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ПОНЯТТЯ ДОКТРИНИ АДМІНІСТРАТИВНОГО ПРАВА

Анотація. *В умовах сучасних державотворчих і правотворчих процесів, зумовлених істотними змінами у позитивному праві, актуалізується потреба формулювання на підставі методологічного плюралізму нового розуміння доктрини адміністративного права як складного, багатомірного системного феномену для позначення сукупності юридико-наукових суджень про адміністративно-правовий простір, що і є метою роботи. Основним методом наукової роботи є метод правового аналізу, використання якого дало змогу визначити в контексті цілісного представлення знань про «доктрину адміністративного права» її поняття, структури, системи шляхом аналізу консеквенцій: а) філософії права, б) теорії права, в) історії права, г) адміністративного права. Зосереджена увага на методологічному значенні філософських, теоретичних положень, зв'язках із загальною правовою доктриною: у взаємосприйнятті дослідницьких здобутків; розмежуванні адміністративного права з іншими галузями; забезпеченні урахування адміністративного законодавства у нормативному матеріалі інших галузей права (і навпаки); встановленні ідентичності або відмінності генези правових явищ тощо. Доведено, що феномен «доктрина адміністративного права» є системою, яку характеризують: 1. Єдність по відношенню до середовища (цілісність) і різноманіття зв'язків із ним; 2. Структурованість її, наявність у її системі відносно самостійних компонентів; 3. Наявність детермінантних характеристик «доктрини» як цілісності, які є результатом взаємодії її компонентів; 4. Наявність всередині системи) суперечностей, які є рушійною силою саморозвитку системи; 5. Історичність, наявність розвитку у часі, «історичного базису» і досвіду минулого. Запропоновано визначення доктрини адміністративного права. Практичне значення результатів дослідження полягає у тому, що теоретичні положення та висновки можуть стати основою для подальших наукових досліджень доктрини адміністративного права та її проблемних питань.*

Ключові слова: адміністративне законодавство, правова доктрина, стратегія розвитку, структура доктрини, правова система держави.

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THE CONCEPT OF THE ADMINISTRATIVE LAW DOCTRINE

Abstract. *In conditions of modern state-building and law-making caused by significant changes in positive law, arises the necessity of developing a new understanding of the doctrine of*

administrative law. This understanding should be based on the methodological pluralism, present the doctrine as a complex, multidimensional system phenomenon that denotes a set of legal scientific judgments about administrative legal framework. The above outlines the purpose of this study. The main method of scientific work is the method of legal analysis, the use of which allowed, in the context of a holistic presentation of knowledge about the doctrine of administrative law, to determine its concept, structure, system by analysing the consequences of: a) the philosophy of law, b) the theory of law, c) the history of law; d) the administrative law. The focus is on the methodological significance of philosophical, theoretical positions, connections with the general legal doctrine in the mutual perception of research achievements; delimitation of administrative law with other branches; ensuring the consideration of administrative legislation in the statutory material of other branches of law (and vice versa); identification of the identity or differences in the genesis of legal phenomena, etc. It is proved that the phenomenon "doctrine of administrative law" constitutes a system described by: 1. Unity in relation to the environment (integrity) and diversity of relations with it; 2. Its structure, the presence of relatively independent components in its system; 3. The presence of determinant features of "doctrine" as an entity, which constitute the result of the interaction of its components; 4. The presence of contradictions within the system that are the driving force of self-development of the system; 5. Historicity, the presence of over-time development, the "historical basis" and the experience of the past. The definition of the doctrine of administrative law is offered. The practical significance of the research results is that the theoretical provisions and conclusions can form the basis for further research on the doctrine of administrative law and its issues.

Keywords: administrative legislation, legal doctrine, development strategy, doctrine structure, legal system of the state.

INTRODUCTION

The doctrine of law ("communis opinio doctorum" – the legal science of lawyers, the general opinion of doctors, teachers, professors, scientists) – is the concept of a systematic set of legal scientific interpretations and judgments about positive law. The doctrine of administrative law, as a derivative and structural component of the phenomenon "doctrine of law", generates a logical-theoretical model of the positive segment of this legal branch. This model (design, scheme, means, method) serves as a test of proper understanding of: a) the interpretation of provisions, b) the need for legal regulation of social relations, c) the assessment of their efficiency, d) the compliance with the principles of state and civil society, e) the laws of evolution of the legal framework and the system of law. At the present stage of development of Ukrainian statehood, the necessity of investigating the issues of the doctrine of administrative law is dictated not only by general theoretical considerations, but also by significant changes in the positive law itself. First, it is the consolidation of natural human rights and freedoms in the provisions of positive law; secondly, the fundamental requirement for a positive segment of the right to meet these standards.

Under such conditions, the modern theory of administrative law of Ukraine should focus on the development of a new doctrine of administrative law, the definition of the conceptual directions of development of administrative law, the administrative law research, the main aspects of such a doctrine. In doing so, an important role belongs to the science of administrative law as a system of knowledge about administrative phenomena, the theory of administrative law, the administrative law doctrine [1]. That is why the

purpose of the study is to develop a new understanding of the doctrine of administrative law as a complex, multidimensional systemic phenomenon to denote a set of legal scientific judgments about the administrative legal framework, its logical-theoretical paradigm. To achieve the said purpose, the study is based on research of modern multivariate source base and methodological pluralism of scientific research (including with increased use of integrated methods, including: narrative, historical-genetic, taxonomy, periodisation, comparative-synchronous, comparative-diachronic, system-structural, etc.). The findings of the study will contribute to the development of an innovative scientific basis for modern reformational state-building and law-making.

In 2019, the pages of the All-Ukrainian legal journal "Legal Science of Ukraine" saw two discussions on doctrinal issues of administrative law. The first covered the new national doctrine of administrative justice [2], the second – the new national doctrine of administrative law [3] with expression of positions by representatives of various Ukrainian branch scientific schools. Three issues of the yearly periodical of branch scientific professional works "Issues of Administrative Law", published in 2017-2019, also focused on the results of innovative scientific research of scholars of administrative law, covering the substantiation of the need for updated understanding of the doctrine of administrative law and priorities for its definition, structure, understanding component series, development of "basic" terminology.

During 2017-2020, several landmark international, all-Ukrainian scientific, research-to-practice events were organised and held, primarily under the auspices of the National Academy of Legal Sciences of Ukraine and its structural units, including with the involvement of foreign legal scholars, representatives of international and domestic professional legal associations and with the awareness of the participants of such events of the urgent need to develop basic innovative approaches to a new understanding of the doctrine of administrative law, to prioritise basic fundamental and applied professional branch-related research. In recent years, in dissertations, primarily for the degree of Doctor of Laws, the topical issues of the doctrine of administrative law have been thoroughly studied. For example, in terms of the distribution of powers of public administration [4], administrative and legal support of the rights of citizens of Ukraine in terms of European integration [5], the use of sources of administrative law in the judiciary of Ukraine [6], etc. An array of scientific articles on various issues of administrative law doctrine, which were published in 2019 in Ukrainian and foreign scientific journals, also attract attention of the authors [7-12].

1. MATERIALS AND METHODS

Correct definition of methodology for accompanying legal research, including and branch realities, serves as a condition for objective results of scientific research in the form of new knowledge. Accordingly, the desire to understand the properties of the phenomenon "doctrine of administrative law" inevitably forces to objectify the methodological paradigm, correlated with the purpose and objectives of the study. This paradigm is primarily based the following: a) cognitive technologies; b) the worldview of the researcher; c) research objectives; d) features of the object and subject of scientific research. The methodology used in this paper is harmonised with the principle that the application of a method cannot be reduced to a single formula, and specific research

technologies (especially procedures for analysis, comparison, taxonomy, periodisation, etc.) vary depending on the nature of the subject and its purpose. In our case, the subject of knowledge (the doctrine of administrative law) constitutes a complex and multidimensional systemic phenomenon, the harmony of which is bound by the pluralism of legal understanding of the substantive essence of administrative law. This determines the methodological pluralism as a stable structure, into which methods are integrated in a separate segment, including: narrative, historical-genetic, taxonomy, periodisation, comparative-synchronous, comparative-diachronic, etc. Notably, the study used a unique resource of the dialectical method as a basic one, which allowed to explore the qualitative changes in the phenomenon of the administrative law doctrine, its components, systemic, comprehensive understanding, etc.

The method of semantic analysis is used to specify the content of the subject matter terminology ("administrative law", "legal doctrine", "doctrine of administrative law", "structure of the doctrine of administrative law", "system of doctrine of administrative law", "features of doctrine of administrative law", "components of the doctrine of administrative law", etc.), and the logical-legal method is used for the development of basic elements of such a subject matter terminology. The comparative legal method allowed to characterise the integrative features of the doctrine of administrative law, its components and defects in the use of their resources upon the statutory consolidation in the conditions of modern state-building and law-making. The system-structural method allowed to consider the latest doctrine of administrative law as a systemic multifaceted phenomenon, to identify components of the doctrine of administrative law, features that form its uniqueness, especially in modern conditions of radical revision of its essence, content, and purpose, to consider it as: a) an established set of views, ideas, and positions generated by legal science and mediated by legal practice; b) the collective opinion of reputable legal scholars on the main issues of legal regulation and other administrative and legal phenomena; c) statutory material, which reflects the principles and values of the state, local government, and civil society; d) a certain type of legal understanding, according to which a holistic administrative and legal system functions and develops. The methods of forecasting and modelling facilitated the development of an original understanding of the "doctrine of administrative law" and recommendations for its use to form an innovative scientific basis for modern rule-making and law enforcement activities.

