain political goals, strengthening the organisational and regulatory influence of society on society, but to build a model of service state, which aims to serve the interests of citizens and society. Under this model, public administration plays the role of a service tool designed to ensure the public interest, and public administration is based on the principles of feedback between public administration and citizens.

CONCLUSIONS

Based on a detailed analysis of scientific approaches to the essence of the concept of “public authority”, it is proposed to interpret this legal category as sovereign, legitimate authority, it is based on the public interest, which is the ability of individuals and legal entities, bodies and officials to influence the solution of social and public policy issues and includes state power, direct democracy and local self-government.

As for the category of “public administration”, despite the fact that in Western administrative law doctrine it is interpreted mostly in organisational (set of entities responsible for the implementation of the administrative function of public authority) and functional (specific administrative activities of the relevant sub-projects to meet public needs) aspects, however, should still distinguish the functional component and allocate it to a separate category – “public administrating”.

The categories of “public administration” and “public administrating” are similar in nature, but different in content independent administrative and legal concepts that characterize the organisation and functioning

of public authority. Public administration should be understood as public authorities, and bodies and structures that are not organizationally part of the public authority system, but perform the functions delegated by it to realise public interests in all spheres of society and the state. For its part, public administrating is the activity of public administration represented by public authorities, bodies and structures that are not organisationally part of the public authority system, but perform delegated functions to realise public interests in all spheres of society and the state, acting exclusively within the powers and in the manner prescribed by law, in order to ensure the rule of law, human and civil rights and freedoms to meet the needs of society and the state and endowed with the prerogative of public authority. Based on the above approach to the understanding of public administration and public administrating, we can say that the category of “public administration” determines how public power is built, which entities are empowered to implement it. While the category of “public administrating” reflects the substantive part of public power, i.e. the forms and procedure for its implementation.

This understanding of the nature and relationship of the categories of “public authority”, “public administration” and “public administrating” can be the basis for construction of a modern concept of these categories in the Ukrainian doctrine of administrative law. The practical implementation of this concept will contribute to the development of an optimal model of public authority, which is based on the principles of the rule of law, human and civil rights and freedoms and generally meets all the criteria of democratic principles of statehood.

RECOMMENDATIONS

The scientific value of the study is that it develops the concept of legal categories “public authority”, “public administration” and “public administrating”, based on the analysis of the content of these concepts and their relationship in the modern doctrine of administrative law. The findings of the study can be used in research work – for further general and special research in the field of law; in law-making – in the process of development and improvement of the legal framework in the field of organisation and implementation of public authority, in order to harmonise Ukrainian legislation with world standards; in the educational process – while studying in educational institutions of the legal direction of academic disciplines of general theory of law, constitutional law and administrative law.

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МОДЕЛІ ПУБЛІЧНОГО УПРАВЛІННЯ ГРАЛЬНИМ БІЗНЕСОМ У СВІТІ

Анотація. *Актуальність дослідження питання моделей публічного управління гральним бізнесом у світі зумовлена необхідністю вивчення зарубіжного досвіду задля удосконалення правового регулювання та інструментів публічного управління ринком грального бізнесу в Україні. При проведенні дослідження авторами використовувались філософські, загальнонаукові та спеціально-наукові методи пізнання. Авторами виділено такі моделі публічного управління: заборона грального бізнесу; дозвіл на проведення азартних ігор без обмежень, проте встановлення певних кваліфікаційних, організаційних, фінансових та інших вимог; встановлення державної монополії на організацію та проведення азартних ігор, яка проявляється в різних видах. З метою розроблення пропозицій по удосконаленню публічного управління ринком грального бізнесу в Україні авторами розкрито переваги на недоліки кожної з виокремлених моделей публічного управління ринком грального бізнесу, які використовуються в різних країнах, зокрема в США, Індії, Данії, Словенії, Франції, Австрії, Греції, Норвегії, Німеччині, Польщі, Швейцарії, Угорщині. Констатовано, що встановлення абсолютної (тотальної) заборони на організацію та проведення азартних ігор не вирішує проблему неконтрольованих азартних ігор і гральної залежності в суспільстві. Авторами зроблено висновок про доцільність впровадження в Україні так званої третьої моделі публічного управління, при якій держава, діючи від імені суспільства та в інтересах суспільства, укладає так званий суспільний договір з організаторами азартних ігор, відповідно до якого суспільно шкідливий вплив азартних ігор буде компенсовано за рахунок фінансування суспільно корисних цілей (добрих справ)*

Ключові слова: *азартні ігри, ринок грального бізнесу, лотерейна діяльність*

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MODELS OF PUBLIC GAME BUSINESS GOVERNANCE IN THE WORLD

Abstract. *The urgency of researching the issue of models of public gambling management in the world is explained by the need to study foreign experience to improve the legal regulation and tools of public management of the gambling market in Ukraine. The authors used philosophical, general scientific and special scientific methods of cognition. The authors highlight the following models of public administration: ban on gambling; permission to conduct gambling without restrictions, but the establishment of certain qualification, organisational, financial and other requirements; establishment of a state monopoly on the organization and conduct of gambling, which manifests itself in various forms. To develop proposals for improving public management of the gambling market in Ukraine, the authors identify the advantages of each of the selected models of public management of the gambling market used in different countries, including the United States, India, Denmark, Slovenia, France, Austria, Greece, Norway, Germany, Poland, Switzerland, Hungary. It is stated that the establishment of an absolute (total) ban on the organisation and conduct of gambling does not solve the problem of uncontrolled gambling and gambling addiction in society. The authors conclude that the introduction of the so-called third model of public administration in Ukraine, in which the state, acting on behalf of society and in the public interest, enters into a so-called social contract with gambling organisers, according to which socially harmful effects of gambling will be compensated financing of socially useful goals (good deeds)*

Keywords: *gambling, gambling market, lottery activity*

INTRODUCTION

Ukraine has come a long way in regulating the gambling business: from its permissiveness and uncontrollability from 1991 to 2009 to its total ban in 2009, which lasted until 2020. Thus, during the period of permissiveness of the gambling business in Ukraine, a large number of various gambling establishments operated, but the greatest damage to society was caused by slot machine halls, of which there were several thousand. Without proper legislation, the gameplay was in no way controlled by the state, and players were very quickly drawn into gambling addiction and then into debt. When the gambling business reached catastrophic proportions and became threatening to society, in 2009 it was banned by the state Law of Ukraine “On Prohibition of Gambling Business in Ukraine” on May 15, 2009 No. 1334-VI before the adoption of a special law that would regulate this activity [1], respectively, the organisation and conduct of gambling was recognised as a criminal offense. In fact, the ban lasted for eleven years before the adoption of a special law in 2020 [2], which legalised gambling, but gambling did not disappear, but went into the illegal sphere and became a powerful tool for financing criminal activity. The player again found himself alone with his problems, as he was in fact recognised by the state as a participant in the crime, and was prosecuted for participating in illegal gambling. Accordingly, illegal gambling was also carried out without any tools to protect players, and was aimed at maximising the involvement of players in the game, which led to the involvement of organisers of criminal activity in gambling addiction and debt.

Only in 2020, the Law of Ukraine “On State Regulation of Activities Related to the Organization and Conduct of Gambling” No. 768-IX of 07/14/2020 gambling business was again allowed in Ukraine [2]. The market itself started operating in the spring of 2021 (when the first license to organise and conduct gambling

was issued). At the same time, at all stages of development of the legal regulation of the gambling business in Ukraine, the choice of models of state regulation of certain types of gambling business and public management of the gambling market as a whole has always attracted attention.

V. Dorogykh was the first in Ukraine to conduct a comprehensive study at the level of dissertation research in 2004 issues of administrative and legal regulation of the gambling business [3, p. 5]. N. Maidanyk explored the civil law nature of the gambling agreement [4, p. 240]. Since gambling was banned in Ukraine in 2009, most of the dissertation research was devoted to the fight against illegal gambling: V. Filyutovych-Gerasimenko considered the issue of administrative and legal bases of counteraction to illegal gambling business [5, p. 22], N. Petrychko researched the issues of criminal law and criminological research of illegal gambling [6, p. 154], A. Savchenko drew attention to the criminal law qualification of illegal gambling [7, p. 40-44], S. Ryabchuk considered the criminological characteristics and prevention of illegal gambling [8, p. 200], M. Lyskov considered the issue of administrative and legal regulation of the lottery sphere [9, p. 19], E. Drachevsky researched the issues of criminal law protection of economic relations in the field of organization and conduct of gambling and lotteries [10, p. 14].

In most foreign countries, gambling has long been legalized and therefore most of the work of foreign scientists is devoted to assessing the effectiveness of a model of gambling, in particular R. Williams, J. Rehm, R. Stevens evaluated the social and economic impact of gambling in Canada [11, p. 10]. M. Abbott, P. Binde, L. Clark, D. Hodgins, M. Johnson, D. Manitowabi, L. Quilty, J. Spångberg, R. Volberg investigated and evaluated the harm from gambling and possible ways to compensate for it [12, p. 134]. V. Zheng, E.P.W. Hung assessed the economic benefits of liberalizing casino regulation in Macau [13, p. 541], A. Gonzales, T. Lyson, K. Mauer evaluated the impact of casino development on Indian reservations in Arizona and New Mexico [14, p. 405].

After the legalisation of gambling in 2020, Ukraine began to face a number of theoretical and practical problems of public administration that need to be addressed today: which public administration tools to choose, which methods and tools to apply, how to enshrine all elements of public market management appointed in the Law, etc. In particular, the gambling market, which has long been in the shadows, has generally supported the legalisation of the gambling business, but has strongly opposed certain elements of public administration, in particular by opposing strict government regulation and control. Thus, the organisers of gambling believed that the legalisation of the gambling business should only provide for the licensing of this type of activity and not impose any strict restrictions on the gambling establishment, gambling equipment, process and types of games. As of today, the market is opposed to the introduction of an online control system for the organisation and conduct of gambling, as it does not want to show real turnover and pay taxes, citing the very high cost of licenses in Ukraine.

In addition, the parliament has not yet adopted a law that would regulate the issue of taxation of the gambling business, which seriously hinders the development of the legal gambling market. In fact, the problem of illegal gambling establishments still exists today conditioned upon the extremely high cost of gambling licenses (the highest in Europe) and the high tax burden conditioned upon higher tax rates. This means that the illegal gambling business still remains “more profitable” for the organisers than the work officially. And this, among other things, means the existence of corruption in law enforcement agencies.

The purpose of the article is a study of foreign experience of public management of the gambling business, the study of the positives on the shortcomings of each of the models of public management of the gambling market to develop proposals for improving public management of the gambling market in Ukraine.

1. MATERIALS AND METHODS

The legal basis of this study was foreign legislation, which regulates the issue of gambling, including current legislation of Ukraine. The authors used philosophical, general scientific and special scientific methods of cognition, which provided an opportunity to conduct a detailed analysis of the main models of public management of the gambling market that exist in the world.

The dialectical method of cognition allowed to highlight the content of the basic provisions of public management of the gambling market in certain countries, to study the patterns of development of categories of gambling management, features of their reflection in the environment, the impact of individual models of public administration and objective reality. Using this method, the authors were able to analyse the development and transformation of different models of gambling management in different periods of development and based on this study to identify key trends in the model of public gambling management in Ukraine. Within this method, the authors also analysed the natural relationships between different models of public administration in different countries and identified how changes in the model of public governance of gambling in some countries affect the change of models in neighboring countries. Based on the dialectical

method of cognition, it was also possible to analyse the contradictions that exist between the purpose and results of a particular model of management and suggest ways to resolve such contradictions.

Methods of logic (analysis, synthesis, abstraction, generalisation, analogy, induction and deduction) were used to study some features of public management of the gambling market, in particular, the synthesis method summarised the main features of state regulation of gambling in each country and grouped them into separate models of public administration, the method of analysis allowed identifying the main advantages and disadvantages of each. The methods of induction and deduction were used by the authors to study the scientific literature, find the necessary material, generalise and develop proposals for improving the legal regulation of public administration in Ukraine.

The formal-legal (dogmatic or legal-technical) method was used to study and interpret the norms of legislative acts of foreign countries, which regulate their national gambling markets. The comparative legal method was used in the study of the main provisions of legislation of different countries on the regulation of different types of gambling.

Special legal methods were also used in the study, namely specific sociological and system-structural methods. The specific sociological method allowed to study the case law and draw conclusions about the effectiveness of the implementation of certain tools and methods of public administration in Ukraine and abroad. The system-structural method was used in formulating the basic forms of public administration and in explaining the content of the categories of these forms of government. The method of generalisation allowed consistently bringing together certain facts and formulating sound conclusions of scientific research aimed at improving public governance of the gambling market in Ukraine.

2. RESULTS AND DISCUSSION

To choose the most appropriate for Ukraine model of public gambling management, it is advisable to study the models of foreign gambling management, considering their advantages and disadvantages in choosing and improving the gambling market management model in Ukraine. At the same time, the choice of the model of public administration should be conditioned by certain principles that guide the state in shaping the policy on gambling. In particular, on June 5, 2017, the general strategy and principles of European lotteries were approved in Europe [8]. This strategy uses a value-oriented approach. It is noted that the main difference between lotteries and gambling is the values pursued by game organisers. The principle of public utility of lotteries applies to lottery operators. Therefore, the right to conduct lotteries is given by the state to certain lottery operators with the condition of supporting socially important projects or allocating funds for “good deeds”, while the main focus and value for gambling operators (including illegal ones) is to benefit shareholders.

Lotteries that are members of the European Lottery Association must adhere to three core values:

1) responsibility – lottery operators must ensure and prioritize the interests of consumer protection and responsible gaming over other interests.

2) society/sustainability – this value is based on the idea that the problems of social and public order prevail. This does not mean that lotteries are not for profit, but it does mean that lotteries are in the public interest, so a balance must be struck between each country's legal requirements for spending on social goals and profiting from lotteries.

3) integrity – lottery operators are required by EU and national law to adhere to strict performance standards (such as EL and WLA safety standards) to ensure safe and fair operations and to manage the risks of fraud or other criminal activity. The implementation of these values requires the introduction of strict regulatory principles and rules, which are described in more detail in this Strategy.

We believe that the lottery market in Ukraine should definitely develop on the same principles (values). However, since lotteries in Ukraine are not gambling, the gambling business must define its own principles of public administration, on which the governance model should be based.

There are three main models of public management of the gambling market in the world, on which government regulation of certain types of gambling depends:

1) ban on gambling (China (except Macau), Afghanistan, Pakistan, Saudi Arabia, Iran, Bahrain, Azerbaijan, Iceland, Brazil, Indonesia, Thailand, Algeria, Libya, Sudan, Central African Republic and others). However, some of these countries are considering the possibility of legalisation and strict regulation of gambling activities for tourists. That is, most of the countries where the gambling ban is in force are Muslim countries, and the gambling ban is explained by the religious traditions of society. At the same time, a number of Muslim countries in recent years have relaxed the absolute ban on gambling in favor of tourism, allowing the opening of land-based casinos exclusively for tourists (Egypt has about 25 casinos for tourists only; in

Turkey, casinos are banned, so many tourists the part of Cyprus where you are free to gamble, Mongolia, Vietnam, Cambodia, North Korea, etc. allow gambling only for foreigners [15]);

2) permission to conduct gambling without restrictions, but the establishment of certain qualification, organisational, financial and other requirements (Ukraine until 2009, Malta, Gibraltar, Monaco). A subspecies of this model of public administration is the authorization of gambling without any serious restrictions only in a certain territory of the state and not anywhere (individual states of the United States, Macao, India, Laos, Malaysia, South Korea, Peru, Paraguay, Uruguay). Such a model of public administration usually requires a certain permit or license. Market control, as a rule, involves only the supervision of compliance with licensing conditions, the number of licensees is not limited, and the licenses themselves are quite easy to obtain. Most of these countries have consciously chosen this model and today are the centers of the gambling industry. In particular, the turnover of the land gambling market in Macau actually occupies half of the world turnover of the gambling market, in particular, the income of casinos in Macau is three times higher than the income of casinos in Las Vegas [13, p. 541]. This was achieved in part conditioned upon the lack of a tax on winnings in gambling in Macau. In 2014, revenues from the gaming business tax accounted for 84% of Macao's total budget revenues. However, when in 2021 the Chinese government decided to tighten control over the activities of casinos in Macau and only took the initiative to change the rules for licensing gambling, and imposing new restrictions on casino operators, including appointments of government officials to oversee companies, casino shares Sands China fell 30%, Wynn Macau 27.5% and Galaxy Entertainment Group 18.4%. For a number of companies, this decline was a record in its history. And the capitalisation of the Macau casino market lost \$ 14 billion [16];

3) the establishment of a state monopoly on the organisation and conduct of gambling, which manifests itself in various forms (almost all EU countries: France, Finland, Denmark, Austria, Great Britain, etc.) – absolute state monopoly, state monopoly of a private company, oligopoly, restriction of the maximum number of gambling establishments, restriction of permitted types of gambling, etc.

The first model of public administration – a complete ban on gambling, has a number of shortcomings and problems for the state, including:

a) the gambling business is moving into the shadows and is an instrument, including the financing of criminal activity, and therefore in a state with a complete ban on gambling, as a rule, the crime rate increases;

b) the level of corruption in law enforcement agencies is growing, as the ban on gambling is introduced simultaneously with the introduction of criminal liability for its organization, and therefore gambling organisers use corrupt connections in law enforcement and other agencies to cover up criminal activities;

c) declining markets in related industries – tourism, hospitality, horseback riding and racetracks, professional sports, sports analytics and sports media. Many tourists (especially from countries where gambling is banned) travel to gamble. Gambling has always been at the forefront of the world tourism system. Accordingly, the ban on gambling in one country means the rise (increase of the market) of gambling in neighboring countries and increase tourism in such countries, i.e. is a stimulus to economic development for neighboring countries. At one time, Georgia developed on this principle;

d) direct revenues to the state budget from gambling organisers in connection with the ban on gambling are reduced, including budget revenues from related industries are reduced, primarily hotel activities and tourism;

e) society is not protected from the risks of gambling addiction. Protecting the vulnerable part of society from the risks associated with gambling addiction is possible only through the regulation of the gambling business and only in conditions where the gambling business operates in the legal field and subject to the principles of responsible gambling. In particular, in Ukraine from 2009 to 2020, gambling was considered a crime, and therefore the player actually acted as a participant in the crime, because without the fact of the game it was impossible to prove the fact of gambling. In addition, the player was held administratively liable for participating in prohibited gambling. Accordingly, the player was considered an offender, and the current legislation of Ukraine does not provide for the possibility of proving the fact of harm to the offender. Moreover, the disposition of Art. 203-2 of the Criminal Code of Ukraine was formulated in such a way that gambling was recognized as a crime in the field of economic activity, not a crime in the field of public order and morality, and therefore the disposition of the article did not provide for [17, p. 225].

It is interesting that during the thirty years of independence, Ukraine has gone through each of the above three models of public governance, as mentioned in the previous section. In fact, it was the permissiveness of the gambling business in the 1990s that led to the choice of a radically different model of public administration – a total ban on gambling in 2009. At the same time, over a period of ten years, the state authorities assessed the shortcomings of the total ban on gambling, which manifested itself in the rapid growth of illegal gambling and gambling-related crimes (tax evasion, money laundering, fraud, extortion, etc.), which,

considering the experience of the state on the permissiveness of the gambling business, led to the election in 2020 of the third model of public management of the gambling business.

Examining the second model of public administration, it should be noted that this is the model organised by the world's largest gambling markets – the United States and Macau. In choosing the second model of public administration, but extending it only to certain territories, states were guided by the goal of maintaining and developing depressed regions.

Macau occupies the largest share of the Asian gambling market. Macau, which has long been a Portuguese colony, has successfully used the ban on gambling throughout China, allowing the province to grow rapidly, primarily at the expense of the national population (Chinese) who came to the province to play. Conditioned upon deductions from the gambling business, Macao's budget is actually formed. The impetus for the rapid development of Macau as a gaming center was the focus on wealthy customers. Macau's focus on high-stakes customers with private rooms and special privileges is the reason for its success. Initially, casinos were created on the basis of VIP-rooms. They signed contracts with gambling promoters, who made a profit from attracting wealthy players. These high-stakes players earned casinos 66% of total revenue in 2013 [18].

In Macau, significant funds have been invested from the gambling business in new casino complexes with luxury hotels and first-class shopping malls. These casinos have created new jobs for the city's residents, increased the number of tourists and increased tax revenues. The area of Macau is extremely small, it is 29.7 km², including 6 km² of land connecting the small islands of Coloan and Taipa, which houses large casino complexes. In 2014, 49 Macau casinos generated annual revenue of approximately \$ 28 billion, which is 3 times the revenue of 135 casinos in Las Vegas. Today, there are about 33 terrestrial facilities in Macau, with 850 gaming tables and 4,000 slot machines. Today, Macau focuses only on the rich, and develops the direction of middle-class players through the organisation of various exhibitions and forums [19].

All types of gambling are allowed in Macau: land-based casinos, gaming terminals, lotteries, poker and sports betting. The legal status of online gambling is uncertain, as the Macao authorities do not issue online gambling licenses and do not prohibit such activities. This way, users can gamble online. This contrasts with other neighboring regions, such as mainland China, Singapore and Taiwan, where online gambling is prohibited [13, p. 545].

Las Vegas (Nevada) is the second largest gambling center in the world. The largest gaming centers in the United States are Las Vegas and Atlantic City. Until recently, casinos in the United States could be located in these two gaming zones, in Indian reservations and on floating establishments. However, in recent years, US law has changed and today gambling is allowed in 48 of the 50 states. But gambling is still allowed only in Nevada and New Jersey, and other states have significant restrictions or bans on certain types of gambling. To open a casino in Las Vegas, you must obtain a license and meet a number of requirements that are set for the casino, in particular, the gambling establishment can be opened only in a specially designated area. In addition, there are a number of requirements for the area of the gambling establishment, equipment, etc. [20].

In Nevada, the gambling business is regulated by the Nevada Gaming Commission (NGC), which is the licensing and oversight body. There is also a Nevada Gaming Control Board (NGCB), whose main functions are primarily to monitor the casino's compliance with financial requirements, audit, inspection of technical and gaming equipment, testing and certification [21].

According to the American Gaming Association, in the second quarter of 2021, US gambling revenue reached a record \$ 13.6 billion. Experts predict that the industry's annual revenue will be more than \$ 44 billion [22]. However, numerous studies in the United States show that every tenth American suffers from gambling addiction, and the crime rate is about 8% higher than in states without casinos. Also, US research has shown that the opening of casinos has a significant impact on small businesses, as there is a mass bankruptcy of cafes, restaurants, shops, beauty salons, bakeries, etc. conditioned upon “excessive” excitement of the owners of such businesses [23]. In this regard, the permission to gamble in almost all US states is a matter of serious concern. We believe that in ten years it will be possible to assess the extent of the impact of such a decision on society. After all, in the past, the permissiveness of gambling was chosen by those countries that focused primarily on the development of tourism, i.e. when a person only occasionally comes for a certain time and has a certain amount per game. Free access to gambling for the entire population of the state without any significant restrictions, as a rule, leads to an increase in gambling dependence among the population. We believe that over time, the United States will return to the model of limited gambling.

India is a very promising market for the development of gambling, given the population of this country. India is one of the countries where the legal status of the gambling industry is enshrined in the Constitution. According to Entry No. 34 of Entry No. 34 of the 7th Schedule of the Indian Constitution, some states have full authority and legal authority to enact gambling and betting laws. In addition, the entry No. 62 empowers states to tax gambling [24].

In gambling regulation, the country has chosen a model similar to the United States, where states choose the gambling regulation model on their territory, today only three of the 29 states and 7 union territories allow casinos : Goa and Sikkim and Daman and Diu , Daman and Diu Public Gambling Act, 1976, in 1987 Goa became a separate state). Under the Goa, Daman and Diu Public Gambling Act of 1976 , casinos may only be opened in five-star hotels or on vessels with the prior permission of the government. There are now about 20 casinos in India. At the same time, most of the Indian market today operates in the shadows in other states. The issue of legalisation of online games has not been resolved yet [24].

Laos in the settlement of the gambling business also aimed primarily to attract tourists from other countries (China, Vietnam, Thailand). Therefore, casinos in Laos are allowed to open in the so-called special economic zones bordering China and Thailand [25]. At the same time, the local population is prohibited from visiting the casino.

The third model of public management of the gambling business in its various manifestations exists in almost all European countries.

The most common types of public management of the gambling market in the form of state monopoly are:

- permission to gamble exclusively for one state-owned company (France is the sole operator of *Francaise des Jeux* for casinos), Denmark is a state-owned company *Danske Spil A/S*, 80% owned by the state, 10% by the Danish Sports Federation and 10% of the Gymnastics and Sports Association);

- free access to the gambling market for companies (regardless of ownership or other indicators, subject to organizational and qualification requirements), but limiting the maximum number of gambling establishments that can operate simultaneously in the country (Denmark – no more than nine casinos; Slovenia) limited the maximum number of casinos to 15, the UK, with the adoption of a new Gambling Act in 2005 [26, p. 250], limited the total number of casinos that can operate simultaneously in a given region, one regional casino, eight large casinos and eight small casinos);

- limiting the maximum number of entities that can operate in the gambling market at the same time limiting the number of gambling establishments (Austria – the maximum number that can operate in the territory – 12 casinos (currently all 12 licenses are issued to only one company *Casinos Austria AG*, 70% owned by the state), Finland – only one operator can engage in separate gambling activities (1 license for lotteries owned by *Veikkaus OY* and 1 license for casinos, separate slot machines, Greece – the only operator of sports betting and some lotteries – *OPAR*, 34% owned by the state, the sole operator of state-owned drawing/passive lotteries *Kratika Laxeia*, which is 100% state-owned and controlled by the Ministry of Economy and Finance, the only operator of odds on races *ODIE*, which is 100% state-owned and state control represented by the General Secretariat of Sport and the Ministry of Culture, 9 licenses for casinos as and issued by the Ministry of Economy and Finance and the Greek Tourism Development Company (*ETA*).

All European countries now have special legislation that provides a legal definition of gambling and gambling and establishes a legal framework for their activities. France has long maintained a state-owned monopoly. In particular, according to Art. 136 Finance Law 1933 monopoly on lottery activities was granted to *La Française des Jeux*, only in 2019 part of the state shares were privatized, and the company received a monopoly on lotteries and sports betting for 25 years [27]. In exchange, the state budget received 380 million euros. The company also received preferential tax terms, in connection with which the European Commission launched an investigation into this fact [28].

As for the land-based gambling business, there are more than 200 casinos in France, but they can only be located in areas that have officially received resort status and are more than 100 kilometers from Paris or in tourist cities with a population of more than 500,000 people. The only exception is the casino in the resort town of Engen, which today is one of the most profitable. The regulator today is the recently established *Commission Supérieure des Jeux* (Gambling Commission), although until recently this area was regulated by the Ministry of the Interior and the Ministry of Finance. Licenses are issued subject to a positive opinion of local governments on the feasibility of opening a casino (considering economic interests, competition, etc.) [29]. All casinos are operated by four operators: *Partouche*, *Barriere*, *JOA* and *Tranchant* [30].

The website of the French Gambling Commission clearly defines the objectives of state policy on gambling:

- 1) prevention of excessive or pathological gambling and protection of minors;
- 2) ensuring honesty, reliability and transparency of gambling operations;
- 3) prevention of fraud or criminal activity, including money laundering and terrorist financing;
- 4) ensuring the balanced and fair development of various types of gambling to avoid economic destabilization of certain sectors [31].

These goals are to limit and control the supply and consumption of games, as well as control over their use.

Denmark has, as a general rule, banned gambling from anyone other than Danske Spil A/S. Such an absolute monopoly existed until 2012 (entry into force of the Law on Gambling, which was adopted on 07/04/2010) [32]. With the adoption of this law, the gambling market became open to private operators, and a new independent body became the regulator – the Gambling Office. The number of online casinos is not limited. Land-based casinos are limited by the maximum number. The following criteria are considered when issuing a license to open a casino: the casino must be located in a place that is popular with tourists; cannot be in the immediate vicinity of a school or other institution for children; the location must be agreed with the local police and the city council [33]. There are currently nine casinos in Denmark, the maximum number allowed, so it is not possible to obtain new casino licenses. The license is issued for 10 years, and the annual payment depends on the annual turnover of the casino [34]. Slot machine halls are also allowed in Denmark. The values of the Danish Gambling Authority are to ensure a fair and well-regulated gambling market for the benefit of gamblers and operators.

Austria has introduced a federal monopoly on gambling regulation. The single company Österreichische Lotterien GmbH has a monopoly on lotteries until 2027. As for land-based casinos, 12 of the 15 possible licenses have been issued by Casinos Austria AG until 2027, and three remain unused due to breaches of tender rules and it is unknown when the tender will be announced again. Therefore, Austria has both a monopoly on the number of entities and a limit on the maximum number of gambling establishments. The state regulator is the Finanzamt Österreich (Austrian Tax Service) [35].

The purpose of state regulation of the gambling market in Austria is to regulate and control gambling with a special emphasis on combating gambling addiction, protecting consumers and preventing illegal activities and crime. Objectives of regulatory policy: prevention of organized crime (e.g., money laundering, terrorist financing and other illegal activities); prevention of indirect crimes (theft, burglary, fraud) by gambling addicts; youth protection; consumer protection; financial market stability [36].

Belgium clearly limits the maximum number of all gambling establishments in its territory by defining the classes of licenses issued on a competitive basis. The exception is the lottery, a monopoly right held by a single company as defined in the King's Decree. In particular, no more than nine casino licenses may be issued, a Class I license (category A) and issued for 15 years. A class II license (category B) is issued for gambling halls for 9 years, no more than 180 licenses can be issued. Class III licenses (category C) are issued to pubs and bars, which give the right to install no more than two slot machines, are issued for 5 years. Class IV licenses are issued for bookmakers, which can be landline or mobile (mobile), the organiser is issued an F1 license (maximum 31 licenses) for a period of 9 years, and the office (which is the organiser's agent) is issued an F2 license for 3 years (not more than 600 licenses for stationary points and 60 for mobile). Only entities licensed to play online games can obtain an online gaming license [37].

In Germany, the regulator has also chosen a protectionist approach to the regulation of gambling, including consumer protection (prevention of gambling addiction and protection of minors and other vulnerable people), directing the player to a regulated market, guaranteeing orderly and fair gambling, and combating gambling other crimes related to gambling, and the protection of honesty in sports [38]. The gambling business is regulated at the local level – by 16 lands. At the same time, in most lands, land-based casinos are state-owned, and lotteries are also managed by state-owned companies. Only in some countries are licenses for terrestrial casinos issued to private operators, with the maximum number of such licenses being limited, for example, in Baden-Württemberg no more than 3 casinos are allowed, and in Mecklenburg-Vorpommern no more than six.

In Norway, the monopoly on gambling and the activities on which they depend is based on the notion that lotteries (and other types of gambling) must remain in safe forms under public scrutiny to prevent negative social impact, while considering lotteries and gambling as benefits: source of income for sports, culture, humanitarian and socially useful purposes (Article 1 of the Law on Lotteries [39]). In Norway, Norsk Tipping has a monopoly on conducting commercial games such as casinos (online), betting and betting on sports, and the Norsk Rikstoto company has a monopoly on accepting bets on horse races [40]. The opening of land-based casinos is prohibited. Only charitable organisations can qualify for the lotteries.

In Poland, the state-owned company Totalizator Sportowy has a monopoly on lotteries, slot machines and online casino games. Land-based casinos and betting activities can be carried out by private operators. The number of casinos is limited by the population – 1 casino in a village with a population of up to 250,000 people. If the population is more than 250,000 people, it is possible to open two casinos and so the number can increase for every 250,000 people, but not more than six casinos for one province with a total population of 650,000 people. In 2020, 51 casino licenses were issued in Poland [41].

In Portugal, lotteries are run by the sole state-owned Santa Casa da Misericórdia de Lisboa (SCML). Land-based casinos can be opened only in certain premises on the terms of a concession, which is obtained by the results of the competition, usually up to 40 years. Today, Portugal has 12 casinos and 1 gaming hall in nine gaming zones (Azores, Algarve, Espinho, Estoril, Figueira da Foz, Funchal, Povoá de Varzim, Troy and Vidago Pedras Salgadas). Today, the casino does not operate only in the Porto San Gaming Zone.

Spain has established a monopoly on lottery activities based on the principle of oligopoly (there is one state lottery operator – Sociedad Estatal Loterías y Apuestas del Estado (SELAE), also a charity of the Society of the Blind – ONCE Organización Nacional de Ciegos Españoles and lottery operator Chevo). The opening of land-based gambling establishments is regulated at the local level by 17 separate regions [43].

Switzerland, based on a protectionist approach, also introduced a state monopoly on gambling. The field of lotteries and sports betting is a state monopoly and today only two licenses have been issued for the Swisslos and Loterie Romande state lotteries. Based on a protectionist approach, part of the proceeds from gambling should be returned to society through the financing of good deeds or the federal pension fund. Under the new Gambling Act, which came into force on January 1, 2019 (Federal Act on Money Games) [44], casino licenses are issued on the basis of concessions, the maximum number of which is determined by the Federal Council (government) and as of 2021 opened 21 casinos. The concession is issued for 20 years. An online casino license can only be obtained by an operator who has a land-based casino license [45].

According to the Hungarian Law “On the Organisation of Games (Gambling Business)” [46]. The gambling business includes all types of games in which players are entitled to a cash prize or other prize in cash in exchange for amounts paid or provided by them, and which are conducted under predetermined conditions. Winning or losing depends solely or mainly on temperament. According to this Law, games on bets and games with the use of winning cash machines are also classified as games.

The following types of gambling business are allowed in Hungary: a) organisation of games with a draw; b) gambling activities with the use of winning cash machines; c) establishment and activity of an organization that accepts bets on races (totalizator) and other types of gambling business, which do not fall under items a) – c), but are defined in this law (under the general name “gambling business organisation”).

Casinos can be owned by both the state and private companies that have a concession. Gambling establishments in Hungary are divided into two classes. Class 1 casinos require capital of at least 1 billion forints (about \$ 5 million), class 2 – 100 million (for Budapest and Pest - 300 million). The term of the concession for the 1st class is 20 years, for the 2nd class – 10 years. The casino should be located in a separate house or in an isolated part of the building. All its premises must be monitored by video. Persons under the age of 18, as well as staff and owners of gambling establishments are not allowed to play. Slot machine halls are also divided into classes. In the second it is allowed to have no more than 2 machines. In the first it is allowed to place at least 10 machines, each of which must have at least 2 sq.m. Thus, the hall of 1 class is obliged to have a separate entrance. For the first class of slot machines, the obligatory technologically established level of winnings is not less than 80%. For the second class the maximum bet is limited to 200 forints. Machines must obtain a technological conclusion.

The permission of the Gambling Council is required to open a gaming hall. At the same time, its location must be approved by the municipality. There are also general restrictions on the location of gambling establishments, typical for the whole of Europe: the distance from children's, educational and medical institutions, churches and youth clubs is not less than 200 m. Control of the gambling market is vested in the Gambling Council of the Hungarian Ministry of Finance. The annual fee from the 1st class casino is at least 500 million forints, 2nd class – 50 million, and in the capital region – 600 and 350 million, respectively. In addition, a tax is provided for the casino: from the first 5 billion forints of annual income – 30%, from the next – 25%, from the amount of more than 10 billion – 10%. Each slot machine is charged a monthly fee of 100 thousand forints.

In conclusion, the first and third models of public gambling management are based on a protectionist goal – to protect members of society from the harmful effects of gambling. The choice of the third model of public administration is also guided by the principle of public good, where the state, acting on behalf of society and in the interests of society, enters into a so-called social contract with gambling organizers, according to which socially harmful effects of gambling useful goals (good deeds).

CONCLUSIONS

Regardless of model proposed to regulate the gambling business, experts agree that he must be limited to the maximum number of entities that organise it, the maximum number of gambling establishments, or a separate area to prevent its wide availability for all segments of the population. At the same time, it should be recognised that all other activities that do not meet the established requirements will be outlawed and recognised as conducting illegal gambling as a criminal offense.

Today in the world there are the following basic models of public governance of gambling: a complete ban on gambling; permission to conduct gambling without restrictions, but the establishment of certain qualification, organisational, financial and other requirements; establishment of a state monopoly on the organisation and conduct of gambling, which manifests itself in various forms – absolute state monopoly, state monopoly of a private company, oligopoly, limiting the maximum number of gambling establishments, limiting the permitted types of gambling.

Establishing a total ban on the organisation and conduct of gambling does not solve the problem of gambling and gambling addiction, as it contains a number of negatives for society. Therefore, a number of countries today are revising the total ban and liberalising their legislation, in particular, allow gambling for tourists. The most successful model of public administration today is the third – the state monopoly on the gambling market, which, given the historical development of the country, society, the tendency of the population to form gambling, society's attitude to gambling, form of government, etc., is selected by one.

RECOMMENDATIONS

The scientific value of the article is that for the first time in Ukraine it comprehensively generalized the models of public management of the gambling market in the world. The article will be useful for researchers conducting research on legal regulation and public administration of the gambling market and students studying administrative law, to prepare for practical classes, use in the preparation of course and qualification papers on administrative law.

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ПЕРЕГЛЯД ПІДХОДІВ ДО ІНСТИТУТУ ЦИВІЛЬНО-ПРАВОВОЇ ВІДПОВІДАЛЬНОСТІ У ПРОЦЕСІ РЕКОДИФІКАЦІЇ ЦИВІЛЬНОГО КОДЕКСУ УКРАЇНИ

Анотація. *Проблематика цивільно-правової відповідальності хоча і не є новою для цивілістичної доктрини, втім не втрачає актуальності. У дослідженнях українських вчених спостерігаються два підходи до розуміння поняття цивільно-правової відповідальності – позитивно-перспективний та негативно-ретроспективний. Втім, останнім часом активно починає обговорюватись питання поширення на договірні відносини, відносини, пов'язані з ризиком, категорії «цивільно-правова відповідальність». Звучать думки, що у випадках порушення договірних зобов'язань чи завдання шкоди у результаті ризикової діяльності важко обґрунтувати і застосувати заходи цивільно-правової відповідальності. Тим більше що й у зарубіжній доктрині порушення договору традиційно не вважається правопорушенням. Тому метою цієї статті є напрацювання підходів до інституту цивільно-правової відповідальності та окреслення напрямів оновлення цивільного законодавства з урахуванням сучасних європейських тенденцій. У роботі на підставі економічного аналізу права з використанням діалектичного, порівняльного, логічно-догматичного та інших методів аналізуються підходи до розуміння поняття цивільно-правової відповідальності та розмежовуються заходи цивільно-правової відповідальності і заходи захисту цивільних прав. Зокрема робиться висновок, що виправданим є використання категорії «цивільно-правова відповідальність» до випадків вчинення правопорушення, тобто протиправного завдання шкоди. Доцільним видається уведення до цивільного законодавства поряд з категорією «правові наслідки невиконання зобов'язання» більш широкої правової категорії «правові наслідки невиконання (порушення) цивільного обов'язку», оскільки цивільні обов'язки можуть виникати як із зобов'язань, так і з інших юридичних фактів. Це дасть змогу розширити можливості захисту прав і законних інтересів та ефективно відновити порушене право, оскільки відновлювальна функція притаманна саме заходам захисту суб'єктивних цивільних прав*

Ключові слова: *цивільне право, делікт, захист цивільних прав, відшкодування шкоди, оновлення цивільного законодавства*

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OVERVIEW OF APPROACHES TO THE INSTITUTE OF CIVIL LEGAL RESPONSIBILITY IN THE PROCESS OF RECODIFICATION OF THE CIVIL CODE OF UKRAINE

Abstract. *Although the issue of civil liability is not new to civil doctrine, it is still relevant. In the research of Ukrainian scientists there are two approaches to understanding the concept of civil liability – positive-perspective and negative-retrospective. However, recently the issue of extension to contractual relations, risk-related relations, the category of “civil liability” has been actively discussed. There are opinions that in cases of breach of contractual obligations or damage as a result of risky activities, it is difficult to justify and apply measures of civil liability. Moreover, in foreign doctrine, breach of contract is not traditionally considered an offense. Therefore, the purpose of this article is development of approaches to the institute of civil liability and outlining the directions of updating civil legislation considering current European trends. The work based on economic analysis of law using dialectical, comparative, logical-dogmatic and other methods analyzes approaches to understanding the concept of civil liability and distinguishes between measures of civil liability and measures to protect civil rights. In particular, it is concluded that the use of the category of “civil liability” to cases of offense, i.e. unlawful infliction of harm, is justified. It seems appropriate to introduce into civil law, along with the category of “legal consequences of default” a broader legal category “legal consequences of non-performance (violation) of civil duty”, as civil obligations may arise from both obligations and other legal facts. This will allow expanding the possibilities of protection of rights and legitimate interests and effectively restore the violated right, as the restorative function is inherent in the measures to protect subjective civil rights*

Keywords: *civil law, tort, protection of civil rights, compensation for damages, updating of civil legislation*

INTRODUCTION

The institute of civil liability in the doctrine of civil law has not received a clear understanding. In a way, the position on the two meanings of the concept of responsibility can be considered established in Ukrainian science: positive-perspective and negative-retrospective. According to V. Eugenicht, responsibility is a multifaceted concept that is connected not only with the past (with a misdemeanor already committed), but also with the future. Duty and responsibility always depend on each other. The legal concept of responsibility is primarily a responsible attitude to their responsibilities, which ensures their proper performance. Responsibility for violations is a consequence of irresponsible behaviour, breach of duty, a consequence of the fact that individuals have betrayed the “sense of responsibility” [1, p. 6]. That is, the positive-perspective understanding of civil liability is associated with the performance of its preventive function, and negative-retrospective – compensatory. According to I.S. Kanzafarova, the attempt of scientists to formulate the concept of positive responsibility cannot give an effective result given the lack of signs of a legal phenomenon [2, p. 80].

It should be noted that today negative-retrospective understanding dominates legal responsibility as a law enforcement institution, which provides for state coercive measures for the offense and is to establish for the offender negative consequences in the form of restrictions of personal and property nature [3, p. 86]. In this context, civil liability is considered within the framework of protective legal relations, where the restoration or protection of violated rights can be carried out through the application of measures of civil liability. In this sense of civil liability, the use of coercive measures provided for at the regulatory level, most civilians associated with the commission of an offense in both contractual and non-contractual areas [4, p. 365-366].