Knowledge of different aspects of the subject matter is achieved through the use of methodological diversity, mutual correlation of methodological sets, directly adapted to the study of anthropological, phenomenological, sociological, ontological, epistemological, cultural, historical, system-structural, axiological, and other aspects and features. Thus, it can be argued that it is precisely the methodology used in the study that ensured the following: a) objective knowledge of the systematic nature of the doctrine of administrative law; b) patterns of evolution of its subject, structure, and system; c) the development of new knowledge about the impact of doctrine on administrative law theory, branch-related rule-making and branch law enforcement.

2. RESULTS AND DISCUSSION

The concept and term "legal doctrine" is used conventionally both in statutory and research sources. Therewith, the Ukrainian legal science has no generally accepted understanding

of legal doctrine. Much of the discussion on this matter focuses on issues of its legal nature, the correlation with the forms and sources of law, legal science, legal theory. Thus, V.V. Kopeichykov considers legal doctrine as a set of scientific knowledge about a particular legal phenomenon which, under appropriate conditions, can be developed into legal theory with a greater or lesser degree of generalisation [13]. Instead, V.V. Dudchenko does not deny the identification of doctrine with legal theory. In this regard, she writes that the term "legal doctrine" is used as a) a philosophical and legal theory, b) opinions of legal scholars on law-making and law enforcement, c) scientific articles of authoritative legal scholars, d) comments on codes and laws [14]. Notably, the above fragment mentions differing judgments, some of which are recorded in scientific articles and some of which are the thoughts of legal scholars, objectified in some other way. The textbook "General Theory of State and Law" edited by M.V. Tsvik and O.V. Petryshyn notes that legal doctrine traditionally belongs to the secondary sources of both Romano-Germanic and Anglo-Saxon law, manifesting itself in the scientific articles of prominent legal scholars and constituting conceptual ideas, theories, and views on the reality of state and law [15].

The textbook "General Theory of Law", edited by M.I. Koziubra, presents the legal doctrine as one of the oldest sources of law, which includes the work of well-known legal scholars who can be used to resolve legal cases. The legal force of these provisions is conditioned, firstly, by the fact that they reflect the legal reality, the idea of law, the content of law, which constitutes the expression of certain social realities and interests, and secondly, by respect and trust in legal scholars on the part of the society, especially among practicing lawyers [16]. The opinion is expressed that the legal doctrine constitutes an act-document that contains conceptually designed legal ideas, principles developed by scientists to improve legislation, understood by society and recognised by the state as mandatory [17]. The third volume of the Great Ukrainian Legal Encyclopaedia presents legal doctrine as a holistic and logically consistent set of ideas and scientific views on law, acknowledged by the legal community, which constitutes the basis of professional legal consciousness and the conceptual framework of rule-making, law enforcement, law interpreting activities [18]. The legal doctrine is similarly described in special researches concerning its nature, concept, structure, and meaning [19]. For example, E.Yu. Polianskyi writes that in general, legal doctrine should be understood as a set of ideas and principles, as well as legal institutions that are inextricably linked with legal science, legislation, and practice; it should determine the basic principles on which the legal system of the state is based. The doctrine originates in the past, directly regulates the law of the present, defines the law of the future, and constantly functions as a dynamic category that ensures the further development and improvement of law. The legal doctrine of the state, or general doctrine, includes all knowledge that meets the general requirements of the current theory of law, reflected in the law and used in practice [20].

Appropriate analysis of the concept of legal doctrine is contained in the study by I.V. Semenykhin, who supports its recognition as one of the most influential sources of law, and also considers it as an important link between legal provisions and legal practitioners. Semenykhin believes that the results of rule-making activity reach the practitioners through a "sieve" of interpretive activity of scholars, who specify and convey the content of legal prescriptions to the reader in plain language. If necessary, they also supplement, improve, and clean them from various defects – discrepancies, ambiguity, or

vagueness of wording in legal acts, etc. [21].

Despite the pluralism of opinions on some attributes of the concept of legal doctrine, there are reasons to state the existence of a consolidated position of the representatives of the theory of law on the most important provisions of its content. Notably, the achievements of Ukrainian scholars on this matter in many cases coincide with the views of authoritative European lawyers, who emphasise that the doctrine creates a framework of terminology and concepts for law-making and law enforcement, methodologically provides interpretation of statutory material, formats legal understanding of the legislator [22], and correlates it with historical sources [23]. Provisions outlined within the philosophy and theory of law have methodological significance for branch-related legal disciplines. They test the content of knowledge accumulated by them, their system integrity, the logic of their conclusions, theoretical models and hypotheses, determine the methodological reflection, determine the relevance of potential research. The above, with corresponding caveats as to the features of the structure and system, subject, sources, methods, and principles, is perceived as fair point in administrative law. To state this, it is sufficient to compare the above definitions of legal doctrine, which are based on the theory of law, with branch administrative and legal definitions. In fairness, there is another opinion. Thus, P.P. Sierkov is convinced that the theoretical multiplicity and controversy on many issues of administrative legal science has led to the fact that the doctrine of administrative legal regulation does not allow real and systematic development of relevant areas of modern law [24]. In the fundamental five-volume edition "Legal Doctrine of Ukraine", the doctrine of administrative law is defined as a set of theoretical ideas and views on goals, objectives, principles, components, main directions, and ways of development of administrative law as a branch of law of its sub-branches and institutions [1]. Various aspects of the doctrine of administrative law are intensively studied by Ukrainian lawyers in dissertations, monographs, scientific articles, and are published at conferences, forums, round tables, seminars, etc. As a systemic product, the phenomenon of administrative law doctrine is described by the unity in relation to the environment (integrity) and diversity of relations with the environment; the structure of administrative law doctrine, the presence of relatively independent components in its system; the presence of integrative properties, i.e. the determinant features of doctrine as an entity, which constitute the result of the interaction of its components; the presence of contradictions that are the driving force of self-development of the system within this very system (between the components that formed it); historicity of the phenomenon of "administrative law doctrine", the presence of development over time, "historical basis" and the experience of the past [25].

1. *Unity in relation to the environment (integrity) and diversity of connections with the environment* – this is a dual feature of the doctrine of administrative law, which constitutes an important feature with regard to its recognition as a systemic entity. It makes the doctrine a subsystem of another, more complex system. The doctrine of administrative law is a subsystem of at least two systems: administrative law theory and the doctrine of law. It is connected with administrative law theory by the fact that it represents a legal-logical (mental) paradigm (model, logical-theoretical construction, scheme, means, and method) of this branch of law. As part of administrative law theory, it standardises: a) a proper doctrinal understanding and interpretation of administrative law, b) the parameters

of its interference with reality. Connections with the general legal doctrine lies in the plane of mutual perception of research achievements, delimitation of administrative law with other branch-related formations, maintenance of the account of administrative statutory material in statutory material of other branches of law (and vice versa, ensuring that the statutory material of other branches of law is considered in the administrative statutory material), determination of identities or differences in the genesis of legal phenomena, etc.

2. *The structure of administrative law doctrine, the presence of relatively independent components in its system* is also an important attribute. Determination of the components of administrative law doctrine can be performed according to various criteria, which are conditioned by the objectives of the study and the specific features of the scientific views of the researcher. Thus, for example, S.V. Baturina outlines the following components among the substantive features of the doctrine: a) legal knowledge, b) legal values, c) legal experience, d) legal traditions, e) legal dogma, e) legal empiricism [26]. Such a proposal does not raise fundamental objections. Therewith, to understand doctrine as a system, it is appropriate to determine the components that would in themselves represent substantially meaningful, organisationally multifaceted, dialectically interdependent system formations capable of interacting to generate integrative properties of the system "administrative law doctrine". Analysing the statutory material from such standpoints, it is easy to see whether the legislator pays attention to the adoption of acts of doctrinal, conceptual, strategic aspect, and application of similar conceptual constructions in their titles and texts. These are, for example, "Communication Strategy in the Sphere of Prevention and Counteraction to Corruption"[1], "Concept of Development of Mountain Territories of the Ukrainian Carpathians"[2], "Maritime Doctrine of Ukraine until 2035"[3], "Military Medical Doctrine of Ukraine"[4], "National Doctrine of Physical Culture Development and Sports"[5] , etc. The texts of documents also contain the term "concept note"[6].