For a long time, the basis of civil liability was the composition of the offense in the field of property or personal non-property rights, which was understood as a set of signs of objective and subjective nature. One of the authors of the concept of the composition of a civil offense is quite rightly considered to be G. Matveev [5, p. 29]. Later, the term “composition of the offense” was abandoned in civil law, calling the basis (or conditions) of civil liability illegal behavior, harm, causal link between wrongdoing and harm, guilt of the offender. However, according to N. Kuznietsova, this is nothing more than a detail of one and in principle the only basis, which is an offense (civil, disciplinary, etc.). However, sharp criticism of this approach has not yet changed the general assessment of the doctrine of the composition of civil offense, which in almost all textbooks still occupies a prominent place [4, p. 193, 195].

Judicial practice also uses the term “composition of the offense”. In particular, in case 3-72gs12 the Commercial Chamber of the Supreme Court of Ukraine noted that according to Article 1166 of the Civil Code of Ukraine [6] to apply such a measure of liability as damages requires the presence of all elements of a civil offense, namely: wrongful conduct, losses, the causal link between the debtor's wrongful conduct and damages, guilt. In the absence of at least one of these elements, civil liability does not arise [7]. In this regard, we cannot agree with those authors who argue that although the law does not contain a list of conditions of a civil offense, but they can be distinguished by logical interpretation of articles of the Central Committee of Ukraine (Article 22, Article 1166) [6]. Of course, it is impossible not to consider the presence in cases provided by law, “truncated” composition of the offense (Article 1176, Article 1187 of the Civil Code of Ukraine [6]).

Modern unification of private law and the introduction of European standards have necessitated updating the provisions of current legislation on the institution of civil liability. Thus, the harmonisation of civil law in the field of non-contractual obligations is carried out under the influence of the Principles of European Tort Law (Principles of European Tort Law – PETL) [8]. However, the approach implemented in PETL cannot coexist with the above construction of civil liability, as tortious liability can also occur in the case of lawful infliction of damage or regardless of the fault of the perpetrator [9, p. 416]. The question of the relationship between measures of responsibility and measures to protect civil rights, which were mostly studied separately, also needs a separate study [10]. The civilist literature emphasises that the application of measures of responsibility is always based on the principle of guilt. When a person is assigned a duty that already existed, but which the person did not perform voluntarily, it is not a measure of responsibility, but a measure of protection [11, p. 95-96].

In Europe, outdated approaches to understanding civil liability have long been revised. In particular, after the reform of French contract law in France, the second stage of modernization of civil law began – the reform of civil liability law. The main tasks of the reform: consolidation of legislation; considering the principle positions that are actively discussed in the professional environment; supplementing the current legislation with a number of short stories [12, p. 108-109]. In Ukraine, there is also an urgent need to review approaches to the institution of civil liability. Modern law enforcement practice requires a well-developed and scientifically sound concept of civil liability, which would allow to achieve maximum efficiency in the restoration and protection of violated civil rights. This should consider the main functions of civil liability, such as compensation (aimed at restoring the affected area of the victim) and preventive (providing appropriate incentives to take optimal precautionary measures to reduce or avoid expected liability).

Given the ambiguity of the understanding of civil liability, its place in the mechanism of legal regulation, the lack of a single concept of liability, there is a need to discuss the issue of civil liability. *The purpose of this article* is to develop approaches to the institution of civil liability and outline areas for updating civil law, taking into account current European trends.

1. MATERIALS AND METHODS

Transformations in socio-economic life, the emergence of new global risks: terrorism, hybrid wars, coups, natural and social cataclysms encourage the revision of existing mechanisms for regulating relations based on legal positivism and natural law approach, in terms of their effectiveness. The focus on the development of a single legal space, a developed civil society, a common system of protection of rights and interests, and protection against global dangers makes it necessary to unite efforts to develop effective approaches to regulating public relations. Ukraine, which recently joined the socialist system with a dominance of planning and administrative approaches to governance, is only at the beginning of the path of forming the rule of law and integration into the developed world community. And this, in turn, necessitates a rethinking of approaches to understanding the law and change the legal consciousness.

The current trend is the introduction of rationalist legal understanding as a balance of general legal, sociological and economic analysis of law. Such a rationalist concept of understanding the essence of law

presupposes the awareness of law as a self-sufficient phenomenon that actively influences other, non-legal, social phenomena (economics, ethics, religion, etc.), which leaves an imprint on methodology. Therefore, the perception of law is not limited to the normative reflection of material (economic) relations. Law is seen as a defining form of social life for the economy. Therefore, when studying civil liability, it is advisable to use economic analysis of law and use such general techniques as dialectical, formal-logical, comparative, along with the logical-dogmatic method of interpreting law as a special method of scientific knowledge, combined with hermeneutics.

Economic analysis of law is a method by which ideas taken from economics are combined with legal theories and principles in order to predict the impact of legal norms on the behavior of subjects and study the economic consequences of such behavior. The fundamental basis of economic analysis of law is the category of efficiency, which, having economic content, can become an important criterion in the creation of legal norms. However, no less important is the basic value for law – justice. Given that economic efficiency cannot contradict justice (and morality in general), the study of civil liability was carried out in terms of justice, taking into account the concept of economic efficiency. These basic categories – economic efficiency and equity – can be sufficient criteria for drawing conclusions about the need to distinguish between protection measures and civil liability measures. However, economic analysis was used as a subsidiary (additional) methodological toolkit, along with traditional methods of legal science – logical-dogmatic method.

Using the dialectical method, various social phenomena are studied in their development. This method allowed analysing the contradictions of approaches to understanding civil liability. Formal-logical approach was used to substantiate the proven theories of judgment on the application of measures of civil liability. And the comparative method made it possible to analyse and identify differences between measures of civil liability and measures of protection. The state of doctrinal developments on the understanding of civil liability was also studied with the help of a comparative method.

The logical-dogmatic method of scientific research is aimed at identifying obvious signs (aspects, characteristics) of legal phenomena without immersion in the internal essential connections. It was aimed at cognising the dogma of law, which solves the problems of systematisation, interpretation, and application of law, as well as the development of law. The combination of the dogmatic method with the method of hermeneutics, which involves the spread of knowledge of the intellect, feelings, intuition of the researcher, allowed considering civil liability through the prism of its perception by researchers from different countries.

The main stages of the study of civil liability were: 1) the hypothesis that the concept of “civil liability” should be used in the understanding of law enforcement, which provides for coercive measures for the offense; 2) analysis of approaches to understanding civil liability; 3) development of directions of delimitation of measures of responsibility and measures of protection; 4) formulation of the conclusion that the category of “responsibility” should be used in a negative retrospective sense, and in order to expand the protection of rights and legitimate interests to introduce into civil law the category of “legal consequences of failure (violation) of civil duty”.

2. RESULTS AND DISCUSSION

2.1. Approaches to understanding the concept of civil liability

In foreign doctrine, the doctrine of civil liability is reduced to the following theories: the theory of responsibility as a duty (liability as duty), the theory of responsibility as a price (value) (liability as cost) and the theory of liability as a vulnerability (liability as vulnerability). According to the first theory, liability is understood as a secondary obligation that arises as a result of failure to perform the primary duty. In this case, the secondary obligation is a legal consequence of the violation of primary rights or failure to perform primary obligations, but the initial obligation does not disappear, but is transformed into another form. Liability as a price is considered in the context of those costs, losses, fees that the perpetrator must pay for the violation. And a relatively new theory – the theory of responsibility as a vulnerability was formulated by N. Oman. In his opinion, the first two theories have a significant drawback: they focus on state coercion. But such state coercion will not be applied without appropriate action by the victim. Instead, responsibility as a vulnerability is explained by the author that being responsible means that a person is exposed to an attack to which he has not been subjected before. The property and liberty of the defendant, who has been found not liable for certain civil offenses, remain protected from any further action by the plaintiff. However, when the defendant is found responsible, everything changes. Now the plaintiff has the right to apply to the coercive apparatus of the state with a request to coerce the defendant to perform a certain duty. Since the defendant is no longer “invulnerable” as a result of the defense of the state, the coercive mechanism that protected him is now given to the plaintiff to use as he sees fit. Of course, there are limitations on the defendant's vulnerability. The plaintiff has only

certain remedies at his disposal. The defining feature of the legal status of civil liability is precisely this unstable situation – the possibility of being subjected to private attack by the plaintiff [13, p. 393-394]. (To be liable means that one is exposed to attack in a way that one was not previously exposed. The property and liberty of a defendant who has been found not liable for some civil wrong remains protected from any further action by the plaintiff. Once a defendant is found liable, however, this changes. Now the plaintiff has the power to call upon the coercive apparatus of the state to do things to the defendant. In the absence of civil liability, this machinery lies inert. It is unlawful for a private party to employ it against an opponent. In many cases it is even unlawful for the state to employ the machinery against the defendant. Once the defendant is found liable, however, this changes. Now he is exposed. As he is no longer “invulnerable, impenetrably armed” by the protection of the state, the very coercive apparatus that protected him is now put at the disposal of the plaintiff to use or not as he or she sees fit. To be sure, there are limits on the vulnerability of the liable defendant. Only certain remedies are put at the disposal of the plaintiff. What defines the legal status of civil liability, however, is precisely this precarious position of exposure to private attack by the plaintiff.)

As already mentioned, in the Ukrainian civil doctrine, civil liability is understood in two aspects: as retrospective liability (liability for a civil offense) and long-term or positive liability (the obligation to act lawfully, the requirement to comply with legal norms) [4, p. 196]. In accordance with paragraph 22 of Part 1 of Art. 92 of the Constitution of Ukraine [14, p. 196] exclusively the laws of Ukraine determine the principles of civil liability; acts that are crimes, administrative or disciplinary offenses, and responsibility for them. Considering the issue of official interpretation of the provisions of paragraph 22 of Part 1 of Art. 92 of the Constitution of Ukraine [14, p. 196]. The Constitutional Court of Ukraine (hereinafter – CCU) used the concept of legal responsibility in understanding the application of measures of public law for non-performance or improper performance of their duties. A systematic analysis of the above constitutional provisions led the CCU to conclude that the content of paragraph 22 of the first part of Article 92 of the Constitution of Ukraine is not aimed at establishing a list of types of legal liability. It stipulates that only the laws of Ukraine should regulate the principles of civil liability (general grounds, conditions, forms of liability, etc.), the basis of criminal, administrative and disciplinary liability – acts that are crimes, administrative or disciplinary offenses (the main features of offenses their composition), and responsibility for them [15, p. 196]. Thus, we can state that in contrast to criminal, administrative and disciplinary liability, the grounds for civil liability are not limited to those established by law. This allows talking about a fairly broad understanding of civil liability, which includes breaches of obligations.

In foreign scientific literature, the term “responsibility” is used in connection with torts [16; 17]. For example, in a publication examining trade agreements, the term “liability” is used in the context of non-contractual claims. [17, p. 83]. The purposes of tort law are compensation for damage and deterrence of future tort behaviour [18, p. 443], which in essence is the performance of compensatory and preventive functions of civil liability. It is also suggested that breach of contract is not traditionally considered an offense [19]. In the Concept of updating the Civil Code of Ukraine, members of the Working Group on recodification (updating) of civil legislation of Ukraine within the systematic update of the Civil Code of Ukraine [6] (hereinafter – the CC of Ukraine) proposed to reconsider the normative approach to the relationship responsibility”. Instead of the phrase “liability for breach of obligation” in the opinion of the authors it is advisable in the title of Chapter 51 of the Civil Code of Ukraine [6] to use the category “legal consequences of default”. Instead, the category of “liability” should be used in cases of illegal harm [20, p. 43].

It is clear that liability for unlawful infliction of harm and the legal consequences of non-performance are covered by the retrospective and prospective notions of civil liability, respectively. The first is the result of an offense, and the second is the failure to fulfill an obligation or obligation. However, the concept of civil liability, including its grounds and measures, it is advisable to clarify. In particular, is it appropriate to cover the concept of civil liability and, accordingly, to apply the conditions of civil liability to those situations where there is no responsible attitude of the subjects to their responsibilities, which ensures their proper implementation. And how to deal with risky activities in this case – it is covered by the conditions of civil liability or not, because the risk characterizes the activities carried out within the legal field. And so, it is difficult to talk about the first condition of responsibility – the illegality of behaviour. And although the category of “civil liability” is often confused with the category of “risk”, however, in their legal orientation and legal consequences, they differ significantly. The risk goes far beyond property liability and in many cases, due to regulations, a person is forced to bear negative property consequences in the absence of illegality of his behaviour. In this regard, the ratio of risk and liability is manifested in the fact that the risk allows to overcome the negative consequences, which are not due not only to the illegality of the debtor's behavior, but also his behavior in general. Liability in any case is associated with adverse consequences for the person who violated the law [21, p. 95].

On the other hand, it is worth remembering that responsibility together with the function of compensation performs the function of deterrence, which allows to ensure an effective (socially and economically) result [22, p. 156]. From the economic standpoint, the rules of responsibility are a tool for internalising risks, thus creating incentives for socially beneficial behavior [23, p. 150]. For example, when it comes to a special type of activity associated with the relationship of the use of technology, artificial intelligence, or the implementation of certain professional activities, the concept of higher responsibility is used in a positive and long-term sense. This means a responsible attitude of the subjects to their responsibilities, which ensures their proper performance. At the same time, conditioned upon the peculiarities of activities related to the use of technology or the implementation of certain types of professional activities, the requirements for a responsible attitude to responsibilities are inflated compared to other activities. Compensation for the culprit in such cases should be understood as a measure of civil liability. In the case of innocent harm, compensation is a measure of protection for the victim.

In general, approving the above-mentioned idea expressed in the Concept of updating the Civil Code of Ukraine, it seems appropriate to introduce into the Civil Code of Ukraine the category “legal consequences of non-performance (violation) of civil duty” [6]. In this case, the concept of “legal consequences of non-performance (violation) of civil duty” will cover 1) measures to protect civil rights and interests; 2) measures to ensure the restoration of the dynamics and functioning of civil relations; 3) measures of civil liability. In this regard, it is appropriate to amend Art. 14 of the Civil Code of Ukraine, in particular to set out Part 3 of Art. 14 in the following wording: “The performance of civil duties is ensured by means of encouragement, the application of measures of responsibility and other legal consequences established by the contract or act of civil law” [6]. This will expand the possibility of protection of violated rights and interests and their effective restoration.

There is also a need to amend the title of Chapter 51 of the Civil Code of Ukraine. Now this chapter is called “Legal consequences of breach of obligation. Liability for breach of obligation”. This wording is not very correct, as the legal consequences of violation of obligation is opposed to responsibility. However, liability is only a component of the legal consequences of breach of obligation. Therefore, it is expedient to rename Chapter 51 of the Civil Code of Ukraine [6] to “Liability and other legal consequences of non-performance (breach) of the obligation”. At the same time, it is necessary to think about the delimitation of such categories as “measures of civil liability” and “measures to protect civil rights”.

2.2. Distinguishing between measures of civil liability and measures to protect civil rights

In legal doctrine, the protection of rights and interests is understood as:

– a comprehensive system of measures of material and procedural order, which includes forms, methods, means, which are independently chosen by the person whose rights and interests are violated, and is used to ensure such rights [24, p. 47];

– An integrative legal model based on the protection of civil rights and legally protected interests as an interdisciplinary (mixed) legal institution that exists on the border of substantive and procedural law, contains rules of private and public law and, accordingly, considers substantive and procedural aspects of civil rights protection. interests protected by law, covers its material, procedural and procedural elements, and combines static and dynamic states of protection [25, p. 156-157];

– legal activities aimed at eliminating obstacles to the exercise of their rights and the termination of the offense, the restoration of the situation that existed before the offense. At the same time Yu. Pritika notes that the term “measure of protection” is synonymous with the word “methods”, while “means” and “forms” of protection should not be confused with the concept of “method” of protection of rights [26, p. 16-17]. We will adopt this approach and in the future we will proceed from the identity of the concepts of “protection measure” and “protection method”.

The opinion of O. Cot seems appropriate that measures to protect civil rights and measures of civil liability are coercive, which is expressed not in their implementation solely through state coercive activities, but in the fact that their use is provided by possible coercion [27, p. 221]. In addition, the relationship between measures to protect subjective civil rights and civil liability is manifested in the fact that: 1) and measures of responsibility and methods of protection are certain legal means, legal instruments to influence the relevant social relations; 2) they are aimed at localizing the consequences of violations of rights, but methods of protection in their scope is a broader concept, which involves not only the restoration of the violated right or compensation for losses, but also prevention, suppression and elimination of violations of civil law; 3) the list of methods of protection of civil rights is wider than the measures of responsibility provided by law. Responsibility measures are an integral part of protection [28, p. 206], confirmed by the content of Art. 16 of

the Civil Code of Ukraine [6], in which responsibility is inherent only in some ways of protecting civil rights and interests. It should be borne in mind that liability alone cannot provide such protection, as it is a static legal category. This function is realized through the application of specific measures of responsibility, which in civil science are called sanctions [29]. Quite common today is the legal position that civil liability is the imposition on the offender of legal consequences, which are manifested in the deprivation of his certain rights or in replacing the default with a new one, or joining the default additional [30, p. 97; 31, p. 127].

O. Cot, clarifying the criteria for distinguishing liability measures from other protection measures, adds that liability is associated with the deprivation of existing rights or the imposition of new additional responsibilities and performs compensatory, not restorative function, which is characteristic of measures to protect subjective civil rights. This opinion is supported by other scholars, who point out that the absence of this feature indicates that this method of protection of civil rights is not a measure of civil liability [32, p. 137]. Finally, measures of legal responsibility are not factual, but legal in nature, which distinguishes them from self-defence, or property compensatory nature, which distinguishes them from measures of operational influence, which are organisational in nature [27, p. 230-233]. It is believed that such an approach is balanced and corresponds to the essence of measures to protect civil rights and civil liability and allows to effectively protect the violated right. In fact, this possibility of choosing the form of protection of rights or interests is a manifestation of the principle of dispositiveness, as the realisation of the right to protection involves self-determination of all issues related to the choice of remedies and their practical implementation [33, p. 144].

In this context, it is appropriate to note that at the time of adoption of the Central Committee of Ukraine, Art. 16, which enshrines ways to protect civil rights and interests, contained an extremely progressive (if not revolutionary) rule establishing the right of the court to apply other than those expressly provided for in this article, methods of protection: not only those provided by law, but and those established by the treaty [6]. According to the authors of the Central Committee of Ukraine, the parties, concluding the contract, had the opportunity, not limited to statutory means of protection, to provide effective, in their opinion, a way to protect rights in such a particular situation. But in practice, this idea did not work: when concluding the contract, the parties did not go so far in managing contractual risks to not only anticipate the consequences of non-performance or improper performance of the contract, but also to minimise them by identifying a unique method of protection. In the best case, when concluding the contract, they were limited to an indication of the means of protection established by the current legislation. However, the ambiguous case law on the application of the provisions of Part 2 of Art. 16 of the Civil Code of Ukraine [6] gave impetus to the negative trend that led to mass rejection of lawsuits due to the fact that the plaintiff, applying to the court, chose a method of protection not established by law or contract to protect the right or interest violated, unrecognised or disputed. The situation was partially remedied in 2017, when procedural legislation, including the Civil Procedure Code of Ukraine [34], was amended to expand the court's capacity to protect the rights, freedoms and interests of individuals. In the same year, in particular on October 3, Part 2 of Art. 16 of the Civil Code of Ukraine was supplemented with the words "or by a court in cases specified by law." Now this norm reads as follows: "The court may protect a civil right or interest in another way established by contract or law or court in cases specified by law" [6]. This has improved the position of persons who apply to the court to protect their violated right or legitimate interest, as such a rule is aimed at implementing the provisions of Articles 55, 124 of the Constitution of Ukraine and Art. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [6, p. 491-494]. However, such an updated rule came into conflict with the norm of Part 2 of Art. 5 of the CPC of Ukraine [34], according to which the court has the right to determine such a method of protection, which does not contradict the law, which has already been noted in the literature [28, p. 61]. Thus, protection measures and measures of civil liability are correlated as general and partial, i.e. protection measures are a broader concept that includes measures of civil liability [35, p. 81-86].

Currently, in the context of the recoding of civil law, the proposal to formulate the current principle of freedom of contract as broader – the principle of freedom of transaction – is considered promising. It is proposed to consider further expansion of the content of this principle in such a way as to generally declare freedom of entry into civil law relations (of course, subject to the requirements of reasonable and fair conduct of the subjects of legal relations) [36, p. 194]. Therefore, it seems logical not only to expand the possibility of entry of subjects into civil law relations, but also the possibility of protection of rights and legitimate interests by introducing into civil law category "legal consequences of non-performance (violation) of civil duties". And the category of "liability" to use in cases of illegal harm.

CONCLUSIONS

Revision of approaches to the institute of civil liability is already not only a matter of scientific discussion, but also a request for law enforcement practice. Unification of private law and harmonisation of civil law requires a coherent theory of civil liability, which must be developed by doctrine and ensure maximum efficiency in the restoration and protection of violated civil rights. To this end, the category of “responsibility” should be used in the negative-retrospective understanding as a law enforcement institution that provides for coercive measures for the offense and consists in establishing negative consequences for the offender in the form of restrictions of a personal and property nature. The obligation to act lawfully, the requirement to comply with legal norms – a positive perspective of responsibility – is rather a category related to the exercise of civil rights and the performance of civil duties. Failure to do so, especially in the case of a contractual relationship, a risk relationship, may not always be covered by the conditions of civil liability or, moreover, the concept of “composition of a civil offense”. Therefore, it is advisable in such cases to use the category of “legal consequences of non-performance (breach) of the obligation.” Accordingly, it was proposed to amend the title of Chapter 51 of the Civil Code of Ukraine, stating it as follows: “Liability and other legal consequences of non-performance (breach) of obligation.” This approach will allow not only to use measures of civil liability to restore the violated civil law, but also to apply other measures to protect civil rights and interests.

The distinction between protection measures and civil liability measures is made based on the ratio of general and partial, where protection measures, as a general category, cover measures of civil liability. At the same time, protection measures are not only legal instruments of influence on the relevant public relations and are aimed at localising the consequences of violations of rights, but also provide for the prevention, suppression and elimination of violations of civil law. In addition, the list of ways to protect civil rights is broader than statutory liability measures. This allows significantly expanding the actual possibility of protection of violated rights and restoring the violated rights as effectively as possible and to encourage participants in civil relations to socially desirable behaviour. At the same time, the issues of general grounds for liability for damage and conditions of civil liability, as well as certain measures (sanctions) for its application are also promising for further research.

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ОКРЕМІ АКТУАЛЬНІ ПИТАННЯ ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ ВІДНОВЛЕННЯ ЗЕМЕЛЬ

Анотація. Внаслідок стрімкого погіршення протягом останніх десятиліть стану земель в Україні, значна частина останніх незалежно від їх цільового призначення вимагає проведення невідкладних заходів їх відновлення. Актуальність такого наукового дослідження зумовлена насамперед браком комплексного і всебічного аналізу правового забезпечення відновлення земель. Зважаючи на це, метою статті є дослідження нагальних проблем у сфері правового забезпечення відновлення земель та розробка обґрунтованих пропозицій щодо їх розв'язання. Методами дослідження є сукупність філософських, загальнонаукових і спеціально-правових методів. В основі методологічних підходів до дослідження питань правового забезпечення відновлення земель є філософська концепція біосфероцентризму. У статті здійснено комплексне дослідження актуальних теоретичних проблем правового забезпечення відновлення земель. Сформульовано дефініцію поняття «відновлення земель» як правової категорії, з'ясовано її сутність та особливості. Здійснено всебічний аналіз чинного законодавства в досліджуваній сфері. Охарактеризовано попередні й основні заходи відновлення земель. Установлено місце правових норм, що регулюють суспільні відносини у сфері відновлення земель, у системі земельного права. Запропоновано критерії розмежування охорони та відновлення земель. Обґрунтовано необхідність внесення змін до чинного земельного законодавства стосовно закріплення обов'язків власників і користувачів земельних ділянок щодо відновлення родючості ґрунтів, інших корисних властивостей і функцій земель. Зроблено пропозицію законодавчого посилення юридичної відповідальності в досліджуваній сфері. Проведене дослідження спрямоване на вдосконалення правового забезпечення відновлення земель, що забезпечить їх збереження як основного національного багатства

Ключові слова: охорона, заходи, землекористувач, ґрунти, родючість

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SOME CURRENT ISSUES OF LEGAL PROVISION OF RESTORATION OF LAND

Abstract. *Due to the rapid deterioration of the state of lands in Ukraine over the past decades, a significant part of the latter, regardless of their intended purpose, requires urgent measures to restore them. The relevance of such scientific research is primarily due to the lack of a complex and comprehensive analysis of the legal support of land restoration. In addition, without a thorough theoretical study of the problems of legal support for land restoration, it is impossible to make appropriate reasonable proposals to improve existing and develop new legislation in the study area. Research methods are a set of philosophical, general scientific and special legal methods. At the heart of methodological approaches to the study of legal issues of land restoration is the philosophical concept of biospherecentrism. The article provides a comprehensive study of current theoretical problems of legal support for land restoration. The definition of the concept of “restoration of land” as a legal category is formulated, its essence and features are clarified. Preliminary and main measures of land restoration are described. The place of legal norms regulating public relations in the field of land restoration in the system of land law has been established. Criteria of delimitation of protection and restoration of lands are proposed. The necessity of making changes to the current land legislation regarding fixing the obligations of owners and users of land plots to restore soil fertility, other useful properties and functions of land is substantiated. The proposal of legislative strengthening of legal liability in the studied sphere is made. The study aims to improve the legal provision of land restoration, which will ensure their preservation as a major national wealth*

Keywords: *protection, measures, land user, soils, fertility*

INTRODUCTION

In the conditions of the swift worsening of the state of the land resources in Ukraine of exigent decision one of the most thorny problems of the present requires is stopping of the further scale worsening of the state of lands and their restoration. The outlined problem updated that goes speech about lands of Ukraine, which pursuant to Constitution of Ukraine make basic national riches and are under the special protection of the state. They show by itself basis of sovereignty of the state and come forward basis of vital functions of all of living. Land executes different functions. How an object of menage, it comes forward the basic mean of production in a rural and forest economy, is a spatial base for placing of the buildings and structures. In addition, land is a basic natural object, and also serves as a spatial base for the location of other natural objects – forests, waters, bowels of the land, objects of the vegetable and animal world. The use of land (land plot) can take place on various legal titles, a prominent place among which is the right to lease land [1].

Restoration of the state of all lands of the country as the main national wealth, regardless of their purpose, is an important basis for its sustainable development, because ensuring the latter requires stability and the quality of land. In this way restoration of land, which is essential for the preservation of land as the main national wealth, for present and future generations, to ensure sustainable development of the country as a whole, environmental and food security. The provision of the latter is reflected in a number of modern studies [2-4].

Thus, saving of the state of land, which is able to provide the necessities of humanity both today, and in the future, can be attained due to realization of measures, directed on renewal of the high-quality state of land of the agricultural and forestry setting, and also other properties of land of separate categories. Basis of forming of public policy in the field of protection and restoration of land in Ukraine makes Association Agreement between the European Union and the European Atomic Energy Community and their member

states, of the one part, and Ukraine, of the other part. As rightly noted in scientific research, one of the ways to prevent legal defects in land and legal regulation in Ukraine at present and in the future is to ensure the adaptation of the national land legislation to the requirements of the EU [5]. The state accepted the row of position papers on which undertook certain obligations, in particular, about joining: a) to Scope convention of UNO about the change of climate (Convention on Climate Change, 1992) [6]; b) to Convention of UNO about a fight from desertification (United Nations Convention to Combat Desertification, UNCCD, 1994) [7]; c) to Convention of UNO about the guard of biological variety (Convention on Biological Diversity, 1992) [8]. Today basis of planning of measures of restoration of land in the state is made: Basic principles (strategy) of public ecological policy of Ukraine on a period to 2030 year [9], approved by Law of Ukraine from February, 28 in 2019 No. 2697-VIII, Conception of fight against degradation of land and desertification, approved by order of Cabinet of Ministers of Ukraine from October, 22 in 2014 No. 1024-p. [10], National plan of actions in relation to a fight against degradation of land and desertification, approved by order of Cabinet of Ministers of Ukraine from March, 30 in 2016 No. 271-p [11].

A large area of land, regardless of its purpose, requires urgent restoration measures. Legal norms aimed at restoring the state of land are enshrined in regulations of various legal force. At the same time, they, unfortunately, are mostly general or declarative in nature, devoid of any systematization. This leads to legal gaps and conflicts in the mechanism of legal regulation of public relations concerning the restoration of land as an important natural resource. In addition, the current land legislation does not clearly distinguish between the provisions for ensuring the restoration of land and the regulations for their protection. Public relations in the field of land restoration remain insufficiently regulated by the legal provisions of the legislation, which ultimately has a negative impact on judicial practice. The presence of these shortcomings in the legal provision of land restoration today has an extremely negative impact on the development of relevant legal relations and the state of the land as a whole. The state of the land is related to the climate, changes in the latter are largely due to the state of the land.

Most scientific labours of land-legal subject devoted research of questions of legal safeguard of land. The problems of restoration of land were examined in legal science of Ukraine only fragmentary or side. In particular theoretical problems in relation to the separate measures of restoration of land were probed at the level of dissertation researches. Speech goes about labours of P. Kulinich [12], M. Deynega [13] and A. Misinkevich [14].

The special attention is deserved by monographic research of P. Kulinich, in which a scientist is offer the ways of perfection of the legal adjusting of agricultural land-tenure in Ukraine in the context of priority of requirements in relation to restoration, guard and saving of land of the agricultural setting [15]. Ponderable payment in the study of theoretical-methodological and applied principles of legal regulation of the use, restoration and protection of soils is carried out N. Gavrysh [16]. Separate aspects of legal problem of restoration of soils are reflected in the monographic study of S. Khominets [17]. Certain aspects of innovative methods for restoring soil fertility were studied in the works of S. Arora, D. Sahni [18], M. Drosos and A. Piccolo [19].

The purpose of this article is to research of modern problems in the field of the legal providing of restoration of lands and offer ways to resolve them.

1. MATERIALS AND METHODS

The methodological framework of this study included a set of philosophical, general scientific and special methods of scientific knowledge, namely: dialectics, analysis and synthesis, modeling, historical and legal, formal logical, systemic and structural, comparative legal, formal legal.

The basis of methodological approaches to the study of legal support for restoration of land should be the idea of biospherocentrism. In the current significant deterioration of the state of land, which is extremely important in the relations of land use and restoration, there is a change in the anthropocentric paradigm of nature management to a biospherecentric paradigm of human-environment interaction. Biospherecentrism is interpreted in science as a new type of worldview, makes the interests of an individual and society as a whole dependent on the needs of the entire planet and all living things that are on it. In particular, in philosophy, anthropocentrism and biospherocentrism are considered as philosophical concepts that reflect a person's attitude to the world around him and his perception of himself in it. From the position of supporters of biospherocentrism, a person is an integral part of the biosphere and should not put himself, his needs and interests above the needs of all living organisms on the planet. In this case, we are talking about a whole set of ecosystems. Negative processes characteristic of the current state of land have an impact on social development, to a certain extent restraining it by destroying the results of human labor and a tangible slowdown

in the development of productive forces. Further uncontrolled and irresponsible use of natural resources without taking into account the needs and peculiarities of the existence of all life on the planet poses a serious threat to all mankind. Thus, both in the use of natural resources (including land) and in their restoration, it is necessary to adhere to the idea of biospherecentrism.

The general scientific dialectical method became the basis for the entire study, made it possible to consider the legal support of land restoration in conjunction with other legal phenomena, and the corresponding normative legal array – in the dynamics of its development. Using the formal-logical method, a number of legal constructions have been formulated, such as: “restoration of land”. Today the so-called synergetism of technical processes in crop rotation technologies as a preliminary measure of land restoration is reflected in the agricultural sphere. When disclosing the problems of legal support for land restoration, the anthropological methodological approach cannot be left out either, as the conducted scientific research is to some extent aimed at man, at realizing his rights and interests, because the state of land and ecological and food security impact on the life and health of the individual.

Formally, a legal one was needed in the process of establishing the content of individual prescriptions of land legislation in the field of ensuring of restoration of land. The systemic-structural method is the basis for the classification of land restoration and the adoption of certain measures. The modeling method was used in the design and modernization of legal norms proposed to amend the current land legislation, as well as in the processing of the draft Concept of the restoration of degraded, unproductive and technologically contaminated land and the draft law “On restoration of land”.

2. RESULTS AND DISCUSSION

2.1. *Defenition of “restoration of lands” as a legal category, its essence*

Above all things it is necessary to mark that the analysis of encyclopaedic and linguistic literary sources allows to draw a conclusion, that term “restoration” is used in the context of high-quality properties of land (in particular, fertility of soils), states of the broken land. In accordance with the large explanatory dictionary of the modern Ukrainian language to “restore” a term means to return a previous kind to anything to damaged, spoiled, blasted [20]. The new explanatory dictionary of the Ukrainian language contains analogical formulations of term “restoration” as returning of previous kind to anything to damaged, spoiled, blasted; adduction to the previous state; returning to old [21]. A word “reproduction” interpreted how to reproduce again that, to repeat, reproduce, copy [22]. In other encyclopaedic editions this term is interpreted as an update, recreation of old [20]; creation again that, reiteration [23].

Restoration is bringing the state over of lands from existent negative to inherent them to the primary high-quality state. Speech goes about certain positive changes, including to soil fertility, and also about restoration of executable lands functions in accordance with their having a special purpose setting. To reproduce lands as natural object it is impossible. It is known that the high-quality state of lands is characterized the aggregate of their both positive and negative properties. It is expedient to notice that terms “reproduction” and “restoration” are not identical. Terms resulted at the same time in the current landed legislation and in the most advanced studies of scientists, as a rule, equate, thus as in researches will present of legal doctrine, so in labours of research soil scientists.

It is necessary to underline that such natural object as lands in general are unreproduced, it is impossible anew to create them as a natural object, however they can be restored. However, to restore of lands, unlike some other natural resources, for example forest resources, inherent certain specific. It consists in that the state of lands is subject restoration (speech goes about restoration of their high-quality state, their soils, due state of the broken lands), and also functions which execute lands on their basic having a special purpose setting. In the wide understanding restoration is a removal of worsening of the state of land.

Therefore, it is expedient to consider restoration of lands as a legally provided system of measures aimed at restoring lands to their original quality condition, deteriorated due to anthropogenic or natural (natural) factors, lost ability to perform certain functions arising from their main purpose, proper condition of disturbed lands through their reclamation, conservation of degraded and unproductive lands, land reclamation of this natural object and other measures provided by law. We emphasize that in accordance with the recently adopted Law of Ukraine “On Making Alteration in Some Legislative Acts of Ukraine in Relation to Perfection of Control the System and Deregulation in the Field of Land Relations” from April, 28 in 2021 No. 1423-IX [24] conservation of lands includes not only termination of their economic use for the purpose of silting and afforestation, but also through renaturalization, that is transformation of lands degraded, unproductive, and also technogenic polluted into natural biogeocenoses.

2.2. Features of restoration of lands

Reproduction of natural objects finds its manifestation precisely through quantitative indicators, they cover the creation of natural objects. We are talking about the reconstruction of, say, objects of the plant world, including forests, as well as objects of the animal world. It is obvious that reclamation of disturbed lands, conservation of degraded and unproductive lands, land reclamation are legal measures for their restoration. As rightly noted in scientific papers, these measures are directly related to the quality of land. For agricultural and forestry lands, which perform the function of a means of production, the primary basis should be the restoration of their quality, in particular, soil fertility [25].

Restoration of lands combines both the restoration of their quality and the restoration of the previous condition of disturbed lands. After all, in the latter case there is a destruction of the upper layer of the land. It should be noted that land plots, the condition of which is recorded in the materials of the State Land Cadastre, are subject to restoration. The qualitative condition of lands is fixed in the materials of their inventory in the implementation of land management, in particular, by conducting an inventory, qualitative characteristics of land plots are established, contaminated and degraded land plots in need of conservation are identified. In addition, the qualitative condition is reflected in the materials of the normative monetary valuation of land.

The condition of the land plot is also indicated in the agrochemical passport of the field (land plot), which is, for example, obligatory when leasing agricultural land. Therefore, the quality of the land, recorded in the relevant documentation, and should be considered initial (from the moment of its transfer to ownership or provision for use). The initial, so to speak, zero state for each owner and land user may be different, but it is necessary to focus on the materials of the State Land Cadastre. Any changes in the condition of the land plot must be timely reflected in the documentation of the State Land Cadastre. It seems appropriate that, say, notaries, when certifying land contracts, require a certificate of the state of the land, so that the new owner of the land was aware of the existing state of the land at the time of alienation.

First of all, the restoration of lands damaged as a result of illegal actions that caused the deterioration of soil cover, led to unusable condition of lands due to negative impact on them, such as: contamination of lands with radioactive and chemical substances, waste, wastewater and others. However, in some cases, legitimate actions are also taken, necessitating the restoration of both agricultural and non-agricultural land.

Thus, the actions that led to a change in the structure of the terrain as a result of mining, exploration, construction and other works are legitimate, provided that there is a relevant working project of land management. It should be noted that by law mentioned Ukraine “About making alteration in some legislative acts of Ukraine in relation to perfection of control the system and deregulation in the field of land relations” from April, 28 in 2021 No. 1423-IX [24] relocation of soil cover (fertile soil layer) within the same land plot intended for personal farming, horticulture, construction and maintenance of a dwelling house, farm buildings and structures (homestead plot), individual country house construction and construction of individual garages, carried out without the development of a working project of land management.

2.3. Measures of restoration of lands

The need for land restoration is caused by various factors. First of all, the condition of lands is negatively affected by anthropogenic activities: (a) improper tillage, (b) violation of the organization of the territory, (c) deterioration of protective forest belts, (d) insufficient application of erosion measures, (e) deforestation, (f) destruction of slopes, (g) improper cultivation of slope lands, (h) neglect of reclamation measures, etc. At the same time, soil erosion can be caused by natural disasters. Especially these problems were exacerbated during the land and agrarian reform. A detailed study of individual important problems of their implementation was the subject of special scientific research [26]. Among the natural factors are most often: (a) terrain, (b) surface shape, (c) steepness and exposure of slopes, (d) erosion resistance of soils, (e) rainfall, (f) volumes of natural intakes, (g) the thickness of the snow, (h) the speed of its spring melting, etc.

It should be emphasized that among the legal measures of restoration of land there are previous and basic. Thus, the existence of preliminary land restoration measures is evidenced by the Land Code of Ukraine [27] obligations of owners and users of land to preserve the useful properties of land, at their own expense to restore the land in case of illegal change of its terrain, except for illegal change of terrain land (Articles 91, 96). In order to prevent the intensification of land degradation processes (including soils), mineral fertilizers are applied, soils are washed in cases of salinization, appropriate irrigation regimes are applied, etc. After all, as soil experts rightly emphasize, the legal regime of lands (including soils) is aimed at strict observance by owners and land users of scientifically sound technological regulations, high culture of behavior to prevent and/or eliminate the phenomena of soil degradation and possible environmental risks, associated with illegal, environmentally unsafe land use [28].

The previous measures to restore soil fertility also include the introduction of crop rotations, in the process of which the approved standards for the optimal ratio of crops in various natural and agricultural regions are taken into account. So, the main restoration measures are: conservation of degraded and unproductive lands, reclamation of disturbed lands, land reclamation. It is the implementation of these measures for land restoration that received proper legal support. However, there are other land restoration measures. Although, unfortunately, their implementation is not regulated by law today. Such measures primarily include phytoremediation – a method of biological neutralization of soil pollutants, which restores their fertility. Experts recommend considering it as one of the areas of reclamation [29]. When using this method, plant roots absorb organic pollutants, transforming them into environmentally friendly products. Bioremediation is also a measure of land restoration, which is divided into two types: biostimulation and bioaugmentation. Restoration of man-made contaminated lands can be carried out by cutting the soil layer, collecting pollutants, steam extraction, etc. Such a measure is the so-called detoxification, which can be used as a stand-alone measure or in the reclamation of disturbed lands. It should be emphasized that the implementation of these measures in the future should be enshrined in law.

2.4. Specificity of ensuring of restoration of lands in the countries of Western Europe

Increased attention to soil protection and restoration is due to the current state of soil resources, awareness of their role in providing food and fulfilling their environmental functions, population growth and declining agricultural land, projected climate change and exacerbation of the world's food problem. Soil protection agricultural technologies are currently being introduced in European countries to reduce chemical and mechanical stress on both the soil and the environment as a whole. First of all, these are zero and conservative systems of cultivation, which is carried out both with the support of state institutions and by providing appropriate subsidies, which, of course, contributes to the implementation of soil protection technologies. In some European countries, especially in Great Britain, Germany, France, Denmark conservative agriculture, which involves reducing the use of agrochemicals, is becoming increasingly popular.

It should be emphasized that the Annexes to the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 “On Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage” address the removal, control and reduction of harmful substances so that contaminated soils, taking into account their current, established at the time of contamination or future use, do not pose a risk of adverse effects on human health in the long run [30].

In accordance with Annex II to the above-mentioned Directive 2004/35/CE, the restoration of the natural state is carried out by applying both initial and additional restoration. Thus, initial recovery means any restorative measure through which natural resources that have been damaged or damaged services are returned to their original state or close to the latter. Additional restoration, like any restorative measure applied to natural resources or services to correct that fact, means that the initial restoration does not end with the full return of natural resources or services to their previous state.

2.5. Legal aspects of restoration of lands

Land restoration includes various legal aspects. Thus, depending on its purpose, the restoration of soil fertility of agricultural lands, the productivity of forest lands, restoration in order to perform other functions (in the case of lands of other categories) are distinguished.

Restoration measures are carried out at the national, regional and local levels, carried out by owners and users, including tenants of land. According to the role of anthropogenic factors, natural and artificial land restoration should be distinguished. Thus, the reclamation of disturbed lands, their land reclamation provides their artificial restoration. Conservation of lands contributes to their natural restoration, resulting in the formation of fallow lands and self-restoration of land. According to the source of legal support, land restoration is carried out if there are grounds and in the manner prescribed by law (it is about their reclamation), and according to bylaws (it is about land conservation).