In the literature, the terms "doctrine", "concept", "strategy" are often identified, and the legislator is not very careful upon distinguishing between them, therefore there is a need to find grounds for a clearer definition of their correlation. In official sources, the term "doctrine" can be defined, firstly, as a document (Recommendations of parliamentary hearings No. 827-VIII on the topic: "On the military medical doctrine of Ukraine" dated

[1] Communication strategy No. 576-r in the field of preventing and combating corruption. (2017, August). Retrieved from https://zakon.rada.gov.ua/laws/show/576-2017-p#Text.

[2] The concept of development of mountain territories of the Ukrainian Carpathians No. 232-r. (2019, April). Retrieved from https://zakon.rada.gov.ua/laws/show/232-2019-p#Text.

[3] Maritime doctrine of Ukraine No. 232-r for the period up to 2035. (2009, October). Retrieved from https://zakon.rada.gov.ua/laws/show/1307-2009-п#Text.

[4] Military medical doctrine of Ukraine No. 910. (2018, October). Retrieved from https://zakon.rada.gov.ua/laws/show/910-2018-п#Text.

[5] Decree No. 1148/2004 on the national doctrine of development of physical culture and sports. (2004, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1148/2004#Text.

[6] Procedure for selection of state investment projects No. 571. (2015, July). Retrieved from https://zakon.rada.gov.ua/laws/show/571-2015-п#Text.

25.11.2015[1]); secondly, as a set of views, scientifically sound principles, common organisational requirements for the establishment of relevant activities (Military Medical Doctrine of Ukraine); thirdly, as a system of conceptual ideas and views on the role, organisational structure, and tasks for the functioning of the subject (National Doctrine of Physical Culture and Sports). The functions of the doctrine at the official level are called, firstly, the definition of strategy and main directions of further development (Maritime Doctrine of Ukraine); secondly, to be the basis for the development of regulations; thirdly, to be the basis for the development of guiding documents (Military Medical Doctrine of Ukraine); fourthly, to play the role of the bearer of concepts, conceptual ideas (National Doctrine of Development of Physical Culture and Sports). Notably, the official documents entitled "concept" and "strategy" are adopted at both the state and regional levels. For example, the Development Strategy of the Kyiv Oblast for 2021-2027 – approved by the Order of the head of the Kyiv Oblast State Administration No. 695 of November 29, 2019[2]; the Concept of territorial development of Kyiv Oblast – approved by the Order of the head of the Kyiv Oblast State Administration No. 591 of July 19, 2007[3]; Communication strategy in the field of prevention and counteraction to corruption – approved by the Order of the Cabinet of Ministers of Ukraine No. 576-r of August 23, 2017[4]; the Concept of training specialists in the form of dual education model – approved by the Order of the Cabinet of Ministers of Ukraine No. 660-r of September 19, 2018[5]. There are no documents called "doctrine" at the regional level. This can also be considered in favour of the dominant position of the phenomenon "doctrine" in the triad "doctrine – concept – strategy".

Analysis of scientific sources that address the distinction between the phenomena of doctrine, concept, and strategy gives grounds to believe that the views of scientists are not fundamentally different from the vision of the legislator [27]. Thus, V.B. Averianov, in his reflections on the new doctrine of administrative law, sees the concept of administrative torts, the concept of administrative sanctions, etc. in its system [28]. R.S. Melnyk explores the concept of "human-centredness" as one of the components of the doctrine of modern administrative law [29]. The clearest position in this regard is occupied by P.D. Barenboim, who insists that "doctrine" is a higher systematic development of an important problematic issue of law as against the term "concept" and therefore it may include several concepts [30]. Thus, the phenomenon of administrative law doctrine in relation to strategies, concepts, laws, and other acts of administration, research, investigations, proposals, conclusions, etc., serves as a theoretical dominant, a guiding principle, a complex attitude.

1 Recommendations of the Parliamentary Hearings No. 827-VIII on the topic: "On the Military Medical Doctrine of Ukraine". (2015, November). Retrieved from https://zakon.rada.gov.ua/laws/show/827-19#Text.

2 Development strategy of Kyiv Oblast No. 695 for 2021-2027. (2019, November). Retrieved from http://koda.gov.ua/oblderzhadministratsija/publichna-informatsiya/strategiya-rozvitku-kiivskoi-oblast/.

3 The concept of territorial development of Kyiv Oblast № 591. (2007, July). Retrieved from http://koda.gov.ua/normdoc/pro-skhvalennya-proektu-koncepcii-teri/.

4 Communication strategy No. 576-r in the field of preventing and combating corruption. (2017, August). Retrieved from https://zakon.rada.gov.ua/laws/show/576-2017-p#Text.

5 Order No. 660-r "On approval the concept of training specialists in the dual form of education". (2018, September). Retrieved from https://zakon.rada.gov.ua/laws/show/660-2018-p#Text.

They are integrated into the doctrine, and the implementation of each of them ensures the implementation of the doctrine at large.

3. *The presence of integrative properties, i.e. determinant features of "doctrine" as an entity, which constitute the result of the interaction of its components*. Thus, the interaction of these components generates for the system (of administrative law doctrine) such properties that act as its features and do not constitute features of each of the components. A simple, schematic example of such solvation can be the interaction of traffic rules, building rules of the city of Kyiv, the rules of improvement of the city of Kyiv. Its results are the concepts of development of parking and pedestrian space, introduction of intelligent transport system, automated traffic management system, which are the features of the Kyiv City Development Strategy. In the given case, the integrative properties of the system "administrative law doctrine" should recognise: clearly and consistently unified framework of concepts and categories; continuous process of ordering of summative fragments in system components; generation of scientifically sound guidelines for the areas of law-making, rule-making, law enforcement; the ability to integrate individual scientific opinions into the public consciousness; to form knowledge about the unity and differences of the interacting components of the system; to determine the need to improve the quality of administrative law material; to ensure the evolution of the subject and theory of administrative law; to outline criteria of the uniform scientific approach to understanding of administrative law institutes and their elements; to stimulate the development of internal relations between administrative law by the relevant legislation and academic disciplines; to determine the laws of development of administrative law and to the principles of administrative law on their basis.

4. *The presence of contradictions within the system (between the components that formed it) that are the driving force of self-development of the system.* There are no phenomena in public life that are outside the process of development. The system of administrative law doctrine is no exception to this rule. The driving force behind its evolution are internal contradictions, conflicts, discrepancies, and contradictions. Their detection and launch of coordination mechanisms give rise to the dynamics of self-development of both structural components and the system at large. These processes are objectified in the problems of administrative legal framework and efforts to solve them. These are, for example, problems of harmfulness and public danger of administrative misconduct, administrative responsibility of a legal entity, the ratio of administrative process and administrative procedure, reform of the Code of Ukraine on Administrative Offenses, the legal nature of official relations, etc. Research on problematic issues of administrative law generates new knowledge and enriches the content of administrative law doctrine [31].

5. *The historicity of administrative law doctrine, the presence of development over time, the historical basis, and the experience of the past.* Correct, objective, impartial understanding of social transformations, changes in legal policy and regulatory support of legal practice, as well as the treatment of branch-related problems, is impossible without recourse to the historical and philosophical treasuries of administrative law. For modern Ukrainian administrative legal science, recourse to historical heritage has become an important source of updating and replenishing modern knowledge about the regulation of relations by means of administrative law [32; 33]. Borrowing the achievements of previous

times, the science of administrative law is constantly moving forward [34].

CONCLUSIONS

The analysis of the studied literature allowed to make important generalisations about the understanding of the administrative law doctrine. Firstly, it testifies to the globality and universality of this category; secondly, the identity of the genesis of concepts and definitions used to interpret its content, characteristics, features, essence, attributes, qualities, etc.; thirdly, it allows to consider the doctrine of a systemic product of legal scientific interpretations developed and concentrated in the space of administrative law, which have gained a well-established understanding in the field of understanding legal phenomena. Administrative law doctrine is integrated by: a) an established system of views, ideas, and provisions generated by legal science and mediated by legal practice; b) the collective opinion of authoritative legal scholars on the main problems of legal regulation and other administrative phenomena; c) statutory material which reflects the principles and values of the state, local self-government, and civil society; d) a certain type of legal understanding, according to which a holistic administrative system functions and develops. Thus, the administrative law doctrine, as a systemic entity, provides the overall substantive unity of the administrative legal framework with help of its integrative properties, ensures its internal differentiation and organic dependence on the essence of law, the interrelation with forms of expression, informativeness, predictability, stability of elements.

According to the logic of historical development, one of the important conclusions of the study of the interaction of the components of the system of administrative law doctrine is the recognition of the feature of legal succession in local doctrines of administrative law, existing at different stages of its evolution. This integration feature, firstly, expresses the inseparability of the process of cognition of administrative ideas, principles, theories, concepts, methods, and forms generated at different evolutionary stages, and secondly, ensures the preservation and organic implantation in modern understanding of all that was gained by predecessors. Each step of the science of administrative law is prepared by the previous stage and each of its subsequent stages is naturally connected with the previous one.

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ІТАЛІЙСЬКИЙ ДОСВІД ФУНКЦІОНУВАННЯ АДМІНІСТРАТИВНОЇ ЮСТИЦІЇ

Анотація. *Розвиток адміністративного судочинства України зумовлює пошук оптимальних шляхів для удосконалення системи. Кожна країна має свою стратегію функціонування адміністративної юстиції, що залежить від культурних, історичних, національних, інтеграційних процесів, а також поетапності становлення правової системи конкретної держави. Основна мета роботи полягає в аналізі італійського досвіду щодо функціонування адміністративної юстиції. Для досягнення поставленої мети використані різноманітні теоретичні методи. Метод правового прогнозування дозволив виявити напрями удосконалення адміністративної юстиції в Україні. У статті авторами наведено поняття та особливості функціонування адміністративної юстиції в Італії в питаннях захисту порушених прав, свобод та інтересів людини і громадянина рішеннями, діями та бездіяльністю суб'єктів владних повноважень, аналізується система та структура органів адміністративної юстиції Італії, їх спеціалізація, особливості розгляду деяких категорій публічно-правових спорів та розмежування юрисдикції адміністративних судів та загальних судів при вирішенні деяких категорій адміністративних справ, особливості їх розгляду в адміністративних судах Італії першої та апеляційної інстанції, повноваження Державної Ради Італії в частині вирішення публічно-правових спорів, а також повноваження квазісудових органів влади Італії, які виконують функції правосуддя в сфері адміністративної юстиції. Встановлено, що адміністративні суди Італії наділені повноваженнями оцінювати діяльність публічної адміністрації. Орієнтуючись на досвід інших країн, в тому числі Італії, можна зробити висновок, що якісно побудована система адміністративної юстиції може сприяти захисту прав громадян України, розвитку правової держави. Але важливо не лише орієнтуватися на зарубіжні країни, але й враховувати особливості правової системи України.*

Ключові слова: адміністративні суди, публічно-правові спори, публічний інтерес, адміністративний акт, суб'єкт владних повноважень, орган публічної адміністрації.

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ITALIAN EXPERIENCE OF THE ADMINISTRATIVE JUSTICE FUNCTIONING

Abstract. *The development of administrative legal proceedings in Ukraine determines the search for optimal ways to improve the system. Each country has its own strategy for the functioning of*

administrative justice, which depends on cultural, historical, national, integration processes, as well as the gradual formation of the legal system of a particular state. The main purpose of the study is to analyse the Italian experience of the administrative justice functioning. To achieve this goal, various theoretical methods are used. The method of legal forecasting allowed to identify areas for improvement of administrative justice in Ukraine. The author presents the concept and features of administrative justice operation in Italy in matters of protection of violated rights, freedoms and interests of individual and citizen by decisions, actions and omissions of the authorities; analyses the system and structure of administrative justice in Italy, its specialisation; features of some categories of public law disputes and delimitation of jurisdiction of administrative courts and general courts in resolving certain categories of administrative cases, features of their reading in administrative courts of Italy of first and appellate instance; powers of the Italian State Council in resolving public law disputes, and powers of quasi-judicial tribunals of Italy, which perform the functions of justice. It is revealed that the administrative courts of Italy are empowered with the rights to assess the activities of public administration. Based on the experience of other countries, including Italy, we can conclude that a well-built system of administrative justice can help protect the rights of Ukrainian citizens and the rule of law. But it is important not only to focus on foreign countries, but also to take into account the peculiarities of the legal system of Ukraine.

Keywords: administrative courts, public law disputes, public interest, administrative regulation, public authority, public administration body.

INTRODUCTION

The basic rights and freedoms of citizens were established in the constitutions of many Western European countries before the middle of 19th century. This was the most important achievement of legal thought at the time. One of the most important elements of the modern rule of law is the institution of judicial control over the subjects of power, as the nature of their public authority management functions in society has created the preconditions for such control by the judiciary. In modern EU countries, the institution of administrative justice has gone through quite complex and ambiguous stages of its establishment. As a result, each EU country has created its own institutions for the protection of citizens' rights, taking into account historical traditions and the needs of social development. Control over the activities of public administration is considered to be one of the most important elements of ensuring the rule of law, efficiency of public administration and justice in modern society. Of particular importance is the judicial protection of the rights, freedoms and interests of citizens from unlawful decisions, actions or omissions of the public authorities. In most EU countries, the task of protecting citizens from unlawful actions of the state and control over acts, actions or omissions of the public authorities (public administration) is entrusted to the administrative justice authorities. By interacting with citizens, bodies of authority may violate the rights, freedoms and interests of individuals by their decisions, actions or omissions. Under these circumstances, the administrative court is the mechanism of legal protection of the rights, freedoms and legitimate interests of citizens violated by the bodies of authority in all cases of power and authority abuse by the public bodies and their officials.

The study of the experience of the administrative justice of Italy is especially relevant for Ukraine, as it perform not only the function of judicial protection of the rights, freedoms and interests of citizens from wrongful decisions, actions or omissions of public

authorities, but directly have authority in the separation of powers, in particular, the administrative court of Italy participate in the development of draft regulations of the Government of Italy, the Parliament of Italy and the President of Italy, assist them in the exercise of their powers, perform coordinating functions, etc. The mechanisms of practical implementation of the principle of separation of powers with the direct participation of administrative court in Italy differ significantly from other EU countries, which have a classic model of administrative justice. The administrative court of Italy have passed a difficult historical path since their establishment, which preceded the creation of a united Italian state in the 19th century, and until their implementation in the system of government bodies established by the Republican Constitution of Italy in 1947.

The aim of the paper is to investigate the peculiarities of the functioning of administrative courts in Italy and resolve public law disputes in certain categories, which may be of considerable practical interest for domestic practice in the development and amendment of current legislation of Ukraine.

1. LITERATURE REVIEW

So, according to V. B. Averyanov, administrative justice is a system of judicial bodies (courts) that monitor compliance with the law in public administration by resolving in a separate procedural order of public disputes emerging in connection with appeals of individuals or legal entities to administrative authorities, local governments or their officials [1]. J.V. Lazur notes that administrative justice is a procedure for considering and resolving of public disputes arising in the field of administrative management between citizens or legal entities, on the one hand, and public authorities – on the other, carried out by judicial bodies specially created to resolve such disputes [2]. According to O. P. Ryabchenko, administrative proceedings are regulated by the rules of administrative law, the process of hearing by a special administrative court of a lawsuit in order to restore the violated rights and freedoms of participants in administrative relations, as well as to control the legality of acts and decisions of public authorities and local governments, as well as their officials [3].

O. Kuzmenko and T. Gurzhiy present their classification of views on the concept of "administrative justice". They point out that there are currently three main areas according to which it can be understood as [4]:

1) a special procedure for resolving administrative and legal disputes by courts and other authorised state bodies. Such position in the definition of "administrative justice" is shared, for example, by Yu. Shemshuchenko and V. Stefanyuk.

2) an independent branch of law, the purpose of which is to resolve disputes by courts between citizens and public authorities (administration) or between the governing bodies themselves (i.e. administrative proceedings). Such explanation of administrative justice is offered, for example, by G. Breban;

3) not only a special type of proceedings, but also a system of specialised courts or specialised litigation functions that carry out administrative proceedings.

V. R. Shchavinsky notes that administrative justice should be understood as a special procedure for resolving public law disputes through a system of administrative courts established to protect the rights, freedoms and interests of individuals, the rights and interests of legal entities in the field of public relations [5]. O. Sergeychuk characterises

administrative justice as a mandatory element of the system of external control over the legality of acts of public authorities and their officials in part of their acts or actions (omissions) that violate the statutory rights of individuals or legal entities provided by the system judicial authorities in the prescribed administrative procedure [6].

2. MATERIALS AND METHODS

To achieve this goal, general scientific approaches were used, the concepts and features of the administrative justice in Italy in the protection of violated rights, freedoms and interests of individuals and citizens by decisions, actions and omissions of the public authorities. The system and structure of the administrative court of Italy, its specialisation and features of hearing of some categories of public law disputes, etc. are analysed with the help of methods and ways of cognition of the object of research. To study this issue, it is necessary to use system analysis, the methodological basis of which is based on the dialectical method. The use of this method ensures a systematic approach to differentiation of the jurisdiction of administrative courts and general jurisdiction courts in resolving certain categories of administrative cases. The development of an effective theory for solving this is the task facing the doctrine of administrative law. In turn, the solution of this problem depends on the right goals and the right tools, which determine the complexity of the correctness of its description. Therefore, the analysis of the special aspects of the functioning of administrative justice in the administrative courts of Italy of the first and appellate instance, the powers of the State Council of Italy in resolving public disputes allows us to understand the relation between their components and their impact on the external environment. The comparative method was used to establish the contents of the powers of the quasi-judicial tribunals of Italy, which perform the functions of justice in the field of administrative justice. This made it possible to study the experience of the administrative court of Italy, which is especially relevant for modern realities of Ukraine. In addition, the comparative method was used not only to study the function of judicial protection of the rights, freedoms and interests of citizens from wrongful decisions, actions or omissions of the authorities, but also to substantiate that the Italian administrative court is involved in development of regulatory acts, and have direct authority in the system of separation of powers.