It is quite important that when implementing land restoration measures, especially soils, it is necessary to take into account the division of the territory of Ukraine into soil-ecological zones. In addition, it makes sense to talk about the restoration of not only the state of the land, but also land rights, in particular, the return of illegally occupied land (it is about the restoration in a broader sense). Thus, the return of illegally occupied land plots must be preceded by bringing them to the previous, usable condition by demolishing illegally constructed buildings and structures, restoring the disturbed relief of land plots, etc. (article 212 of the Land Code of Ukraine).

Today, as rightly noted in scientific papers, the return of illegally occupied land is an example of a measure to eliminate violations of land legislation [31]. Land restoration is an element of defence of rights to them. It should be emphasized that the above method of defence of violated rights is manifested through the reclamation of disturbed lands, conservation of degraded and unproductive lands, as well as the implementation of land reclamation and other measures to restore them.

It should be noted that the restoration of the state of the land plot, which existed before the violation of rights, is usually considered a substantive method of defence. However, examined it can be and as an obligation-legal method of defence of land. Thus, there are cases of loss of original quality, violation of the terrain due to the actions of the tenant. Therefore, in this case, the rights of the subjects who are in a contractual relationship (in particular, the owner of the land) are violated. In obedience to the decree of Cabinet of Ministers of Ukraine of “On Approval of the Typical Lease Contract of Land” [32] after the termination of the agreement the lessee must return to the landlord land (land) in a condition not worse than that in which he received it for rent. Therefore, in the presence of an agrochemical passport of the field (land) when the relevant obligation of the lessee is included in the text of the lease agreement as one of the conditions of the latter, it is a mandatory legal way to protect the rights of the land owner [33].

2.6. Criteria for distinguishing restoration and protection of lands

The question of the legal nature of land restoration is extremely relevant, to clarify which it is appropriate to pay attention to the analysis of the relationship between restoration and protection of land, because in scientific works restoration is often interpreted as an independent area of land protection.

The law considers the protection and restoration of land to be the responsibility of landowners and land users. Land protection measures are aimed at ensuring the rational use of land, preventing their clogging and pollution, guaranteeing a special regime of land use for environmental, health, recreational and historical and cultural purposes. Land protection measures are carried out both at the state level (these are the relevant management functions) and at the local level (when using land plots by their owners and users). We are talking about their rational use, fulfillment of obligations to comply with the requirements of environmental legislation, as well as the preservation of useful properties of the land.

Thus, land restoration has certain specifics. Its measures are carried out, when worsening of the high-quality state of land of the agricultural setting took a place already, in particular, to fertility of soils, violations of the previous state of lands in the case of change of their relief, and also if it be impossible implementation of the proper functions lands pursuant to their having a special purpose setting. Land restoration measures should be introduced not only in case they lose their original quality condition, but also the ability to perform appropriate functions, disturbance of land relief, and so on. Measures of protection of land on maintenance article 22 of the Law of Ukraine of “On Protection of Land” [34] more aimed at preventing the deterioration of the quality of agricultural land, reducing or losing fertility, as well as productivity of forestry land, to ensure the performance of non-agricultural land relevant functions.

At the same time, there is a kind of connection between land protection and restoration, because, due to certain measures for land protection (such as: the state complex system of observations; natural-agricultural, ecological-economic, anti-erosion and other types of zoning lands) are lands that have undergone changes in the structure of the terrain, are degraded, have low natural properties, are characterized by high erosion of soils, where the intensity of erosion processes and their dynamics. Land protection measures contribute to the establishment of their negative quality characteristics, topography, low soil fertility, which, of course, helps to more effective and timely restoration measures.

2.7. The place of legal norms regulating public relations in the field of land restoration in the system of land law

In connection with the above, the question of the legal nature of land restoration, establishing the place of legal norms governing public relations for land restoration in the system of land law of Ukraine remains extremely important. Legal norms are known to form the relevant branch of law through individual legal institutions. These rules are part of the field of law, but differ from other industry rules in some way. In the theory of law, it is generally accepted that the legal institution is a separate group of rules of law that regulates one or another type of homogeneous social relations.

Legal norms aimed at ensuring the restoration of land operate in case of deterioration or loss of quality of agricultural land, in particular, soil fertility, violation of the previous state of land in case of change of their relief, as well as inability to perform certain basic functions according to their purpose. We are talking, for example, about the reduction or loss of the original quality of land. For example, when grading soils, there is

a decrease in the assessment of soil quality due to the deterioration of their natural properties. Information on changes in soil properties must be included in the land cadastral documentation, in particular, in the Land Book, in the agrochemical passport of the field or land plot. In the latter case, certification is carried out in order to control changes in fertility, soil contamination with chemicals. If these indicators change in the direction of deteriorating soil quality, there is a need to restore their fertility.

Land protection and restoration measures are separated by a time frame. The first are aimed primarily at ensuring the rational, targeted use of land, preventing deterioration, pollution and littering, providing a special regime of land use for environmental, health, recreational and historical and cultural purposes. The obligations of land owners and users regarding land protection are referred to in the Land Code of Ukraine, which stipulates that these entities are obliged to comply with environmental legislation, increase soil fertility, preserve other useful properties of land, maintain erosion structures, networks of irrigation and drainage systems (Articles 91, 96). If the implementation of these protection measures did not give the expected result (that is protection measures were not effective or not implemented at all), and negative consequences for the condition of lands and reduction of soil quality (soil fertility) occurred, it is necessary to carry out restoration measures.

After the restoration of the quality of lands (including their soil fertility), the condition of disturbed lands, as well as the functions they perform for the main purpose, the lands again become the object of legal relations for their protection.

Legal norms regulating public relations in the field of restoration of land can be considered an independent legal institution, which is characterized by a special subject composition. It is characterized by specific concepts, legislative constructions, such as: disturbed lands; degraded lands; unproductive lands; man-made contaminated lands; land degradation; soil degradation; land plots with eroded, waterlogged, with high acidity or salinity soils; unfavorable water regime; waterlogged, over-drained lands; land conservation; reclamation of disturbed lands; land reclamation; plastering of soils; liming of soils, etc.

2.8. Features of legal relations in the field of restoration of lands

Public relations arising from the restoration of land should be considered an independent component of land relations, therefore, they are part of the subject of land law, as well as public relations related to the protection and use of land. However, these types of land relations are closely related. For example, the use of land in different legal titles involves both owners and users fulfilling a number of responsibilities for its protection and restoration. In the case of conservation of degraded, unproductive and man-made contaminated land plots, their owners and land users for a certain period lose the right to use them. After the conservation and restoration of such land plots, these entities regain the right to use them. It should be noted that certain measures for land protection allow to identify lands that need to take measures for their restoration, in particular, to identify the processes of land and soil degradation and the peculiarities of the manifestation of these processes. Yes, it is first of all about the state complex system of supervision; implementation of natural-agricultural, ecological-economic, anti-erosion and other types of zoning (zoning) of lands; implementation of rationing (article 22 of the Law of Ukraine "On Protection of Land" [34]). After appropriate restoration measures, these lands again need protection from the state, their owners and users.

Further development of land relations in the field of land restoration will depend on the land legal regulation of such relations. After all, we repeat, as of today, the legal norms governing public relations in this area, properly unsystematized, are contained in regulations of various legal force, and a certain part of them, which is in the legislation governing public relations for land protection, is characterized by conflict and the lack of effective support for the mechanism of their implementation.

It should be emphasized that legal relations in the field of land restoration belong to the legal relations of the active type. Thus, land conservation is preceded by active actions of the obligated person aimed at stopping their economic use (in particular, it is about the initiation of land conservation by land owners or land users). It seems impossible to carry out conservation of degraded and unproductive lands without ordering a project developed by the contractor for land management. Failure to use the land will not directly lead to the restoration of its quality at the appropriate level. In this case, there is a possibility of littering the land with harmful plants, which will lead to further deterioration of its quality. Conservation of land should be carried out, as already mentioned, only on the basis of the developed project. The need for active action is evidenced by the afforestation of such lands, and sowing them, in certain cases, with appropriate herbs. In addition, preserved land plots are subject to systematic monitoring. Both owners and users of land participate in the work of the commission for the survey of land in kind (on the ground) in order to make a proposal to the authorities to return them for use or extend their conservation.

2.9. Obligations of owners and users of land plots in the field of restoration of lands

The main legal relationship in the restoration of land should be considered a legal obligation, which is manifested in the active behavior of the obligated person in order to ensure the subjective rights of other entities. Above all things it is needed to underline that to the articles 90, 91, 95 and 96 the Land Code of Ukraine foresee common laws and duties of proprietors and users of lot lands, and only some of them belong to the rights and duties of subjects of legal relationships in relation to restoration of lands. Pursuant to the article of 91 of the Land Code of Ukraine, most of the responsibilities of landowners are aimed at ensuring the protection of the latter, to increase soil fertility and preserve other useful properties of land. Among the responsibilities of landowners in the field of land restoration under article 91 of the Code can also be distinguished: bringing the land to its previous state at its own expense in case of illegal change of its relief, except for such a change not by the owner of the land, when this procedure is carried out at the expense of the person who illegally changed the terrain. Land owners must restore land plots both their users during their operation. In this case, there is only one object of use, protection and restoration – land.

However, the current land legislation does not specify the obligation of landowners and users to restore lost soil fertility and other useful properties of land in the course of economic activity. After all, even with careful improvement of soil fertility and preservation of other useful properties of land, neither land owners nor land users are insured either by natural forces or by the actions of outsiders, resulting in deteriorating initial quality of land, arise and acquire spread processes of their degradation, disturbance of a relief. In this regard, the problem of restoring the condition of disturbed lands, their quality and ensuring that they perform their functions is acute. We consider it necessary to enshrine the obligation of owners and users in the article 91 and 96 the Land Code of Ukraine [25] to restore soil fertility and other useful properties of land, as well as to restore the land in the event of a change in its terrain. Unfortunately, today there is a certain lack of interest of landowners and users in the implementation of measures for the protection and restoration of land, which in some cases is mostly due to financial problems. We emphasize that the owners and users of land, which carry out their rational use, protection, increase soil fertility, in case of deterioration of land quality, loss of their relevant functions take timely measures to restore them, it is advisable to provide certain preferences and benefits (tax, credit and others). In this case, it is obviously a matter of ensuring the public interest. In contrast, for owners and land users, failure to take measures to restore degraded, contaminated and disturbed land should have negative consequences in the form of, for example, the imposition of fines. It is at the expense of such funds that it is expedient to provide appropriate benefits to land owners and land users who carry out proper land cultivation, increase soil fertility, preserve other useful properties of land, initiate and implement land restoration measures. The above will provide incentives for both the rational use of land, their protection, and the timely restoration of land. At the same time, given the dispersion of powers in the field of land restoration between the State Geocadaastre and the State Ecoinspection, it is advisable to create a separate body (state agency or civil service) to promote more effective activities in this area.

The need for restoration of land is closely linked to the application of legal liability measures in this area. Given the weak economic and legal mechanism, there is an urgent need to strengthen both administrative and criminal liability. In particular, it is expedient to supplement the Code of Ukraine on Administrative Offenses with a special article on liability for non-fulfillment by both the land owner and the land user of the obligation to timely start the procedure of conservation of degraded, unproductive and man-made contaminated lands. In addition, it is necessary to establish criminal liability for ignoring the restoration of the quality of degraded and unproductive lands (primarily by conserving them), the relief of disturbed lands by recultivating them in cases prescribed by law, if it has serious consequences for the environment and human health.

CONCLUSIONS

To restoration of lands and relevant legal requirements need to be systemic. It is necessary to ensure the effective implementation of the legislation on this procedure by amending existing legislation, adopting new regulations in this area in order to properly implement appropriate measures for land restoration through the responsibilities of owners, land users, other entities, through actions which there was a loss of the original quality of such areas, violation of their relief, while strengthening their responsibility in the field of land restoration, as well as the creation and functioning of an appropriate level of incentives for landowners and land users to timely land restoration in parallel with the actual receipt of funds from the state to land owners and users.

In conditions of significant deterioration of land, as the main national wealth, the rapid spread of degradation processes in the country there is an urgent need to develop and adopt the Concept of restoration of degraded, unproductive and man-made contaminated land. The purpose of this Concept is to outline priority

areas for ensuring the restoration of man-made contaminated, degraded and unproductive land. Its main tasks include: a) improving the legal framework for land restoration; b) elaboration of approaches to land restoration, promotion of processes of reduction of their degradation and desertification; c) definition of mechanisms and conditions of realization of this Concept; d) development of a plan of priority actions for the implementation of the provisions of this document; e) improvement of international cooperation in this field. On its basis should be adopted a separate special Law “On restoration of land”, which should establish a definition of “restoration of land”, its measures, and provide for the restoration of land of different categories.

Thus, the time has come for a significant renewal of the legal provision for land restoration, which is essential for the preservation of land as the main national wealth for present and future generations, to ensure environmental and food security, sustainable development of the country as a whole.

RECOMMENDATIONS

The study may be of interest to researchers of problems of land and agricultural law, practicing lawyers, politicians. The materials of this study can be used to prepare methodological recommendations, text-books on land law. Results of the conducted research can be used to improve the land legislation of Ukraine.

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ГАРМОНІЗАЦІЯ УКРАЇНСЬКОГО ЗАКОНОДАВСТВА ПРО АКЦИЗНЕ ОПОДАТКУВАННЯ АЛКОГОЛЬНИХ НАПОЇВ З ПРАВОМ ЄВРОПЕЙСЬКОГО СОЮЗУ

Анотація. Акцизний податок є джерелом наповнення бюджету в Україні та інструментом державного регулювання виробництва і обігу підакцизних товарів. Однак, ухилення від сплати цього податку та зростання тіньового сектору економіки негативно впливають на всі сфери суспільного життя. Тому метою цієї публікації є визначення напрямів удосконалення правового регулювання акцизного оподаткування в Україні, виявлення проблемних аспектів, наслідків впливу збільшення розміру ставок акцизного податку на обсяги виробництва підакцизної алкогольної продукції, мінімізації сектору виробництва та реалізації підакцизних товарів, а також дослідження аналізу зарубіжного досвіду з цього питання. У статті на підставі системного аналізу з використанням діалектичного, порівняльно-правового, статистичного та інших методів аналізується стан правового регулювання акцизного оподаткування алкогольних напоїв та обговорюються підходи щодо удосконалення податкового законодавства в Україні. Зокрема, обґрунтовано необхідність приведення законодавчої бази у відповідність до європейських директив, спрощення податкових процедур для платників податку, встановлення економічно обґрунтованих податкових ставок, посилення контролю щодо обсягів виробництва та обігу підакцизної алкогольної продукції, попередження ухилення сплати податку, а також запровадження позитивного зарубіжного досвіду у цій сфері. Одним із пріоритетних напрямів гармонізації законодавства є застосування диференційованого підходу до оподаткування алкогольних напоїв залежно від їх міцності, а також інших якісних і кількісних характеристик; інвестування частини бюджетних надходжень від акцизного податку на алкогольні напої у програми, направлені на попередження та припинення алкоголізму; використання електронних систем контролю за рухом алкогольних напоїв від виробника до споживача

Ключові слова: акцизний податок, непрямі податки, податкова політика, Угода про асоціацію України з ЄС, Директива 92/83/ЄЕС, Директива 92/84/ЄЕС

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HARMONISATION OF UKRAINIAN LEGISLATION ON EXCISE TAXATION OF ALCOHOLIC BEVERAGES WITH THE LAW OF THE EUROPEAN UNION

Abstract. *Excise tax is a source of filling the budget in Ukraine and an instrument of state regulation of production and circulation of excisable goods. However, tax evasion and the growth of the shadow economy have a negative impact on all spheres of public life. Therefore, the purpose of this publication is to identify ways to improve the legal regulation of excise taxation in Ukraine, identify problematic aspects, the impact of increasing excise tax rates on the production of excisable alcohol, shadowing of the sector of production and sale of excisable goods, and analysis of foreign experience. The article based on systematic analysis using dialectical, comparative law, statistical and other methods analyzes the state of legal regulation of excise taxation of alcoholic beverages and are discussed approaches to improving tax legislation in Ukraine. In particular, the need to bring the legal framework in line with European directives, simplify tax procedures for taxpayers, establish economically justified tax rates, strengthen control over the production and circulation of excisable alcohol, prevent tax evasion, and introduce positive foreign experience in this sphere. One of the priority areas of harmonisation of legislation is the application of a differentiated approach to the taxation of alcoholic beverages depending on their strength, and other qualitative and quantitative characteristics; investing part of the budget revenues from the excise tax on alcoholic beverages in programmes aimed at preventing and stopping alcoholism; use of electronic control systems for the movement of alcoholic beverages from producer to consumer*

Keywords: *excise tax, indirect taxes, tax policy, Association Agreement between Ukraine and the EU, Directive 92/83/EEC, Directive 92/84/EEC*

INTRODUCTION

Harmonisation of Ukrainian legislation with the law of the European Union (hereinafter – the EU) and its adaptation to the key requirements of building a common European legal space covers various areas of legal regulation. The study of the experience of EU countries in the field of excise taxation acquires not only theoretical but also purely practical significance. The signed Association Agreement between Ukraine, on the one hand, and the European Union and its Member States, on the other hand (hereinafter referred to as the Association Agreement [1]) contributes to Ukraine's rapprochement with the European political, economic and legal space and provides for harmonization legislation of Ukraine with EU law. Under the Agreement, the Parties undertook to apply the principles of good governance in the field of taxation, aimed at establishing fiscal neutrality, simplifying trade conditions for external and internal agents and creating conditions for the effective functioning of the EU internal market. That is why the issue of national implementation in Ukraine of directives in the field of indirect taxation in general and excise taxation in particular is of particular importance.

The Constitution of Ukraine [2] defines the obligation of everyone to pay taxes and fees in the manner and amounts prescribed by law. Taxes are the basis of welfare of the state and society, the main source of filling the revenue side of the budget, a tool for regulating socio-economic processes in society, a tool for influencing the economic activities of enterprises and organisations. In addition, tax regulation is an integral part of state regulation of public relations as an important tool for influencing the development of civil society by the state through streamlining the tax system, the establishment and administration of taxes and fees.

We share the opinion of L. Sidelnikova that “only by comparing the interests of man and the state at the level of society can we realize the benefits of taxation, which will be obtained in the form of public goods. That is, society is an entity that reconciles the interests of taxpayers and the state, expressing benefits for each of them” [3, p. 587-588]. The use of excise tax allows having a targeted impact on the level of consumption of goods harmful to human health, and stimulating the production of quality goods of the excise group. After all, the place and role of excise in society is manifested in the fact that the excise tax, as a mandatory payment, is used to finance public goods and services, and is an effective means of financial policy to influence the allocation of resources, redistribution of wealth, public choice in democratic society.

Today, the issue of excise tax reform is one of the most relevant in the formation of the general system of taxation of our state. Excise tax has always been and remains an important source of filling the budget in Ukraine and is an important lever of state regulation of production and circulation of excisable goods. Moreover, according to the State Treasury Service of Ukraine [4] in recent years, we can observe a gradual increase in revenues from excise tax to the budget by payers of this tax (Fig. 1).

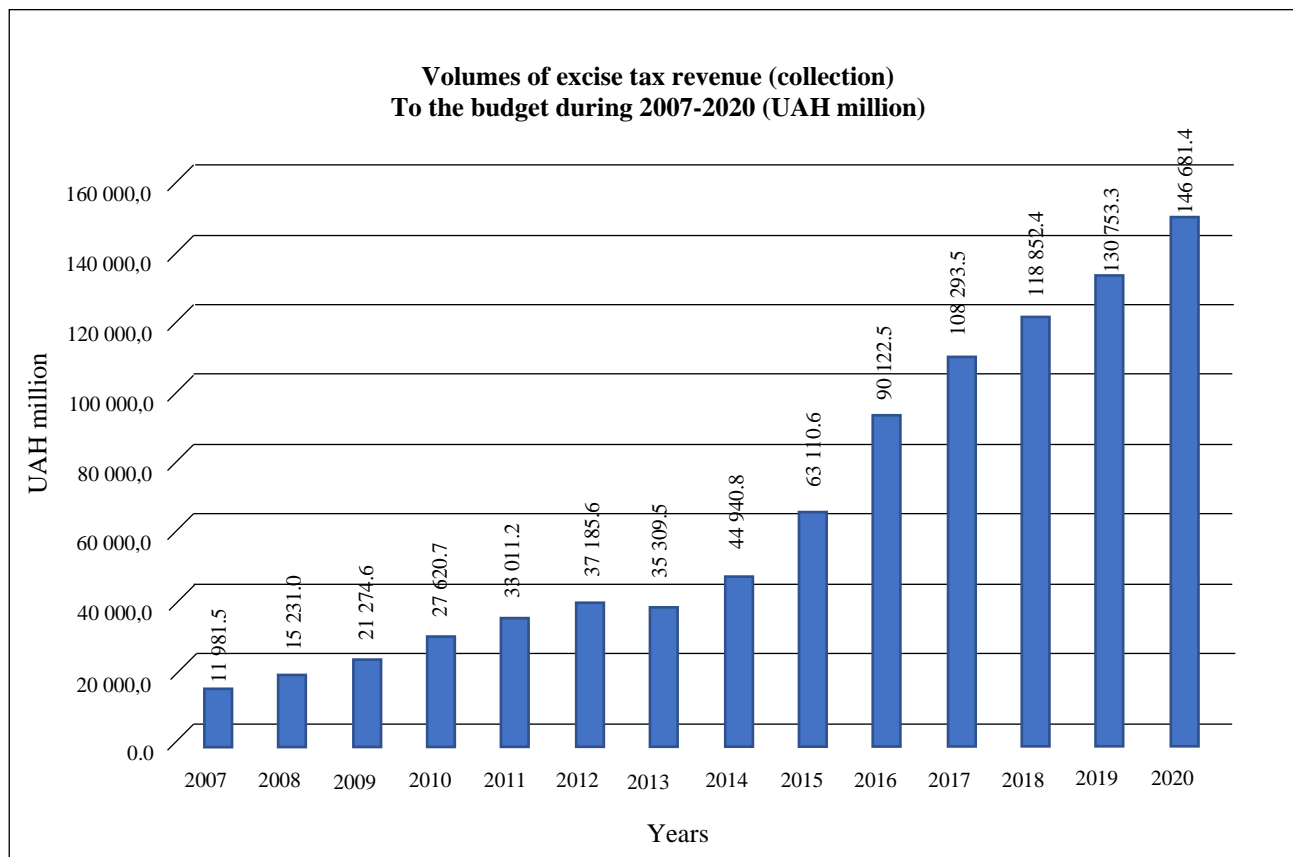


Figure 1. Volumes of excise tax revenues to the budget during 2007-2020

Source: [4]

Particular attention needs to be paid to the study of computational features excise tax on alcoholic beverages, problematic aspects of legal regulation of relations in the field of administration and ways to solve them, taking into account foreign experience. We share the opinion of Ukrainian scientists that “... the system of excise taxation of world countries is formed in balance with the interests of producers and consumers, the public need to support industries and regions, employment, social priorities such as public health and the need to limit harmful foods and beverages, etc. According to the analysis of various approaches that exist in world practice, there is no consensus in the world on the defining direction of the implementation of excise policy, which would fully consider the balance of fiscal interests and social regulation. Each country establishes such a balance in its own way, based on the realities of the time, the influence of political currents, the transformation of public consciousness and values. At the same time, the general approaches used by the EU countries, which our state is also preparing to join, can be taken as a basis for the development of excise policy in Ukraine” [5, p. 218].

By implementing tax policy measures, the level of production and consumption of excisable goods is influenced, the structure of excise tax revenues is optimised, other socio-economic effects are achieved (reduction of consumption of goods harmful to human health, stimulation of production of better goods,

etc.) [6, p. 234-235]. We share the opinion of Ukrainian scientists that “in conditions of economic instability, economic reform and adaptation of tax legislation to EU norms in Ukraine there is a decrease in fiscal efficiency of excise tax and increase the level of illegal (shadow) production and sale of excisable groups of goods. Such phenomena are caused, first of all, by the factor of imperfection of the current tax legislation on taxation, regulation and sale of groups of excisable goods” [7, p. 10].

The purpose of this study is to determine on the basis of a comparative analysis of the EU Council Directives on excise taxation, and international treaties of Ukraine, areas of improvement of legal regulation of excise taxation of alcoholic beverages in Ukraine, identify major problems of excise taxation. excisable alcohol products, shadowing of the sector of production and sale of excisable goods, including research of foreign experience on this issue.

1. LITERATURE REVIEW

The issue of implementation of international legal norms in Ukrainian legislation, in particular EU norms, is being studied by such Ukrainian scholars as M. Buromensky on the relationship between international and national law [8], B. Denisov and A. Melnyk studies the interaction of international law with the domestic law of Ukraine [9], V. Mytsyk, K. Smirnova, E. Streltsov analyses the current problems of unification of international law and its impact on national law [10]. Some aspects of excise tax administration are studied in the works of Ukrainian scientists, namely: V. Korotun, S. Brekhov, N. Novitskaya focused on the mechanism of excise tax administration, control over the production and circulation of excisable goods in Ukraine [6], I. Liutyi, A. Dryga, M. Petrenko formulated the main directions of improving the taxation system through excise duty [5], O. Bondarenko and V. Chizhenko studied the fiscal efficiency of the excise tax as a component of the optimisation of the indirect taxation system [7], N.I. Atamanchuk, N.S. Khatniuk, H. Boreyko, Yu. Bakay analysed the features of excise tax on fuel in Ukraine [11], I. Khlebnikova studied the impact of a specific excise tax on the parameters of the development of markets for alcoholic beverages and tobacco products in Ukraine [12] and others.

Numerous studies have been devoted to foreign scholars administration of excise tax on alcoholic beverages, namely: L. Wilson, R. Pryce, C. Angus, R. Hiscock, A. Brennan, D. Gillespie on the impact of alcohol tax on retail prices [13], A.M. Solov'ev analyses the level of excise rates on alcoholic beverages, estimates revenues from the collection of excise duties on alcoholic beverages and their share in budget revenues and GDP of European countries [14]; A. Ngo, X. Wang, S. Slater, J. Chriqui, F. Chaloupka, Y. Lin, L. Smith, Q. Li, C. Shang presents a thorough overview of excise taxes on alcohol as a percentage of retail prices for alcohol in 26 OECD countries [15]; A. Ardalan, S. Kessing studies the impact of excise duty rates on the price of beer in EU member states [16]; T. Bieber examines the provisions of Directive 2020/1151 on excise duty on beer [17]; C. Shang, A. Ngo, F. Chaloupka determine the extent to which alcohol prices increase with increasing taxes and the effectiveness of tax policies in reducing consumption in OECD countries [18]; K. Anderson analyses alcohol tax rates and the types of tax instruments used in different countries [19]; J. Nelson, J.R. Moran estimates the impact of excise tax rates on the price of alcohol [20]; E. Kolářová, D. Homola, V. Kolářová, E. Kramná focuses on the consumption of alcohol and cigarettes in the Czech Republic and its impact on the income of the Czech Republic [21]; U. Bergman, N. Hansen is studying the change in excise duties on the price of alcoholic and non-alcoholic beverages in Denmark [22] and others.

Without diminishing the importance of scientific work of scientists, it should be noted that some issues of excise taxation of alcoholic beverages remain insufficiently studied, which necessitates deepening and expanding research in the context of tax reform and harmonization with EU standards. In particular, it is necessary to analyse the international legal obligations undertaken by Ukraine in accordance with the Association Agreement, including the compliance of Ukrainian legislation with the provisions of EU directives on excise taxation. The issue of preventing the shadowing of the production sector and the sale of excisable goods in the context of reforming tax and customs legislation needs to be studied more thoroughly. According to Ukrainian scientists, “the problem of the current system of excise taxation is a significant shadowing of the sector of production and sale of excisable goods” [7, p. 14]. That is why in the current conditions of tax legislation reform, harmonisation of excise tax with EU legislation, this tax requires further research and finding new ways to improve its administration.

2. MATERIALS AND METHODS

The research used a set of general and special methods of scientific knowledge, namely: dialectical, comparative law, statistical and graphical representation of results. The dialectical method, based on the principles of unity of systems in the study of their individual interdependent components, was used in the analysis of elements in the holistic structure of the mechanism of legal regulation of relations in the field of excise taxation of alcoholic beverages. The comparative legal method was used to review the current legislation of Ukraine, including tax legislation of foreign countries, EU Council directives in the field of taxation. This allowed outlining the common and distinctive features of excise tax administration and to suggest some positive European experience in Ukraine. The application of the statistical method allowed to identify the dynamics of growth of revenues from excise tax to the budget, determine the role of this tax in the development of the revenue side of our budget, analyse the dynamics of reduction of ethyl alcohol and alcoholic beverages during 2013-2020.

The article is based on the provisions of international treaties of Ukraine, EU legislation, Ukrainian legislation, laws and bylaws of Ukraine aimed at regulating relations in the field of legal regulation of indirect taxation, as well as relevant legislation of foreign countries, namely: Constitution of Ukraine [2]; Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part [1]; Tax Code of Ukraine [23]; Budget Code of Ukraine [24]; Council Directive “On the Harmonization of the Structures of Excise Duties on Alcohol and Alcoholic Beverages” No. 92/83/EEC of 10/19/1992 [25] and the Council Directive “On the Approximation of Excise Duties on Alcohol and Alcoholic Beverages” No. 92/84 /EEC of October 19, 1992 [26] and others. It should be noted that the tax legislation of Ukraine is focused on the application of international law. Article 3 of the Tax Code of Ukraine includes in the tax legislation “current and international agreements, the binding nature of which has been approved by the Verkhovna Rada of Ukraine”, the same agreements are referred to in paragraph 3 of Art. 13 and Article 19¹.1.32 of the Code. But in paragraph 5 of Art. 13, and in Art. 14.1.53, 14.1.154, 14.1.158 The Tax Code requires the application of all “current international treaties of Ukraine”, all this allows to involve a wide range of international legal acts for the development of tax legislation [27, p. 337-358].

The authors study the practice of applying tax legislation by the State Tax Service of Ukraine, use reference books, statistical materials on the administration of excise tax in Ukraine, indicators of the alcohol industry and the industry of alcoholic beverages. In preparing the study, scientific and educational literature on financial law, economic theory, and branch of legal sciences was used. The main stages of the study of the peculiarities of the legal regulation of excise taxation of alcoholic beverages were: 1) putting forward a scientific hypothesis about the role and place of excise duty in society, as well as excise taxation of alcoholic beverages in the general taxation system; 2) testing the hypothesis for which: 2.1) statistical analysis of excise tax revenues to the state budget of Ukraine during 2007-2020, the dynamics of production of ethyl alcohol during 2013-2020 and alcoholic beverages during 2013-2020, the ratio of the production of ethyl alcohol and spirits during 2014-2020 and the volume of the retail market for alcoholic beverages during 2017-2019; 2.2) analysis of the impact of increasing excise tax rates on the price of alcoholic beverages and the tendency to reduce the production of ethyl alcohol and, as a consequence, the growth of “shadowing” of the market for the production of these products; 2.3) clarification of the regulatory and social potential of the excise tax, which is carried out through the influence of the state on the volume of production of excisable goods and the volume and direction of their consumption by the population; 2.4) research of scientific positions of Ukrainian and foreign scientists on the administration of excise tax on alcoholic beverages, legal issues and ways to solve them; 2.5) legal analysis of the provisions of EU Council directives on excise duties on alcoholic beverages; 2.7) synthesis of the obtained scientific results; 2.8) formation of own scientific position; 2.9) giving arguments in support of it; 2.10) final formulation of conclusions and proposals in terms of further research on the topic of “excise taxation of alcoholic beverages”.

3. RESULTS AND DISCUSSION

In Ukraine, the procedure for calculating and paying excise tax is regulated by the Tax Code of Ukraine (hereinafter – the Tax Code of Ukraine). In accordance with paragraph 9.1 of Art. 9 of the Civil Code of Ukraine [23] excise tax belongs to national taxes and is defined as an indirect tax on the consumption of certain types of goods (products), defined as excisable, included in the price of such goods (products). Article 215 of the Civil Code of Ukraine clearly defines the list of excisable goods. And one of these goods is ethyl alcohol and other alcoholic distillates, alcoholic beverages, beer (except kvass “live fermentation”). Peculiarities of calculating the excise tax on alcoholic beverages are determined by Article 225 of the Criminal Code of Ukraine. We share the opinion of M. Jarosz [28, p. 8] that today in Ukraine the excise tax is undergoing another

stage of reform at much lower tax rates than in the EU, the presence of problems in the administration on the way to the European system of indirect taxation.

It should be noted that most of the recently developed proposals in the field of excise tax reform in Ukraine are justified by the need to implement the provisions of the economic part of the Association Agreement between Ukraine and the EU. And one of the directions is to increase the size of excise tax rates. Thus, in Ukraine, the constant increase in the rate of excise tax on vodka and alcoholic beverages amounted to almost 300% for the period from 2011 to 2017, namely: from 01/01/2011 to 03/31/2012 – 42.12 UAH per 1 liter 100 % alcohol; from 04/01/2012 to 03/31/2013 – UAH 45.87 per 1 liter of 100% alcohol; from 04/01/2013 to 02/28/2014 – UAH 49.49 per 1 liter of 100% alcohol; from 03/01/2014 to 06/30/2014 – UAH 56.42 per 1 liter of 100% alcohol; from 07/01/2014 to 02/29/2016 – UAH 70.53 per 1 liter of 100% alcohol; from 03/01/2016 to 02/28/2017 – UAH 105.80 per 1 liter of 100% alcohol; from 03/01/2017 – UAH 126.96 per 1 liter of 100% alcohol. At the same time, if from 2011 to 2014 the increase in excise tax rates was gradual and insignificant (from UAH 20.00 to UAH 32.00 per 1 liter of 100% alcohol, or 60%), then for the period from January 2014 to January 2017 year rates increased from 32.00 UAH to 105, 80 UAH per 1 liter of 100% alcohol, or more than three times [29].

However, excessive growth of tax rates remains one of the main factors in the shadowing of the alcoholic beverages market and, as a consequence, the lack of tax revenues to the budget. We share the opinion of scientists that for any tax there is a limit on the rate above which taxpayers will try to avoid paying taxes. This dependence is traditionally illustrated by the Laffer curve, first discovered and described by the American economist Arthur Betz Laffer. The Laffer curve is a curve that shows the relationship between tax rates and tax revenues. Its main idea is that when the tax rate increases from 0 to 100%, tax revenues will first increase to a certain maximum level, and then begin to decline (to 0). The reason is that high rates restrain business activity and thus reduce the tax base. A. Laffer proved that “not always raising the tax rate leads to an increase in tax revenues of the state” [30, p. 400-401].

It is worth noting that for most countries, excise tax rates are the main tool for regulating the level of alcohol consumption. However, each type of alcohol has its own specifics of production and sale, which requires a special approach to regulation and control by the state. According to K. Anderson, “the wide distribution of rates and differences in tax instruments between countries and products demonstrates the different benefits of health and welfare lobbyists and industry groups in influencing government decision-making.” Foreign scholars also note that “the only significant increase in the excise tax rate may help in the field of prevention, but it would not benefit the Czech treasury, as the impact of higher tax rates on state revenues will be eliminated by falling consumption” [21]. The percentage of excise duties on average alcohol prices ranged from 5% in Luxembourg to 59% in Iceland for beer and from 0% in France to 26% in Iceland for wine. Excise taxes were 5% of reduced prices for alcoholic beverages in the Czech Republic to 41% in Sweden for cognac, 19% in the US to 67% in Sweden for gin, 13% in the US and 63% in Australia for Scotch whiskey for six years and for 6% in Iceland to 76% in Sweden for Kuntro liqueur [15].

The establishment of differentiated rates of specific excise duty on certain types of alcoholic beverages is precisely the tool of tax regulation, the use of which allows to influence the formation of a socially acceptable structure of their production and consumption. The result of this approach is to curb the production of certain types of alcoholic beverages and stimulate the production of others. A typical example of the latter is the establishment of a zero rate for natural grape wines, differentiation of rates depending on the strength of beer [6, p. 242]. After all, the system of excise taxation in the world's leading countries is formed based on the need to balance the interests of producers and consumers, the public need to support industries and regions, employment, and other priorities of socio-economic policy. Issues of public health, public order, the need to limit the social consequences of alcohol abuse are also taken into account [6, p. 88].

In the context of the above, we note that the excise tax on alcoholic beverages in Ukraine, in terms of harmonisation of its legislation with EU law, requires in-depth research, generalisation of legal issues and borrowing positive foreign experience in solving them. Because, the excise tax is characterised by significant regulatory and social potential, which is carried out through the influence of the state on the volume of production of excisable goods and the volume and direction of their consumption by the population. Carrying out the analysis indicators of the alcohol industry, it can be noted that during 2016-2020 there is a steady trend to reduce the production of ethyl alcohol (Fig. 2).

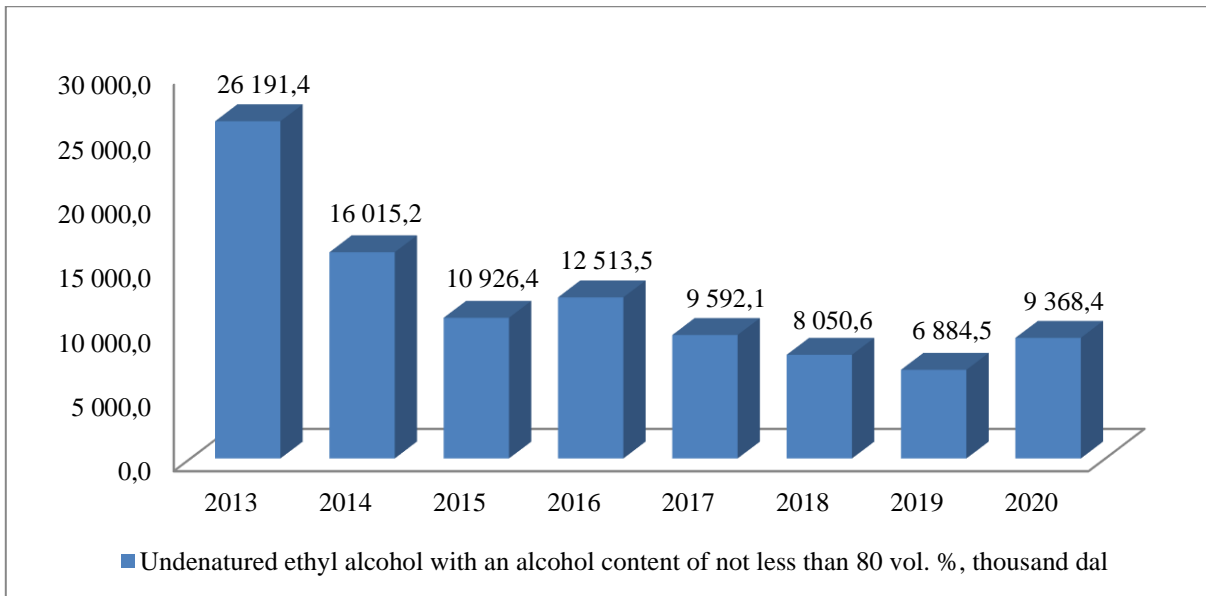


Figure 2. Volumes of production of ethyl alcohol during 2013-2020

Source: [31]

In addition, the tendency to reduce production is also observed in the production of alcoholic beverages (Fig. 3).

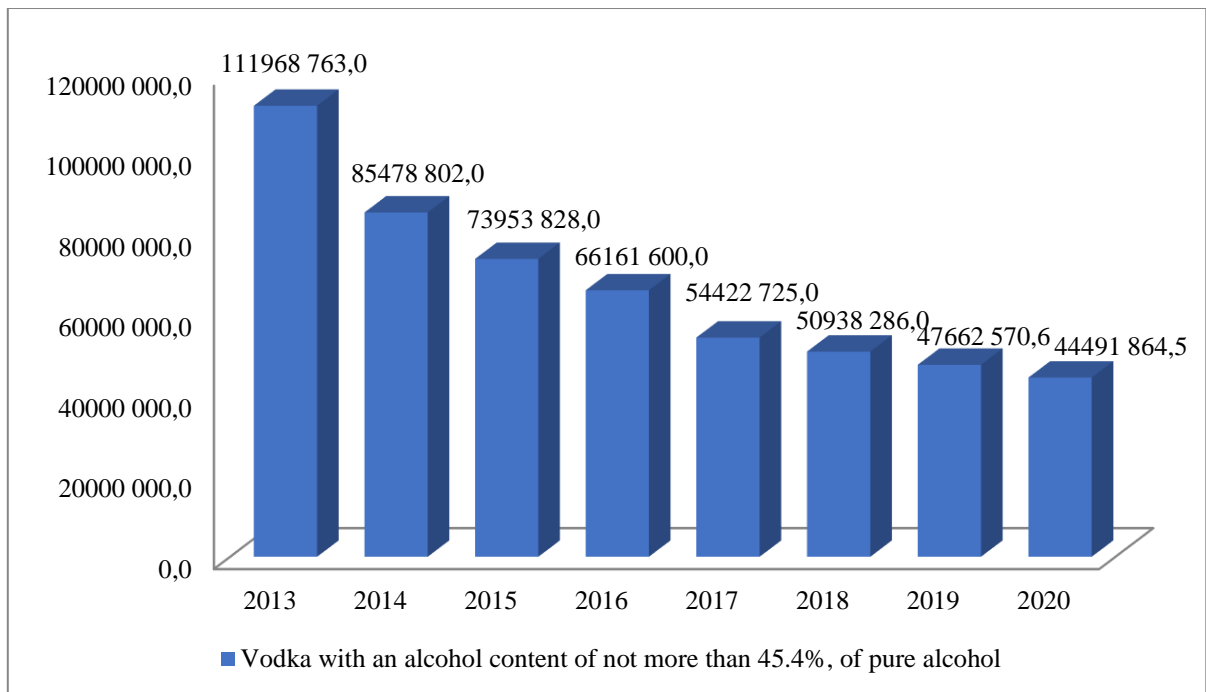


Figure 3. Volumes of production of alcoholic beverages during 2013-2020

Source: [31]

Thus, according to the State Statistics Service of Ukraine [31], the volume of alcohol production in 2020 compared to 2013 decreased by 3 times, and the volume of alcoholic beverage production in 2020 compared to 2013 decreased by 2,5 times (Fig. 4).