The use of the logical-dogmatic method together with the method of hermeneutics made it possible to determine the essence of administrative justice and some approaches to its functioning. Thanks to this approach, the scientific basis for the study of the legal basis of the organisation of administrative justice in Italy was determined. The outlined scientific visions are based on the principles of scientific unity of theory and practice, scientific objectivity, which includes the scientific results of the study, and does not make such results dependent on other subjective or objective approaches. Dominant, in the methodological sense, among all the above methods is the method of comparative law, which allowed to conduct research and compare the functioning of the administrative justice of Italy.

The method of legal forecasting provided an opportunity to identify possible areas for improving the functioning of administrative justice in Ukraine. With the help of the modelling method, proposals aimed at improving the functioning of Ukrainian legislation

in the functioning of justice were forecasted and developed. The comparative method allowed to conduct a comparative and analytical analysis of the norms of the Administrative Law of Italy and to conclude that it is necessary to introduce this institution in Ukraine. The method of analysis and synthesis helped to ensure the formation of basic concepts and categories of functioning of administrative justice. Consideration of the main approaches and various components should be based on system-structural, technological, functional and operational approaches, which are also the basis for creating the preconditions for the establishment of administrative justice operation. After all, the exercise of power and the implementation of the constitutional function of protecting the rights, freedoms and interests of citizens from wrongful decisions, actions or omissions of the state in the face of its public bodies is the main task of administrative justice.

Logical methods, in particular inductions, deductions, generalisations, etc. were the basis of the whole study. The use of the generalisation method allowed us to draw a general conclusion that the exercise of power and the constitutional function of protecting the rights, freedoms and interests of citizens from wrongful decisions, actions or omissions of the public authorities represented by its power entities is the main task of administrative justice, entrusted to the State Council of Italy, regional administrative tribunals and "quasi-judicial" authorities.

3. RESULTS AND DISCUSSION

3.1 Judicial system of Italy

The administrative courts in Italy as a tool to protect the rights, freedoms and interests of citizens from wrongful decisions, actions or omissions of public authorities and their officials appeared during the formation and development of administrative justice in Western Europe in early and second half of the 19th century. And in Italy, since the establishment of the State Council of the Kingdom of Sardinia in 1831, which later became the State Council of Italy. The administrative courts in Italy have gone through several stages of development, which allow us to speak about the significant role of Italy in the development of theoretical and practical approaches to the development of the institution of administrative justice. Currently, the institute of administrative justice in Italy is a well-developed system of legal and organisational norms and mechanisms designed to resolve public law disputes. Although the current Italian legislation does not contain a definition of administrative justice, this institution includes, in addition to administrative courts, a set of other governing institutions authorised by law to hear administrative cases to resolve various categories of public law disputes. Administrative courts play an important role in the system of governing institutions in Italy, as they are simultaneously at the junction of all three branches of government. First, they perform the functions of justice in administrative cases for appeals against acts of public administration under Italian law. Secondly, the State Council of Italy is an advisory body to the Government of Italy, which is the appellate court in appealing against decisions of the administrative court and within its advisory functions provides its opinion on the statutory list of bills and other regulations requiring its assessment as expert body in the field of law. Third, the Italian State Council participates in the exercise of legislative power, as it assists the Government in law-drafting activities.

Italian administrative justice has all the basic general features of administrative justice, but in structural terms it is carried out by established administrative and courts of general jurisdiction, individual statutory subjects of power, which will be discussed below. Such system has also been established in other European countries: France, Spain, Portugal. In addition, there are mixed forms where the functions of administrative justice are performed by both courts of general jurisdiction and special administrative courts (UK, Switzerland, Belgium). The Italian judicial system includes the Italian Constitutional Court, general and special courts, which include administrative courts. According to Article 102 of the Italian Constitution, justice is administered by courts of general jurisdiction, the activities of which are governed by the Judiciary Act; no new emergency or special courts may be established. Therefore, the administration of justice is entrusted exclusively to courts of general jurisdiction and special courts. The status of courts of general jurisdiction is established directly by the Constitution of Italy[1] and the Law "On the Judiciary" of January 30, 1941 No. 12[2]. Courts of general jurisdiction hear criminal and civil cases. The system of courts of general jurisdiction includes magistracy, tribunals, courts of appeal and cassation, juvenile courts, and supervisory courts. The system of general courts is headed by the Italian Court of Cassation (Corte di Cassazione), which is the highest court in civil and criminal cases and hears disputes over jurisdiction between general courts and administrative courts. A feature of the Italian judicial system is that public law disputes concerning appeals against acts, actions or omissions of public administration can be heard, depending on a certain category, by both administrative courts and general courts. The essence of the division of justice into general and administrative in public law disputes involving public administration is the specifics of the Italian legal system, and, above all, the existence of such concepts as legitimate interest (interesse legittimo) and subjective right (diritto soggettivo).

The distinction between the jurisdiction of general courts and administrative courts in appealing against acts, actions or omissions of the public administration is based on the division of public law disputes affecting subjective rights and legitimate interests. Italian administrative courts, including administrative courts, hear cases involving public disputes affecting the legitimate interests of individuals, and general courts deal with their subjective rights. Moreover, in certain cases defined by Italian law, the jurisdiction of administrative courts extends to disputes involving public administration, affecting the subjective rights of citizens (the so-called "exclusive jurisdiction"). At the same time, general jurisdiction court and administrative courts are endowed with different competence in hearing cases of appeal against acts of public administration. Courts of general jurisdiction may terminate acts of public administration bodies due to their inconsistency with the law. Administrative courts have the right to cancel and change them, extending the effect of previously adopted regulations to the legal relationship heard during the trial.

If it is impossible to determine the jurisdiction of a particular case of general courts or administrative courts, such jurisdiction is determined by the Court of Cassation of Italy. The existence of subjective rights and legitimate interests in Italy has historical roots, as

[1] Constitution of Italy. (1947, December). Retrieved from https://legalns.com/download/books/cons/italy.pdf.

[2] Italian Law No. 12 "On the Judiciary". (1941, January). Retrieved from https://rm.coe.int/168070098d.

the Law on Administrative Disputes of March 20, 1865 No. 2248[1] introduced the division of powers between the judiciary and the executive branches, when courts of general jurisdiction were empowered to hear disputes, related to the protection of civil and political rights, and public authorities were empowered to hear all other categories of administrative cases. The Constitution of Italy[2] mentions subjective rights and legitimate interests in three articles at once (Articles 24, 103 and 113), but does not define them or indicate the difference between them. Thus, in Italy, the legal doctrine has identified the differences between subjective law and legitimate interest, and law enforcement practice has attributed the specific circumstances of the case to a particular concept [7]. Subjective right belonging to an individual is absolute and subject to protection regardless of any factors. Subjective right is directly provided and protected by law, in respect of which all other subjects must adhere to the established behaviour [8]. The rights that are subject to absolute protection under Italian law include the right to life, the right to property, etc. The legitimate interest in Italy is not subject to absolute protection, it is the pursuit of some good and its implementation depends on another interest, the bearer of which is the public administration. The legitimate interest implies the obligation of the public body to act in accordance with the rules established by law and a person's right to demand compliance with it [9-11].

In the Italian legal literature, the following examples of legitimate interests are often cited. A citizen who participates in a public competition for a position in a public body has a legitimate interest. Interest in this case is the pursuit of good, which is a vacant position in this public body. The benefit in the form of a position is available to the public administration, and its transfer to the citizen depends on his professional qualities, level of training and other criteria on the basis of which the public administration makes a choice in favour of a particular candidate. The citizen, therefore, has not a subjective right, but a legitimate interest, which is at the disposal of the public administration [12]. Another example is Article 42 of the Constitution of Italy[3] which gives the public administration the right to forcibly confiscate privately owned objects in the public interest on condition of the payment of compensation (in particular, for the purpose of constructing certain objects for public use). The legislation in this case establishes the priority of public interests over the right of private property. In these circumstances, the legitimate interest of the owner, in respect of which the public administration has decided to forcibly seize the privately owned property, is for the expropriation procedure to take place in accordance with the law and for the public administration to fairly assess the property and pay compensation. In all other cases, the citizen's right to private property (for example, in relations with other citizens) is absolute, i.e. subjective right. Italian lawyers schematically reflect the subject of the differences between legitimate interests and subjective rights in terms of the level and form of legal protection. According to the level of protection, the subjective right is always protected, immediately and completely regardless of the behaviour of other subjects, and the protection of the legitimate interest is not carried out

[1] Italian Law No 2248 "On Administrative Disputes". (1865, March). Retrieved from http://www.aca-europe.eu/en/eurtour/i/countries/italy/italy_en.pdf.

[2] Constitution of Italy. (1947, December). Retrieved from https://legalns.com/download/books/cons/italy.pdf.

[3] *Ibidem*, 1947.

immediately and not in full, but in connection with the implementation of public interest by subjects of power that perform functions of public authority management [8]. The form of protection also differs. Subjective right is subject to protection by the enforcement or judicial authorities of compensatory or rehabilitative measures. The legitimate interest provides for the possibility of broader protection, which allows for the possibility of revoking a wrongful act, as well as obtaining compensation regarding the illegal actions of public administration bodies and their officials [8].

The possibility of obtaining compensation regarding the adoption of illegal acts by a public authority was provided for by Italian law relatively recently – after the adoption of the law "Regulations on Administrative Justice" of July 21, 2000 No. 205[1]. This law added to the jurisdiction of the administrative judiciary the power to hear all public disputes concerning damages caused by decisions, actions or omissions of the public administration, while previously all matters of damages were heard exclusively by general jurisdiction courts. An important characteristic of the Italian judicial system is that it distinguishes between proceedings in general courts and administrative courts according to the criteria of "jurisdiction over monitoring of legality" and "material jurisdiction". The difference is that the court, endowed with "jurisdiction over monitoring of legality", has the right to hear the case only from the standpoint of application of a rule of law within the circumstances of the case. "Material jurisdiction" provides an opportunity not only to assess the actions of the parties in the case in terms of compliance with the law, but also to assess the feasibility of such actions. The administrative courts of Italy, which are endowed with "substantive jurisdiction", in considering public law disputes between individuals and public administration have the right to decide on the case based on the expediency of the public administration in adopting the contested act in certain circumstances, while the courts of general jurisdictions do not have the right to go beyond the jurisdiction to verify legality when making a decision. And only the Italian Court of Cassation, which hears the case as a last resort, is endowed with "substantive jurisdiction" and has the right to be guided in its decision by the principle of the expediency of the parties' actions.

3.2 The system of administrative courts in Italy

The system of administrative justice includes both judicial and "quasi-judicial" authorities. The judicial bodies of administrative justice of Italy include: 1) regional administrative tribunals; 2) The State Council of Italy (heads the system of administrative justice); 3) Council of Administrative Justice of Sicily. The "quasi-judicial" bodies of administrative justice in Italy are the Accounting Chamber, which has certain powers to hear public disputes in its field; provincial and regional tax commissions, which consider cases of taxpayers to appeal the decisions of tax authorities; patent litigation commissions; public water tribunals; regional commissioners for the liquidation of public facilities. For example, provincial tax commissions hear cases as a first instance, which can be reviewed by regional tax commissions. Decisions of tax commissions can be appealed in cassation to the Court of Cassation of Italy.

The system of judicial bodies of administrative justice includes the Court of

[1]Italian Law No 205 "Regulations on Administrative Justice". (2000, July). Retrieved from https://eu-ua.org/sites/default/files/inline/files/review-of-the-case-law-of-the-eu-court-of-justice-fields-covered-by-the-association-agreement-2018.1.1.eng.pdf

Cassation of Italy. Although the Court of Cassation heads the system of general jurisdiction courts, it has the right to set aside decisions of administrative courts on the grounds that the administrative court has no jurisdiction regarding the decision in the case. The system of administrative courts also includes the Presidium of Administrative Justice, a coordinating body of judicial self-government that takes care of the status of judges of administrative courts. In this paper special attention will be paid to the analysis of the peculiarities of the functioning of administrative courts. Italy has a two-tier system of administrative courts. The regional administrative tribunals are the courts of first instance, and the Italian State Council is the body that hears appeals against decisions of the regional administrative tribunals, which will be discussed below. In total, in Italy, twenty regional administrative tribunals, the jurisdiction of each of them extends to the respective region, provinces and communes within the structure of the region. The tribunals are located in the administrative centres of the regions. In nine regions, departments have been established outside the administrative centres of the region, which allow to consider cases in other largest cities of the region as well. In addition, in the administrative centre of each region several departments can operate at once, for example, in the administrative centre of Lazio – the city of Rome – there are three departments. Despite the existence of several departments within one regional administrative tribunal, the structure of tribunals remains the same. All divisions of regional administrative tribunals have equal powers, and cases are referred to them on the basis of an internal distribution, which is carried out by the chairman of each tribunal. Each tribunal must have at least five judges in addition to the chairman. Of all the regional administrative tribunals, only the Trentino-Alto Adige Tribunal has a special status. An autonomous division was established in Bolzano within the framework of this tribunal. The peculiarity of this department is that it hears all cases of appeals against acts of public administration related to the violation of the principle of equality of ethnolinguistic groups in the region – Italian and German. In addition, there is a special procedure for selecting judges for this autonomous department – it must be staffed by judges who speak both Italian and German, are attached to the autonomous department of the city of Bolzano for the entire term of office and cannot be later transferred to other tribunals.

The status of the State Council of Italy is that this body is not only the highest court in the field of administrative justice, an advisory body to the Government of Italy, but also a body that assists the President in out-of-court appeals against public administration. The exercise of judicial and extrajudicial functions by the Italian State Council is reflected directly in the structure of this authority. It has three judicial and three advisory departments. Each advisory department have two heads of the department and at least nine judges, who shall be called counsellors of state in the exercise of their powers in the State Council, and each judicial department shall have two heads and at least twelve counsellors of state. Councillors of the State Council and judges of regional administrative tribunals belong to a single system of judges of administrative justice, in which counsellors of state are the most authoritative judges with appropriate qualifications and long experience in administrative justice. The status of administrative judges, their appointment, rights and responsibilities are established by the law "On the structure of administrative jurisdiction and staff of the Chancellery and subsidiary bodies of the State Council and regional

administrative tribunals" of April 27, 1982 No.186[1], which establishes an exhaustive list of administrative judges have the right to participate in the administration of justice in appealing against acts of public administrations: 1) the Chairman of the State Council; 2) heads of departments of the State Council, heads of regional administrative tribunals; 3) counsellors of state; 4) advisers of regional administrative tribunals, first referents, referents.

The Judicial Bodies of Administrative Justice also include the Council of Administrative Justice of the Region of Sicily. The existence of this body is mainly due to historical reasons. The Statute of the Region of Sicily, approved by Legislative Decree of May 15, 1946 No. 455, was adopted a year before the Constitution of Italy[2], Article 23 of which provides that the central judicial authorities of the state must have their own special departments in the regions to address regional issues. The statute established the Council of Administrative Justice of the Region of Sicily. After the entry into force of the Italian Constitution in 1947, national and regional legislators decided not to abolish the Council, but to preserve it and subsequently adapt it to the provisions of the Constitution of Italy.

Today, the Council of Administrative Justice of the Region of Sicily performs advisory and judicial functions similar to the State Council. As an advisory body to the Government of the Region of Sicily, the Council provides its opinion on the draft regulations of the Government of the region. As a judicial body, the Council is a court of appeal regarding review of the decision of the Regional Administrative Tribunal of the Region of Sicily. Also, the Council of Administrative Justice has the right to send the case to the State Council only in cases where there is a possibility of disagreement between the judicial authorities of Sicily and the previously formed legal position of the State Council, which may deviate from the previously adopted legal position. Italian doctrine and jurisprudence treat the Council in two ways. On the one hand, it is perceived as a division of the State Council, located outside the location of its other branches – the city of Rome – but, on the other hand, it is an independent judiciary for the reason that judges of the State Council are appointed. Council of Administrative Justice of Sicily, removed from the State Council of Italy [13]. A special place in the system of administrative justice is occupied by the Presidium of Administrative Justice, whose status is established by the Law "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the State Council and regional administrative tribunals"[3] and is the coordinating body of the entire administrative justice system in Italy. The Presidium of Administrative Justice coordinates the activities of the State Council of Italy and the regional administrative tribunals. The status of the Presidium of Administrative Justice is similar to the status of the High Council of Magistracy, enshrined in Articles 104 and 105 of the Constitution of Italy. In particular, the High Council of Magistracy considers issues related to the appointment of judges to positions in general jurisdiction courts, their transfer and

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals" of 27 April 1982. Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

[2] Constitution of Italy. (1947, December). Retrieved from https://legalns.com/download/books/cons/italy.pdf.

[3] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals", op. cit.

promotion, as well as the disciplinary liability of judges of general jurisdiction courts. The Presidium of Administrative Justice exercises similar powers to the High Council of Magistracy, but in relation to judges of administrative courts of Italy.

Among the wide range of functions of the Presidium of Administrative Justice are the development and adoption of proposals to improve the work of the State Council of Italy and regional administrative tribunals, inspection of offices and subsidiary bodies of administrative courts, consideration of dismissal of administrative court judges. The Presidium of Administrative Justice consists of the Chairman and six members of the Italian State Council, eight judges of regional administrative tribunals and four Italian citizens appointed by both chambers of the Italian Parliament: two members appointed by the Chamber of Deputies and two by the Senate. These citizens must belong to the university faculty and hold the positions of professors in the field of law or must be lawyers with twenty years of experience.