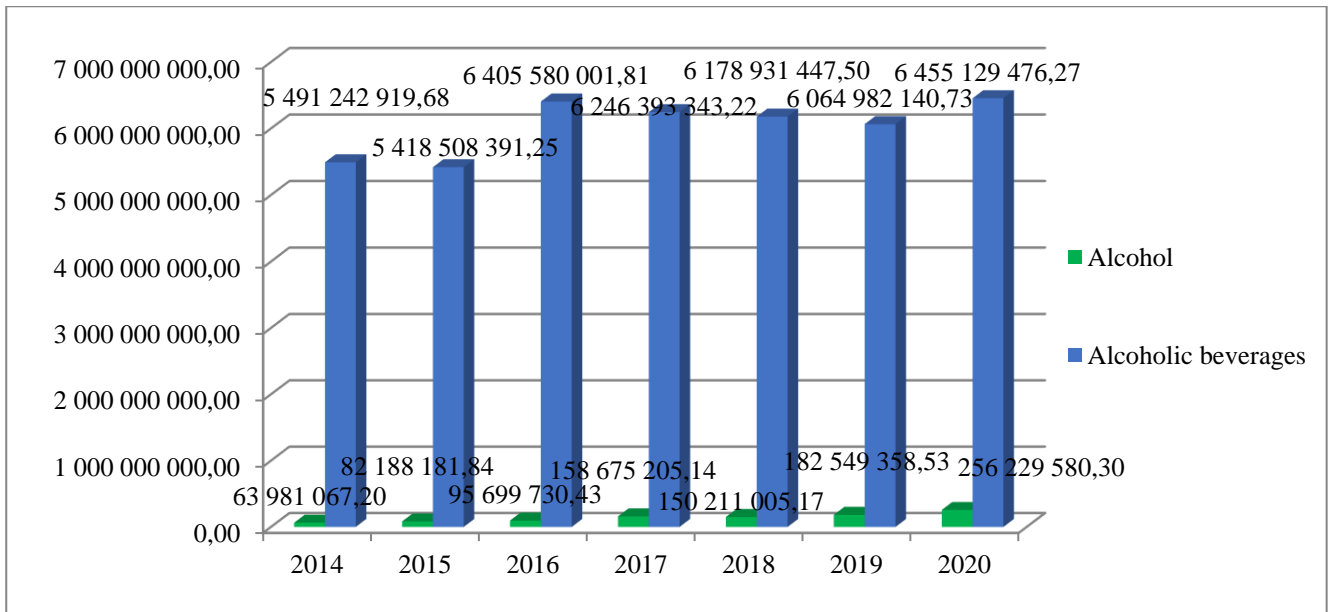


Figure 4. The ratio of ethyl alcohol production and spirits during 2014-2020

Source: [31]

At the same time, the analysis of statistical data of the State Statistics Service of Ukraine [31] shows a steady increase in the retail market for alcohol during 2017-2019 (Table 1).

Table 1. Volumes of the retail market for the sale of alcoholic beverages during 2017-2019

Product name	2017	2018	2019
Alcohol	37 849,0	47 127,9	53 483,7
Vodka and alcoholic beverages, UAH million	12 182,5	14 698,1	15 616,9

Analysis of statistical data [31] suggests that the reduction in production of spirits by 2.5 times in the period 2013-2020 and, at the same time, the growth of retail sales of these products indicates a steady upward trend in the volume of “shadowing” of vodka production market. As a result, raising the excise tax rate on alcohol and alcoholic beverages has led to negative consequences, namely the demotivation of producers and the strengthening of competitive positions of the “shadow” sector, increasing consumption of illegal alcohol.

As rightly noted by T. Chizhova that “today the shadow economy is an urgent problem for the whole world and for Ukraine. It remains one of the most significant threats to the economic security of the state, exacerbating the socio-economic crisis in Ukraine and negatively affecting its international image.” [32, p. 94]. Really, the growth of the shadow sector of the economy can negatively affect all spheres of public life, including the development of civil society in our country. At the same time, citizens and associations of citizens, drawing the attention of society and government agencies to dangerous phenomena and processes in the field of taxation, protect their rights to realise personal economic interests by means provided by applicable law.

The regulatory impact of the excise tax on the development of society may be due to the impact on the volume of production and consumption of excisable goods, the impact on the structure and efficiency of production, improving the quality of manufactured products, improving consumer goods and so on. Undoubtedly, the excise tax, as an indirect tax, is a very important fiscal instrument of the state. For example, according to the official data of the State Treasury Service of Ukraine in 2016, the Consolidated Budget of Ukraine received UAH 346.2 billion from indirect taxes, in 2017 – UAH 447 billion, in 2018 – UAH 520.7 billion, in 2019 – UAH 539.9 billion. At the same time, the total amount of tax revenues to the Consolidated Budget of Ukraine in 2019 amounted to UAH 1,070.3 billion. Analysis of the structure of revenues of the State Budget of Ukraine for 2019 also confirms that more than 50.4% of its revenues are indirect taxes [4].

Analysis of the dynamics of excise tax revenues by 2007-2019 shows an annual increase in its volume to the budget. Thus, in 2007 budget revenues amounted to UAH 11,981.46 million, in 2008 – UAH 15,230.96 million, in 2009 – UAH 21,274.55 million, in 2010 – UAH 27,620.70 million, in 2011 – UAH 33,011.18 million, in 2012 – UAH 37,185.64 million, in 2013 – UAH 35,309.49 million, in 2014 – UAH 44,940.84 million, 2015 – UAH 63,110.60 million, in 2016 – UAH 90,122.48 million, in 2017 – UAH 108,293.46 million, in 2018 – UAH 118,852.42 million and in 2019 – UAH 130,753.28 million [4]. It is

worth noting that in accordance with Art. 9 of the Civil Code of Ukraine [23] excise tax refers to national taxes, the proceeds of which fill the state budget. At the same time, Art. 64 of the Budget Code of Ukraine [24] stipulates that revenues from excise tax on the sale of excisable goods by retailers are revenues of the general fund of budgets of rural, urban, urban communities. The tax rate for beer, alcoholic beverages, tobacco products, tobacco and industrial tobacco substitutes sold by retailers of excisable goods is 5 percent (paragraph 215.3.10 of Article 215 of the Civil Code of Ukraine [23]). At the same time, the excise tax on the retail sale of alcoholic beverages can quickly fill the revenue side of local budgets and, as a result, meet the needs of communities, promote the development of civil society institutions at the local level.

However, the rapid increase in excise tax rates while taking measures to limit the consumption of these products leads to a reduction in the tax base by reducing the consumption of legal products and, consequently, worsening the administration of excise tax to the budget. Therefore, the prevention of illicit trafficking in excisable goods, timely detection of such facts by regulatory authorities, will increase tax revenues to local budgets and ensure a competitive environment of the alcohol market, improve the administration of excise tax on retail sales of alcoholic beverages in Ukraine. According to I. Khlebnikova [12, p. 830], “to consider the excise tax on alcohol and tobacco products only as one of the priority sources of budget replenishment is unacceptable. Moreover, excise taxation of these types of goods as a method of state regulation is aimed at solving problems related to alcohol and tobacco consumption, is actively used and widely studied in developed countries. We share the opinion of this scientist that the excise policy in the field of taxation of alcoholic beverages should be implemented in combination with state, regional and local measures in the field of public health, in particular, in reducing alcohol abuse and alcoholism prevention [12, p. 834].

The strategy of improving tax policy itself should be aimed at optimizing tax relations in society, ensuring sustainable innovative economic growth and, on this basis, maximising the social welfare of citizens. The implementation of such a strategy in the context of current trends in social development is possible only if the combined efforts of a democratic state and civil society. The statements of scientists that “the harmonisation of the tax interests of the state and the interests of citizens-taxpayers depends on how the state performs not only the fiscal function, but also the social one, are quite correct. An important role in this process in most developed democracies of the world is played by civil society, which seeks to actively interact with the state in addressing issues of public importance [33, p. 63]. In addition, as noted, today, one of the problems of the tax system is the development of important areas of harmonization of national legislation with EU norms. Ukraine, as a state that has concluded an Association Agreement with the EU, faces the task of implementing and harmonizing national legislation with EU norms. Of particular importance in this context are the rules on excise duties on alcoholic beverages and bringing them into line with Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages (hereinafter Council Directive 92/83). [25] and Council Directive 92/84/EEC of 19 October 1992 on the approximation of excise duties on alcohol and alcoholic beverages (hereinafter referred to as Council Directive 92/84/EEC) [26], with a view to establishing a common approach to determine the base of excise taxation, the application of uniform tax terms and simplification of foreign economic activity. It should be noted here that the reference in the Association Agreement to acts of EU legislation is sufficient for such acts to become legally binding on Ukraine to the extent that they are binding on the EU. According to D. Buromensky, in some cases an international treaty of Ukraine authorises the use of other international acts, “in which case the treaty norm authorizes the use of such international documents in the domestic law of Ukraine, and the legal force of their rules will be equal to the rules of the treaty” [34, p. 73].

It should be noted that Council Directive 92/83/EEC [25] establishes general rules for determining the basic elements of the excise tax on alcohol and alcoholic beverages, contains a definition of all excisable goods falling into the excise category “alcohol and alcoholic beverages”, the unit of measurement of the tax base for all excisable goods, general approaches to setting excise tax rates, including opportunities and conditions for the use of preferential (reduced) tax rates. The requirements of this Directive on the harmonisation of structures of excise duties on alcohol and alcoholic beverages are mainly taken into account in the legislation of Ukraine, except for the provisions on: definition of such a concept as “intermediate goods”, which are considered excisable goods, the actual strength of which is higher than 1.2% by volume, but not higher than 22% by volume (paragraph 1 of Article 17 of Council Directive 92/83/EEC); reimbursement of the amount of excise duty paid on alcoholic beverages withdrawn from the market if, conditioned upon their condition or term, they are unfit for consumption (Article 25 of Council Directive 92/83/EEC) [25]. The Civil Code of Ukraine also contains definitions of such excisable goods as beer and ethyl alcohol, which differ from the definitions given in Directive 92/83 /EEC.

In addition, Article 27 of Council Directive 92/83/EEC [25] sets out the conditions for exemption from alcohol, namely: which is completely denatured and not intended for human consumption; for the production

of vinegar, and medicines, flavors, food products. In contrast to the EU countries, our country provides for the taxation of alcohol at zero rate of excise tax depending on the direction of its use, in particular, for the production of drugs, organic synthesis products, bioethanol, chemical and technical products, vinegar from food raw materials, perfumes and cosmetics, fortified wine materials, etc. (Article 229 of the Criminal Code of Ukraine [23]).

Council Directive 92/84/EEC [26] lays down the minimum rates of excise duty to be applied in the Member States to alcohol and alcoholic beverages. However, EU law sets only minimum rates, so EU countries are free to apply excise duty rates above these minimums, according to their own national needs. Council Directive 92/83/EEC [25] applies in conjunction with Council Directive 92/84/EEC [26], which sets rates of excise duty depending on the strength of the alcoholic beverage. In the context of the above, Ukraine needs to revise the rules governing the mechanism of excise tax administration, taking into account EU Council Directives, to reform tax legislation and establish a common approach to determining the excise tax base, applying common tax terms and simplifying foreign economic activity. It is also worth noting that in developed countries, pricing policies are used to prevent excessive alcohol consumption, including to prevent and reduce alcohol consumption by minors. After all, pricing policy can change the structure of alcohol consumption by the population, reducing the level of consumption of spirits and reducing the overall level of pure alcohol in terms of absolute alcohol.

As noted by scientists [6, p. 100-101], the main global trends in the field of alcohol taxation are: excise policy in the field of tax regulation of the alcohol market is formed considering national traditions based on finding a balance of interests of producers and consumers, the need to limit social consequences of alcohol abuse; in the implementation of measures aimed at reducing the consumption of alcoholic beverages, the excise tax is characterised by high efficiency; gradual increase in the general level of taxation of alcoholic beverages; use of electronic control systems for the movement of alcoholic beverages from producer to consumer; use of full or partial exemption from excise tax on natural grape wines; application of a differentiated approach to the taxation of alcoholic beverages depending on their strength, and other qualitative and quantitative characteristics, etc.

We share the opinion of scientists that the main task of improving excise taxation in Ukraine is to form an effective system of excise taxation using economically reasonable level of its rates and ensure its performance of the function of limiting the consumption of certain goods harmful to human health [35, p. 111].

CONCLUSIONS

In today's conditions, excise taxation has an important role and place in the formation of the general system of taxation of our state. Excise tax, as an indirect tax, is an important fiscal instrument of the state and a significant source of filling both state and local budgets in Ukraine. Through tax regulation, which is an integral part of state regulation of society, the state influences the development of society through streamlining the tax system, the establishment and administration of taxes and fees. In addition, the use of excise taxation through economically justified tax rates, allows for a targeted impact on the level of consumption of goods harmful to human health, and stimulating the production of quality goods of the excisable group. At the same time, evasion of excise tax and the growth of the shadow sector of the economy can negatively affect all spheres of public life, including the development of civil society in our country. At the same time, citizens and associations of citizens, drawing the attention of society and government agencies to dangerous phenomena and processes in the field of taxation, protect their rights to realise personal economic interests by means provided by applicable law.

We consider the main shortcomings of the tax system of Ukraine to be imperfection and instability of legislation, ambiguity in the interpretation of tax legislation, which negatively affects the activities of economic entities, reduces the attractiveness of the national economy for foreign investors. To eliminate the shortcomings that exist in the tax system of Ukraine, the first steps are to bring the legal framework in line with European directives and principles, for this in Ukraine there are the necessary international and national legal bases and conditions. It is necessary to review the benefits of excise tax in the direction of approximation to EU standards and their formation in accordance with such vectors as: support for the production of national product, which is characterised by the history of its manufacture and the corresponding recipe; support for small producers in the production of alcoholic beverages, in particular, winemakers.

Ways to improve the fiscal efficiency of excise taxation can be measures to improve its administration, namely simplification of tax procedures for taxpayers, setting economically justified tax rates and benefits, strengthening control over the production and circulation of excisable alcohol products, preventing the effects of shadowing goods, including the introduction of positive foreign experience in this area. We consider the

main directions of reforming the excise taxation of alcoholic beverages in Ukraine: a gradual increase in the overall level of taxation of alcoholic beverages; application of a differentiated approach to the taxation of alcoholic beverages depending on their strength, as well as other qualitative and quantitative characteristics; investing part of the budget revenues from the excise tax on alcoholic beverages in programmes aimed at preventing and stopping alcoholism, and financing health care facilities; use of electronic control systems for the movement of alcoholic beverages from producer to consumer. In our opinion, such clarifications will fully consider the existing practice of administering the excise tax on alcoholic beverages and will further increase the efficiency of the mechanism of its action in Ukraine.

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ДОГОВІР ПРО СТВОРЕННЯ ЗА ЗАМОВЛЕННЯМ І ВИКОРИСТАННЯ ОБ'ЄКТА ПРАВА ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

Анотація. *В умовах все більшої уваги сучасного суспільства і кожного його члена до творчості, прояву своєї особистості, можливостей поширення результатів творчої діяльності за допомогою інформаційних мереж, технічних новинок, все більшої ваги та популярності набирають договори щодо розпорядження майновими правами інтелектуальної власності, що визначає актуальність обраної теми даного дослідження. Метою статті є визначення ознак договору про створення за замовленням і використання об'єкта права інтелектуальної власності та розкриття змісту нових підходів у законодавчому регулюванні відносин між замовниками та творцями об'єктів права інтелектуальної власності за договорами про створення за замовленням і використання об'єкта права інтелектуальної власності. У ході проведення дослідження, для досягнення поставленої мети, використовувались, зокрема, такі методи: формально-логічний, системно-структурний, емпіричного аналізу, догматичний та ряд інших. У даній статті аналізуються поняття та особливості договору про створення за замовленням і використання об'єкта права інтелектуальної власності, розкриваються істотні умови даного договору, його зміст, окреслюється специфіка сторін вказаного правочину. Авторами наводиться класифікація договорів щодо розпорядження майновими правами інтелектуальної власності та визначається місце договору про створення за замовленням і використання об'єкта права інтелектуальної власності серед вказаних договорів. Досліджується актуальна судово-практика стосовно договорів про створення за замовленням і використання об'єкта права інтелектуальної власності. Висвітлюються актуальні зміни у законодавстві України, що регулює порядок розподілу прав між замовником та творцем, у тому числі, на підставі договору про створення за замовленням і використання об'єкта права інтелектуальної власності. Проводиться порівняльний аналіз із попередньою редакцією окремих норм законодавства України. Наводяться власні висновки стосовно змін у законодавстві України щодо належності майнових прав інтелектуальної власності на об'єкти, створені за замовленням і подальшого розвитку договорів щодо таких об'єктів у сфері відносин інтелектуальної власності*

Ключові слова: *замовник, творець, зобов'язання, майнові права, працівник*

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AGREEMENT ON CREATION BY ORDER AND USE OF THE OBJECT OF INTELLECTUAL PROPERTY RIGHTS

Abstract. *In the conditions of increasing attention of modern society and each of its members to creativity, manifestation of their personality, opportunities to disseminate creative activities through information networks, technical innovations, increasing importance and popularity are gaining agreements on intellectual property rights of this study. The purpose of the article is to determine the characteristics of the contract for the creation and use of intellectual property rights and disclose the content of new approaches in the legislative regulation of relations between customers and creators of intellectual property rights under contracts on the creation by order and use of the object of intellectual property rights. In the course of the research, to achieve this goal, the following methods were used, in particular: formal-logical, system-structural, empirical analysis, dogmatic and a number of others. This article analyses the concepts and features of the agreement on the creation by order and use of the object of intellectual property rights, identifies the essential terms of this agreement, its content, outlines the specific features of the parties to the transaction. The authors classify the agreements on the disposal of intellectual property rights and determine the place of the agreement on the creation by order and use of the object of intellectual property rights among these agreements. Current case law on contracts for the creation and custom of the object of intellectual property rights is studied. Current changes in the legislation of Ukraine, which regulates the distribution of rights between the customer and the creator, including based on the agreement on the creation of the order and use of the object of intellectual property rights. A comparative analysis is carried out with the previous version of certain norms of the legislation of Ukraine. Own conclusions on changes in the legislation of Ukraine on the ownership of intellectual property rights to objects created by order and further development of agreements on such objects in the field of intellectual property relations*

Keywords: *customer, creator, obligations, property rights, employee*

INTRODUCTION

It is necessary to support the standpoint of scholars that the civil law of Ukraine is a special legal regulator of public relations [1, p. 138], and that the role of private law is increasing [2, p. 111], and the civil science of Ukraine has the main task of conducting research aimed at improving the current civil legislation [3, p. 53].

At one time, the 3rd President of the United States of America Thomas Jefferson noted the special nature of intellectual property, focusing on inventions that, in his opinion, could not be ordinary objects of property rights [4, p. 1].

In today's world, information and technological objects are often defined as increasingly important. In this regard, the state and business pay much attention to the recognition and protection of intellectual property [5, p. 1].

J. Hughes, notes that intellectual property should be considered as a stimulating structure that contributes to the progress of science and art [6, p. 1].

At the same time, we agree that intellectual property rights can arise for an extremely wide and diverse range of objects: from novels, computer programs, paintings, films, television broadcasts and performances, to clothing design, pharmaceuticals and genetically modified animals and plants, etc. [7, p. 1].

Information and communication technology products are indispensable tools of modern life around the world. Smartphones and laptops connect to a huge global computing infrastructure. The emergence of autonomous vehicles, products that provide virtual reality, a wide range of devices "Internet of Things" and countless other innovations suggest that these types of products will continue to play a growing role in today's global economy [8, p. 1].

Expansion and complication of economic relations lead to the transformation of the system of contracts, the emergence of new contractual forms [9, p. 130], and the function of the contract is especially relevant in cases where the legislation either does not contain legal regulation of certain relations, or legislative regulation is imperfect [10, p. 70]. The information component in contractual relations also becomes important in the conditions of information society [11, p. 85-94], especially given the fact that information in civil law is considered as a separate intangible object [12, p. 145], and the contract is the main tool for organising public relations [13, p. 35], which reflects the dynamics of social relations [14, p. 174]. At the same time, the contract is a legal fact and a form of legal relationship, and a document that fixes the rights and obligations of the parties [15, p. 115].

Agreements on the disposal of intellectual property rights is a special legal form of use of works of science, literature, art and industrial property [16, p. 890], which are becoming increasingly important in modern society.

At this stage of development of legal science, a number of works by leading scientists are devoted to issues arising in connection with the conclusion of agreements on the disposal of intellectual property rights, in particular, such as: V. Dmitryshyn "Disposal of intellectual property rights" (Kyiv, 2008), O. Zhilinkova "Contractual regulation of intellectual property relations in Ukraine and abroad" (Kyiv, 2015), A. Kodynets "Civil law regulation of binding information relations" (Kyiv, 2016), O. Yavorska "IT Law" (Lviv, 2017), Yu. Kapitsa "Unification and harmonization of legislation on the protection of intellectual property rights of EU member states and the legislation of Ukraine" (Kyiv, 2019) and others.

At the same time, some issues remain unresolved regarding the subject of agreements on the creation and use of intellectual property rights, the essential conditions of these agreements and legislative approaches to the distribution of rights between the customer and the creator.

The relevance of the research topic is thus explained by the need to analyse at the current level of civil law science and practice aspects related to the definition of the subject, content, essential conditions of contracts for the creation of custom and use of intellectual property rights. The issue of determining the parties and objects of such agreements deserves special attention.