3.3 Jurisdiction of the administrative courts of Italy

Depending on the specifics of its own legal system, each state gives the courts a certain competence to hear cases in terms of appealing against wrongful decisions, actions or omissions of the public authorities. The jurisdiction of courts in most European countries is limited to the hearing of cases of compliance of public authorities' actions with national law. As a rule, the powers of administrative courts are limited to the possibility of recognising an act of public administration as inconsistent with applicable law. Thus, in France, the State Council acts as the first and last instance court on complaints about the repeal of decrees and regulations adopted by the Prime Minister, the President of the Republic and ministers. Article 184 of the Constitution of the Republic of Poland[1] stipulates that administrative courts are created to make decisions on compliance with the laws of public administration, decisions of local governments and regulations of local authorities. In Italy, the jurisdiction of administrative courts provides for the invalidation of acts of public administration, as in most European countries. At the same time, the peculiarity of the administrative courts of Italy is that they are endowed with broader powers, in particular, have the right to assess the appropriateness of public administration's actions, extend regulations to legal proceedings and rule all property issues when assessing acts of public administration for their compliance with applicable law. In addition, in some cases, administrative courts are endowed with powers that go beyond the protection of citizens' rights against wrongful acts of the power entities and are aimed at the effective functioning of the judiciary as a whole.

3.3.1 Types of jurisdiction of administrative courts

In general, the jurisdiction of the administrative courts of Italy is defined as the hearing of public law disputes related to the legality of acts of public administrations that violate the legitimate interests of citizens, the right to repeal this act and compensation for decisions, actions or omissions of public administration [12]. Such competence is called "jurisdiction to verify legality". Its characteristic features are the general nature of hearing of all public-law disputes concerning the protection of legitimate interests, the power to repeal acts and

[1] Constitution of the Republic of Poland. (1997, April). Retrieved from https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

resolve all issues related to compensation and restoration of property rights. In addition, there is "exclusive jurisdiction" under which administrative courts have the right to hear cases of violation of subjective rights by acts of public administration. "Exclusive jurisdiction" and "substantive jurisdiction" are an exception to the statutory order of division of cases between administrative and courts of general jurisdiction. In general, when challenging acts of public administration, there is a "jurisdiction over monitoring of legality", and other types of jurisdictions occur only in cases expressly provided by law. In addition, "exclusive jurisdiction" and "substantive jurisdiction" are characterised by the fact that they are used only in the protection of certain legitimate interests or subjective rights.

"Material jurisdiction" is the endowment of the administrative court with broader powers, within which the judge has the right not only to revoke the act, but also to "replace" it, as well as to take the necessary precautionary measures. By "replacing" an act, Italian law implies the power of a court to extend the limits of another existing legal act of public administration to legal relations that are the subject of legal proceedings. The legislator does not specify what other specific measures a judge may take, which allows him to conclude that the powers of a judge of a regional administrative tribunal and the Italian State Council are very wide when considering a case within "material jurisdiction", as evidenced by many years of practice. However, it should be borne in mind that "material jurisdiction" applies to a very limited number of administrative cases in Italy.

Three types of jurisdiction extend their effect to different legal relationships. Let us take a closer look at each of the three types of jurisdictions. The main categories of cases heard in the administrative courts of Italy fall under the "jurisdiction over monitoring of legality", under which the courts verify the legality of an act of public administration. For administrative courts, there is no single piece of legislation that defines the list of cases that courts hear under "jurisdiction to verify legality". The list of issues heard by administrative courts in the order of "jurisdiction over monitoring of legality" is contained in a large number of regulations, many rules are referenced, and often on regulations that are outdated and do not reflect the current state of legal relations. Thus, Article 2 of the Law "On the Establishment of Regional Administrative Tribunals"[1], deals with the competence of these judicial authorities, which contains a reference to the Royal Decree "Adoption of a single text of laws on provincial administrative junta in the exercise of judicial functions" of June 26, 1924 No. 1058. The provincial administrative junta has ceased to exist since 1968. Regional administrative tribunals were created instead of junta, but the legislator in the text of the new law only made reference to a de facto invalid act, assigning junta powers to tribunals. In addition, since 1924, the nature of legal relations has changed radically, and in the 21st century it is not so easy to apply the law of 1924, adopted at a time when Italy was a monarchy and was already burdened by the fascist dictatorship.

In this regard, courts often refer not to outdated provisions of law, but to the general rules according to which the administrative court has the right to accept for hearing a

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals" of 27 April 1982. Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

statement of claim to appeal against an act of public administration if it violates the legitimate interest. The administrative court is not entitled to accept the statement of claim for hearing only if the case is under the jurisdiction of general courts or "quasi-judicial" authorities. The text of the laws on the State Council lists the main bodies of public administration, whose acts can be heard in the administrative courts of Italy to verify their legality in connection with the filing of an administrative lawsuit. Regional administrative tribunals in Italy consider as the first instance claims for appeals against acts of power entities: 1) community councils; 2) provincial boards; 3) mayors of communes; 3) presidents of regions; 4) interregional public authorities (public authorities include regional authorities, provinces, communes, any state organisations that provide medical benefits, pension and other public services to the population); 5) territorial public authorities of the region; 6) central public authorities. The above list does not include the legislative bodies of the Republic and regions. Administrative courts do not have the right to hear cases as a court of appeal against the provisions of the laws of the Republic and regions. This follows directly from the provisions of the Constitution of Italy[1]. So, in accordance with Art. 134 of the Constitution of Italy, the Constitutional Court has jurisdiction over all disputes over the constitutionality of the laws of the Republic and regions, which may be declared unconstitutional by a decision of the Constitutional Court. This category of public law disputes is not subject to other types of judicial control.

With regard to the laws of the regions, the Italian Constitution provides for a special procedure for their appealing. According to Article 127 of the Constitution, if the Government of the Republic considers that a law passed by a regional council is outside the competence of the region, it may raise the issue of constitutionality before the Constitutional Court of Italy within sixty days of its publication. The provisions of Article 127 of the Italian Constitution have been developed in the legal positions of the Italian Constitutional Court. Thus, in one of the decisions of the Constitutional Court it was noted that the State Council has no right to consider the constitutionality of regional law in accordance with the legislation of the Republic and thus violate the regional right to protect its laws exclusively in the Constitutional Court. Outside the jurisdiction of administrative courts are acts of the President of the Republic, which in their legal force are equated to laws (legislative decrees) and which can be appealed only in the constitutional proceedings. Other acts of the President of the Republic that require countersignature of the competent minister or the Prime Minister are heard by administrative courts in the same manner as acts of the Government or individual ministers, as they are responsible for countersigned acts of the President of Italy. In addition to the list of public administration bodies whose acts can be challenged in administrative courts, Italian law distinguishes three other categories of cases covered by "jurisdiction over monitoring of legality": 1) admission of citizens to the civil service, its passage, dismissal from the civil service; 2) in cases related to the election process – elections to communal, provincial and regional councils; 3) in cases of refusals to issue passports.

This selective approach of the legislator, according to one of the Italian scholars A. Trava, is caused by the importance of these cases and the specifics of the functioning of

[1] Constitution of Italy. (1947, December). Retrieved from https://legalns.com/download/books/cons/italy.pdf.

administrative courts, where the judiciary understands much better the nature of these relationships, the nature of disputes than judges of general courts [14]. In addition, these areas of legal relations are regulated in detail by law, there are a number of special laws on these issues. The Law "On the Establishment of Regional Administrative Tribunals"[1] in relation to these categories of cases contains a reference to the fact that regional administrative tribunals when considering these disputes should be guided, first of all, by special legislation governing these issues. When exercising "jurisdiction over monitoring of legality", regional administrative tribunals may hear cases concerning acts of public administration that contradict the current legislation, as well as those acts adopted by a subject of power that does not have the competence to adopt them. In the first case, the tribunal revokes the contested act in whole or in part. In the second case, the administrative regional tribunal is empowered to revoke the contested act altogether and to indicate to the plaintiff another public body empowered to consider such matters. This is the main difference between administrative and courts of general jurisdiction. The latter – in case of violation of subjective rights – only have the right to invalidate the regulation and suspend its effect. The procedure for determining "exclusive jurisdiction" is fundamentally different from "jurisdiction over monitoring of legality". "Exclusive jurisdiction" of administrative courts is considered to be all categories of administrative cases that do not fall within the competence of courts of general jurisdiction over monitoring of legality of public administration's acts. Administrative courts are empowered to monitor the legality of public administration's acts that violate the subjective rights of citizens, in accordance with the law. Among the regulations that have given administrative courts the competence to monitor the legality of acts that violate subjective rights, we can mention the Legislative Decree "On new provisions on the organisation of labour and labour relations in public administrations, jurisdiction in labour disputes, administrative jurisdiction, issued pursuant to Article 4 of the Law of 15 March 1997 No. 59 of 31 March 1998 No. 80, Legislative Decree "On New Provisions on the Organisation of Labour and Labour Relations in Public Administrations, Jurisdiction in Labour Disputes, Administrative Jurisdiction" of March 30, 2001 No. 165, as well as the Law "Regulations in the field of administrative justice" of July 21, 2000 No. 205[2].