In Ukraine, in the process of legal reform, the current legislation is being actively updated [17, p. 36], as a result, in connection with the adoption of the Law of Ukraine "On Stimulating the Development of the Digital Economy in Ukraine" of July 15, 2021 [18], new approaches were introduced in regulation of the relationship between the customer and the creator, which requires a separate study.

Considering the provisions of the current Civil Code of Ukraine of January 16, 2003 (hereinafter – the "Civil Code of Ukraine") [19], special civil legislation governing relations, arising in connection with the use of intellectual property rights, and doctrinal developments [20, p. 65-66], you can define the following system of agreements on the disposal of intellectual property rights:

1. Agreements on the transfer of exclusive intellectual property rights

This group includes, in particular:

1.1. Agreement on the transfer of exclusive intellectual property rights (Article 1113 of the Civil Code of Ukraine);

1.2. Copyright agreement on transfer (alienation) of property rights of copyright subjects (Article 31 of the Law of Ukraine "On Copyright and Related Rights" of December 23, 1993) [21];

1.3. Agreement on the transfer of ownership of a trademark (Part 9 of Article 16 of the Law of Ukraine "On Protection of Rights to Marks for Goods and Services" of December 15, 1993) [22];

1.4. Agreement on the transfer of ownership of an invention (utility model) (part 8 of Article 28 of the Law of Ukraine "On Protection of Rights to Inventions and Utility Models" of December 15, 1993) [23];

1.5. Agreement on the transfer of ownership of an industrial design (Part 6 of Article 20 of the Law of Ukraine "On Protection of Industrial Design Rights" of December 15, 1993) [24].

2. Agreements on granting rights to use intellectual property rights.

This group includes, in particular:

2.1. License agreement (Article 1109 of the Civil Code of Ukraine);

2.2. Publishing agreement (Article 17 of the Law of Ukraine "On Publishing" of June 5, 1997) [25; 26, p. 107-108];

2.3. Agreement on the use (publication) of the work (Article 33 of the Law of Ukraine "On Copyright and Related Rights" of December 23, 1993) [21].

3. Agreements on the creation of intellectual property rights

This group includes, in particular:

3.1. Agreement on the creation by order and use of the object of intellectual property rights (Article 1112 of the Civil Code of Ukraine) [19];

3.2. Copyright agreement (part 6 of Article 33 of the Law of Ukraine “On Copyright and Related Rights” of December 23, 1993) [21];

3.3. Scenario contract [27, p. 239].

4. Other (“related”) agreements on the disposal of intellectual property rights

This group includes, in particular:

4.1. Agreement on the distribution of property rights to the official work (Article 16 of the Law of Ukraine “On Copyright and Related Rights” of December 23, 1993);

4.2. Agreement between co-authors (Article 436 of the Civil Code of Ukraine; Article 13 of the Law of Ukraine “On Copyright and Related Rights” of December 23, 1993) and others.

From the above classification it can be seen that one of the agreements on the disposal of intellectual property rights is the agreement on the creation by order and use of the object of intellectual property rights, which belongs to the group of agreements on the creation of intellectual property rights.

The purpose of this study is definition features of the agreement on the creation and use of the object of intellectual property rights and the disclosure of new approaches in the legislative regulation of relations between customers and creators of intellectual property rights under agreements on the creation and use of the object of intellectual property rights.

1. MATERIALS AND METHODS

The use of general scientific and special legal methods is carried out, including for full-fledged, comprehensive, comprehensive and complete work. Therefore, during this study, the paper used, in particular, the following methods: formal-logical, system-structural, empirical analysis, dogmatic.

The formal-logical method was used to analyse the provisions of the Civil Code of Ukraine, and other regulations governing the relationship between customer and creator. During the study, the following current regulations of Ukraine were analyzed: the Civil Code of Ukraine of January 16, 2003 [19], the Law of Ukraine “On Copyright and Related Rights” of December 23, 1993 [21], Law of Ukraine “On Protection of Rights to Marks for Goods and Services” of December 15, 1993 [22], Law of Ukraine “On Protection of Rights to Inventions and Utility Models” of December 15, 1993 [23], Law of Ukraine “On Protection of Rights to industrial designs” of December 15, 1993 [24], the Law of Ukraine “On Publishing” of June 5, 1997 [25], and the Law of Ukraine “On Stimulating the Development of the Digital Economy in Ukraine” of July 15, 2021 [18].

The application of the system-structural method in the work made it possible to classify agreements on the disposal of intellectual property rights into four main groups: 1) agreements on the transfer of exclusive property copyrights; 2) agreements on granting rights to use objects of intellectual property rights; 3) agreements on the creation of objects of intellectual property rights, and 4) other (so-called, “related”) agreements on the disposal of intellectual property rights.

The empirical method was used to study the practical aspects of the application of certain types of agreements on the creation and use of intellectual property rights, including the analysis of current case law on these agreements of various courts of Ukraine. The legal nature of agreements on the creation and use of objects of intellectual property rights, the essential conditions, features of the subject composition and the content of these agreements are studied.

In the process of preparing a scientific article, using formal-logical and system-structural methods, and the method of empirical analysis, the authors analyzed the legislation of Ukraine governing the distribution of rights between customer and creator, both before and after the Law of Ukraine “On Stimulating the Development of the Digital Economy in Ukraine” of July 15, 2021 [18].

The application of the dogmatic method allowed making a thorough systematic analysis of the current legislation of Ukraine, which is devoted to the settlement of contractual relations with the participation of subjects of intellectual property rights in Ukraine. In the course of the study, based on the analysis of current doctrinal developments, including case law on contracts for the disposal of intellectual property rights, own conclusions were made, including the settlement of relations between the customer and the creator arising in connection with the implementation of agreements on the disposal of intellectual property rights; concerning the legal nature and features of agreements on the disposal of intellectual property rights; in terms of the

essential terms of agreements on the disposal of intellectual property rights; in respect of the parties to agreements on the disposal of intellectual property rights; in relation to the subject and object of agreements on the disposal of intellectual property rights.

2. RESULTS AND DISCUSSION

According to Article 1112 of the Civil Code of Ukraine under the agreement on the order and use of intellectual property rights, one party (creator – writer, artist, etc.) undertakes to create an intellectual property object in accordance with the requirements of the other party (customer) and in the established terms. It should be noted that along with the term enshrined in Article 1112 of the Civil Code of Ukraine, the Law of Ukraine “On Copyright and Related Rights” of December 23, 1993 contains another concept – “copyright agreement”. Thus, Part 6 of Article 33 of the Law of Ukraine “On Copyright and Related Rights” of December 23, 1993 stipulates that under the copyright agreement the author undertakes to create a future work in accordance with the terms of this agreement and transfer it to the customer. The contract may provide for the payment by the customer to the author of the advance as part of the royalties [21].

Based on the analysis of the above definition, it can be concluded that the design of the contract for the creation and use of intellectual property rights is similar to the contract under Article 33 of the Law of Ukraine “On Copyright and Related Rights” of December 23, 1993, but with the difference that the subject of the contract on the creation by order and use of the object of intellectual property rights is broader. In particular, the subject of the contract on the creation and use of the object of intellectual property rights may include rights to any objects of intellectual property rights, and the subject of the copyright agreement – only the rights to the objects of copyright.

As noted in the annotation to the article, agreements on the disposal of intellectual property rights are gaining in importance and popularity. This conclusion also applies to agreements on the creation by order and use of the object of intellectual property rights and is confirmed, in particular, by the materials of current case law:

– according to the decision of the Solomyansky District Court of Kyiv of December 29, 2018 in case No. 760/24493/18 one of the evidences in the case of invalidation of the certificate of Ukraine on the mark for goods and services is an agreement to create custom design sketches [28];

– the study of the contract for the creation and use of design objects was carried out by the court in the case of copyright infringement and recovery of compensation (decision of the Shevchenkivsky District Court of Kyiv of October 17, 2018 in the case No. 761/13278/16) [29];

– the author's contract for the development of characters for an audiovisual work was studied in the case of recovery of compensation for copyright infringement (decision of the Commercial Court of Odesa region of November 25, 2019 in the case No. 916/1506/19) [30];

– according to the decision of the Desniansky District Court of Kyiv of July 20, 2021 in case No. 754/9399/20 one of the evidences in the case of copyright protection is the contract with the author on the creation of works [31];

– rights to copyright objects created in connection with the terms of the contract were investigated in the process of consideration of the case No. 910/9490/20 by the Commercial Court of Kyiv (decision of the Commercial Court of Kyiv of December 11, 2020) [32];

– the author's contract for the creation of a script for a children's television series was studied in the case of recovery of compensation for copyright infringement (decision of the Commercial Court of Kyiv of May 25, 2020 in case No. 910/2552/15) [33], etc.

Special attention should be paid to the nature and characteristics of the contract for the creation and use of the object of intellectual property rights. Based on the analysis of the structure, which is enshrined in Article 1112 of the Civil Code of Ukraine, we can conclude that the contract for the creation and use of the object of intellectual property rights is a consensual transaction, because at the time of the contract the creator undertakes to create the object intellectual property, therefore, is not able to transfer such an object at the time of the contract. With regard to the essential conditions, it should be noted that the following should be distinguished: the condition of the subject of the contract; the period during which the creator undertakes to create an object of intellectual property rights; ways and conditions of using the object of intellectual property rights.

It should also be noted that the legislation may contain essential conditions for certain types of contracts for the creation of custom and use of the object of intellectual property rights. As mentioned above, in accordance with Part 6 of Article 33 of the Law of Ukraine “On Copyright and Related Rights” of December 23, 1993, under the copyright agreement, the author undertakes to create a future work in

accordance with the terms of this agreement and transfer it to the customer; the contract may provide for the payment by the customer to the author of the advance as part of the royalties.

Therefore, based on the analysis of this rule, we can conclude that the advance payment can be made by agreement of the parties to the copyright agreement, and royalties should always be paid to the author. The author's contract may specify the specific amount of remuneration or the procedure for determining the remuneration, including the terms of its payment [34, p. 216]. The tariff of royalties for the creation of a work, among other things, can be set, for example, by calculating the cost of one page of a certain format or taking into account the cost of a certain number of printed characters in the work, etc. [35, p. 1007]. Therefore, in our opinion, the condition on the amount of royalties refers to the essential conditions of the copyright agreement of the order. As you know, the subject of civil law can independently perform certain actions permitted by objective law in order to force the obligated person to perform his duty [36, p. 91]. Part 1 of Article 1112 of the Civil Code of Ukraine states that the parties to the contract for the creation and use of the object of intellectual property rights are the creator (writer, artist, etc.) and the customer.

The Civil Code of Ukraine stipulates that the creators of the object of intellectual property rights, in particular, include the author, performer, inventor (part 1 of article 421 of the Civil Code of Ukraine). In turn, Article 1 of the Law of Ukraine "On Copyright and Related Rights" of December 23, 1993 states that the author is a natural person who has created a work through his creative work. This article also states that a performer is an actor (theater, film, etc.), singer, musician, dancer or other person who performs, sings, reads, recites, plays a musical instrument, dances or in any other way performs works of literature, art or works of folk art, circus, pop, puppet shows, pantomimes, etc., and conductor of musical and musical-dramatic works [21]. According to Article 1 of the Law of Ukraine "On Protection of Rights to Inventions and Utility Models", an inventor is a person whose intellectual, creative activity has created an invention (utility model). According to Article 1 of the Law of Ukraine "On Protection of Rights to Industrial Designs", the author is a person whose creative work created an industrial design [24].

Thus, we can draw an intermediate conclusion that the current legislation of Ukraine under the concept of "creator" means only a natural person. At the same time, we consider it necessary to state the position of O. Kulinich and L. Romanadze, who point out that if we assume that copyright regulates the relations that develop in the process of using an already created work, then to create the actual work, the party to the copyright agreement can be called only conditionally [37, p. 271]. In our opinion, this position can be supported, because, indeed, at the time of concluding the agreement on the creation and use of the object of intellectual property rights, the object of intellectual property rights does not yet exist, and it cannot be said that the person will create such an object project and, as a consequence, will become the creator.

With regard to the customer as a party to the agreement on the creation and use of the object of intellectual property rights, it should be noted that currently there are no restrictions on the number of persons who may be customers of intellectual property rights. Regarding the subject of the contract on the creation by order and use of the object of intellectual property rights, it should be noted that its subject is the obligation of the creator to create a certain object of intellectual property rights. At the same time, the object of this agreement can be almost any object of intellectual property rights that will be created in the future (literary and artistic works, computer programs, phonograms, videograms, inventions, utility models, industrial designs, plant varieties, animal breeds, etc.). Considering the practical component of preparation and implementation of agreements on the creation and use of the object of intellectual property rights, it should be emphasised that this agreement must clearly define the requirements to be met by the object of intellectual property rights. In particular, depending on the type of object, you need to specify the volume, structure, shape, genre, purpose, working title of the work, type of invention, utility model, scope of the device, requirements for the appearance of the product and more.

The issue of the content of the agreement on the creation and use of the object of intellectual property rights and the information component in such agreements deserves special attention [6, p.85-94], given that the processes of use, dissemination, storage of information contribute to information legal relations [38, p. 123]. The content of this agreement consists of the rights and obligations of the customer and the creator. Based on the analysis of actual practice of execution of agreements on creation by order and use of object of the intellectual property right it is possible to allocate such basic rights and duties of the parties of the agreement. Thus, the creator, in particular, undertakes to create an object of intellectual property rights that meets the terms agreed in the contract, the task of the customer, and transfer it in the appropriate form to the customer within the period specified in the contract. At the same time, the creator, among other things, has the right to demand payment of remuneration specified in the contract and to respect his personal non-property rights. In turn, the customer is obliged to pay the creator a fee for the creation and further use of the object of intellectual property rights, and to comply with the personal non-property rights of the creator. In addition,

first of all, the customer has the right to require the creator to create an object of intellectual property rights in accordance with the requirements specified in the contract, and to use such object in accordance with the terms of the contract.

In the process of studying the peculiarities of fulfillment of obligations under contracts for the disposal of intellectual property rights, special attention should be paid to current changes in the legislation of Ukraine governing the distribution of rights between customer and creator, including on the basis of the contract intellectual property rights, which were introduced by the Law of Ukraine “On Stimulating the Development of the Digital Economy in Ukraine” of July 15, 2021. To reflect changes in the legal regulation of relations between the customer and the creator, we present previous and current versions of the articles of the Civil Code of Ukraine (Table 1).

Table 1. Provisions of the Civil Code of Ukraine governing the distribution of rights between the customer and the creator

<p style="text-align: center;">Previous edition (before the entry into force of the Law of Ukraine “On Stimulating the Development of the Digital Economy in Ukraine” of July 15, 2021)</p>	<p style="text-align: center;">Current edition (after entry into force of the Law of Ukraine “On Stimulating the Development of the Digital Economy in Ukraine” of July 15, 2021)</p>
<p>Article 429. Intellectual property rights to the object created in connection with the implementation of the employment contract</p> <p>1. Personal intangible intellectual property rights to an object created in connection with the performance of an employment contract shall belong to the employee who created the object. In cases provided by law, certain personal non-property intellectual property rights to such an object may belong to a legal entity or individual where or where the employee works.</p> <p>2. Intellectual property rights to an object created in connection with the performance of an employment contract shall belong jointly to the employee who created the object and to the legal or natural person where or in which he works, unless otherwise established. contract.</p> <p>3. Specific features of exercising intellectual property rights to an object created in connection with the performance of an employment contract may be established by law</p>	<p>Article 429. Intellectual property rights to the object created in connection with the implementation of the employment agreement (contract)</p> <p>1. Personal intangible intellectual property rights to an object created in connection with the performance of an employment contract shall belong to the employee who created the object. In cases provided by law, certain personal non-property intellectual property rights to such an object may belong to a legal entity or individual where or where the employee works.</p> <p>2. Intellectual property rights to an object created in connection with the performance of an employment agreement (contract) shall belong to the employee who created the object and to the legal or natural person where or in which he works, jointly, if otherwise not established by this Code or agreement.</p> <p>3. Specific features of exercising intellectual property rights to an object created in connection with the performance of an employment contract may be established by law</p>
<p>Article 430. Intellectual property rights to the object created to order</p> <p>1. Personal intangible intellectual property rights to an object created by order belong to the creator of this object. In cases provided by law, certain personal intangible intellectual property rights to such an object may belong to the customer.</p> <p>2. Intellectual property rights to an object created by order shall belong to the creator of this object and the customer jointly, unless otherwise provided by contract.</p>	<p>Article 430. Intellectual property rights to the object created to order</p> <p>1. Personal non-property intellectual property rights to an object created by order belong to the creator of this object. In cases provided by law, certain personal intangible intellectual property rights to such an object may belong to the customer.</p> <p>2. Intellectual property rights to an object created by order shall belong to the creator of this object and the customer jointly, unless otherwise provided by contract or law</p>
<p>Article 440. Intellectual property rights to the work</p> <p>1. Property rights of intellectual property for a work are: 1) the right to use the work; 2) the exclusive right to allow the use of the work;</p> <p>3) the right to prevent the misuse of the work, including the prohibition of such use; 4) other intellectual property rights established by law.</p> <p>2. Property rights to a work belong to its author, unless otherwise provided by contract or law.</p>	<p>Article 440. Intellectual property rights to the work</p> <p>1. Property rights of intellectual property for a work are: 1) the right to use the work; 2) the exclusive right to allow the use of the work; 3) the right to prevent the misuse of the work, including the prohibition of such use; 4) other intellectual property rights established by law.</p> <p>2. Property rights to a work belong to its author, unless otherwise provided by contract or law.</p>

	<p>3. Intellectual property rights to a work created in connection with the performance of an employment agreement (contract) shall belong to the employee who created the work and to the legal or natural person where or in which he works, jointly, unless otherwise provided by the contract or by law.</p> <p>Property rights to computer programs and (or) databases created in connection with the performance of an employment contract (contract) belong to the legal or natural person where or in which the employee who created these computer programs and (or) databases, unless otherwise provided by contract.</p> <p>A legal or natural person where or where an employee works who created a work in connection with the performance of an employment agreement (contract) acquires intellectual property rights to such work in accordance with this Code or the contract at the time following the creation of such work, unless otherwise provided by contract.</p> <p>4. Intellectual property rights to a work created by order shall belong to the customer, unless otherwise provided by contract or law.</p> <p>Intellectual property rights to a work of art created to order (except for a work specially created as part of the software) belong to its author, unless otherwise provided by contract or law.</p> <p>The customer acquires intellectual property rights to the work created by order, in accordance with the law or contract at the time following the creation of such work, unless otherwise provided by contract</p>
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Based on the analysis of the above provisions, it can be concluded that the legislator continues to adhere to the concept of joint ownership of intellectual property rights to the object created by order, the creator of this object and the customer. At the same time, it should be noted that the above law radically changed the approach to the distribution of intellectual property rights to computer programs, databases created in connection with the implementation of the employment contract (contract), including works of fine art created to order.

In particular, the following changes should be emphasised:

– As a general rule, property rights to computer programs and (or) databases created in connection with the performance of an employment contract (contract) belong to the legal or natural person where or where the employee who created these computer programmes and (or) databases works, unless otherwise provided by contract;

– as a general rule, intellectual property rights to a work created by order belong to the customer, unless otherwise provided by contract or law.

In addition, the legislator made an exception to the rule on the distribution of intellectual property rights, namely, works of art: intellectual property rights to a work of art created by order (except for a work specially created as part of software) belong to its author, unless otherwise provided by contract.

CONCLUSIONS

Proceeding from the foregoing, the conclusions can be drawn as follows.

1. Contracts for the creation and use of objects of intellectual property rights are increasingly used in practice by the subjects of civil law, as evidenced, inter alia, current case law.

2. The agreement on the creation by order and use of the object of intellectual property rights has all the hallmarks of a consensual transaction.

3. It is necessary to allocate the following essential conditions of the contract on creation by order and use of object of the intellectual property right: condition on a subject of the contract; the period during which the creator undertakes to create an object of intellectual property rights; ways and conditions of using the object of intellectual property rights.

4. At the time of concluding the contract for the creation by order and use of the object of intellectual property rights, the object of intellectual property rights does not yet exist, and it can not be said that the person will create such an object and, consequently, become a creator.

5. The subject of the contract on the creation by order and use of the object of intellectual property rights is the obligation of the creator to create a certain object of intellectual property rights.

6. The parties to the contract for the creation and use of the object of intellectual property rights must clearly define the requirements to be met by the object of intellectual property rights. Depending on the type of object, you need to specify the scope, structure, shape, genre, purpose, working title of the work, type of invention, utility model, scope of the device, requirements for the appearance of the product and more.

7. The legislation of Ukraine regulating the procedure for the distribution of rights between the customer and the creator has changed. Meanwhile, the legislator continues to adhere to the concept of joint ownership of intellectual property rights to the object created by order, the creator of this object and the customer.

8. Currently, the legislator has changed the approach to the distribution of intellectual property rights to computer programs, databases created in connection with the implementation of the employment contract (contract), as well as works, including works of fine art, created to order, which requires further testing in time and practice. As a general rule, property rights to computer programs and (or) databases created in connection with the performance of an employment contract (contract) belong to the legal entity or individual where or in which the employee who created these computer works, programmes and (or) databases. Intellectual property rights to a work created to order belong to the customer. Intellectual property rights to a work of fine art created to order (except for a work specially created as an element of software) belong to its author.

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