Among the objectives of "exclusive jurisdiction" of administrative courts, the most important are:

1) hearing of cases on appealing against acts of public administration regarding vacancy filling and passing of civil service;

2) monitoring of the legality of acts of public administration on the provision of public services, the list of which includes state lending and insurance, state property, provision of medicine, transport services, telecommunications, electricity, gas services.

3) hearing of all cases related to acts of public administration in the field of

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals" of 27 April 1982. Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

[2] Legislative Decree "On New Provisions on the Organization of Labor and Labor Relations in Public Administrations, Jurisdiction in Labor Disputes, Administrative Jurisdiction, Issued pursuant to Article 4 of the Law of March 15, 1997 No. 59". (1998, March). Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

construction and urban planning.

The "exclusive jurisdiction" of administrative courts is primarily determined by Article 27 of the Unified Text of Laws on the State Council, which contains a list of cases that should generally be heard in courts of general jurisdiction, but due to their specifics were removed from their jurisdiction and transferred to administrative courts. This category of administrative cases includes, in particular, cases of appeals against acts: 1) the establishment of the boundaries of communes or provinces; 2) in respect of road consortia, the activities of which affect the territory of several provinces; 3) on the refusal of the public administration to protect the rights of legal entities; 4) on the functioning of companies engaged in hydraulic works, the activities of which are provided by the state with the assistance of provincial authorities and interested organisations; 5) on the classification of provincial and municipal roads.

In contrast to "exclusive jurisdiction", "material jurisdiction", which allows the court to proceed from the expediency of a decision made by a public administration, tends to lose its significance over the years. In fact, the list of issues decided by administrative courts "on the merits" is reduced to a few articles of the Unified Text of Laws on the State Council and the Law "On the Establishment of Regional Administrative Tribunals". Cases that have retained significance and are heard by administrative courts in the order of "material jurisdiction" include appeals against regulations:

1) on allowing or prohibiting the creation of public charitable and educational institutions;

2) on merger, division, transformation, creation of consortia or other business associations with the participation of public administration, public institutions, as well as institutions equated to them;

3) on hospitalisation of disabled people;

4) regarding support of the mentally ill;

5) the prefect to take measures to regulate or prohibit the activities of harmful industries.

"Material jurisdiction" also extends to the hearing of regulations issued by the mayors of communes on public safety, construction, local police and hygiene. According to the law "On the establishment of regional administrative tribunals", the administrative court may: cancel the act due to its inconsistency with the law; replace it in whole or in part with another act; oblige the public administration to reimburse the damage or pay the debt incurred before the plaintiff in connection with the adoption of a legal act, which was invalidated by a court of law. The possibility of "changing" the contested legal act is the possibility of the administrative court to extend the application of a similar existing act of public administration to the disputed legal relationship. The administrative court also has the right to invalidate the part of the contested regulation and to indicate the special conditions of validity of the uncanceled part of the same act. "Material jurisdiction" is considered in Italian doctrine as a restriction on the power of public administration [15].

3.3.2 Hearing of cases in the administrative courts of Italy of the first and appellate instances

The legal rules governing the procedure of administrative trial in the administrative courts of Italy are fragmented, as they are contained in a number of legislative acts. Hearing of

cases in administrative courts is regulated primarily by the Italian Code of Civil Procedure. All special norms that establish the peculiarities of the procedure for hearing of administrative cases in administrative courts are contained in the Unified text of the laws on the State Council and the law "On the establishment of regional administrative tribunals". Many provisions of the Unified Text of Laws on the State Council extend their effect not only to the procedure of hearing of cases in the State Council, but also to the administrative procedures that exist within the process in the regional administrative tribunals. These regulations contain a large number of procedural rules. More than half of the norms of the law "On the Establishment of Regional Administrative Tribunals" are procedural norms. The regulation of procedural issues is thus not fully systematic, but at the same time very detailed, which certainly contributes to the lawful, fair and impartial judicial protection of human and civil rights.

When hearing cases of appeal against an act of public administration, the administrative court determines the existence of conditions under which it has the right to accept the statement of claim for proceedings. First, it is permissible only to appeal against acts of public administration that establish or terminate certain legal relations. In the absence of an indication of a specific act in the statement of claim, the court refuses to accept the statement of claim because the subject of the appeal is missing. The act of public administration can be expressed in its omission or so-called "silence". Thus, according to Article 21 of the Law "On the Establishment of Regional Administrative Tribunals"[1] a statement of claim aimed at challenging the "silence" of the public administration at the request of the applicant must be heard in court within 30 days (so-called "claims against omission of the public administration"). Such claims are heard by the court in a simplified manner within a reduced period of thirty days. Second, the act of public administration must be an expression of the will of the public administration. Finally, both final and non-final decisions of the public administration can be appealed in administrative courts. A decision that has been appealed by a person out of court to a higher instance and in the order of which a higher instance has not yet made a decision is considered incomplete. The parties to the case by the administrative court are, as a rule, the public administration and a natural or legal person as a bearer of a legitimate interest. A body of public administration has the right to appeal in court an act of another body of public administration, if this act, in the opinion of its officials, limits its powers or otherwise violates the law. The defendant is always a body of public administration.

The legislation provides for the possibility of involving in the trial of third parties directly interested in the results of the administrative case. These include those who make and do not make independent claims on the subject matter of the dispute, if the court finds that the judgment may affect the rights and obligations of those who are not parties to the case. As an example of an interested person, we can cite the winner of a public competition, when the final decision of the public administration on the results of the competition is appealed by the person who lost it. In addition, any person interested in the process may take part in it if the court also finds that the review procedure affects the interests of the

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person. In the first instance, the administrative case of appealing the act of public administration is considered in the regional administrative tribunal. The Law "On the Establishment of Regional Administrative Tribunals" regulates in detail the jurisdiction of cases and their distribution between regional administrative tribunals.

There are three criteria for delimitation of jurisdiction: 1) according to the location of the public administration that issued the contested act; 2) within the scope of the act of public administration; 3) at the place of civil service by a civil servant in regarding whom the contested act was issued. According to the criterion of location of the body of public administration that issued the act, the administrative case is considered in the regional tribunal of the region in whose territory such body of public administration exercises its powers. If the act extends its effect to more than one area, the competent tribunal is the tribunal in whose territory the body of public administration that issued the act is located. In the event that the act extends to the entire territory of Italy, the competent court is the regional administrative tribunal of the region of Lazio, located in the city of Rome. According to the scope of the act, there are two possibilities for determining jurisdiction. The court of a particular region may be considered competent when the act extends its effect only to the territory of that region; if the act extends to two or more regions, the regional administrative court of Lazio will be competent. The third criterion for distinguishing administrative cases applies only to public law disputes involving civil servants who defend their legitimate interests in court. A statement of claim may be filed by civil servants in the court of the region in whose territory the public administration body is located. In cases with inter-region or central bodies of public administration, the administrative case will be subject to the regional administrative tribunal of the Lazio region. At the same time, the defendant or any other participant in the proceedings has the right to demand recognition of the jurisdiction of the court. In this case, the person submits a request for consideration of the issue of jurisdiction to the State Council, and must reasonably indicate in which court, in his opinion, the case should be considered. The petition shall be filed no later than twenty days from the beginning of the proceedings or may be filed at a later date, when the territorial jurisdiction of the case will be revealed as a result of the submitted documents, of which the party filing was unaware. The petition cannot be submitted at the stage of decision-making by the court in an administrative case.

If all parties agree to the request to transfer the administrative case to another regional administrative tribunal, the chairman of the tribunal shall refer the case to another court and notify the parties, who shall apply to that court within twenty days of receiving notice of the transfer to another court. In other cases, the court makes a decision to deny the petition or to transfer the case to the State Council for further determination of jurisdiction. The decision of the Italian State Council regarding the jurisdiction of an administrative case is binding on the regional administrative tribunals. If the State Council satisfies the request to postpone the case in another court, the plaintiff may send a statement of claim to the territorially competent regional administrative tribunal within thirty days from the date of the request satisfaction.

The Law "On the Establishment of Regional Administrative Tribunals"[1] pays special

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals" of 27 April 1982. Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

attention to the issue of distribution of cases between departments of one regional administrative tribunal, which has already accepted the claim. The chairman of the tribunal distributes cases between departments located both in the administrative centre of the region and in other cities of the region. The party to the case, considering that the statement of claim should be considered by the regional administrative tribunal located in the administrative centre of the region, should submit to the court in this case its objections.

The head of the regional administrative tribunal investigates the objections, hears the parties to the case and issues an order that is not subject to appeal. In any case, the fact that the decision was made by a regional administrative tribunal located in the administrative centre of the region or located in another city may not be grounds for reconsideration of the administrative case. One of the key powers of the administrative court in handling the case is the ability to take measures to secure the claim. The administrative court, as well as the court of general jurisdiction, has the right to apply such measures to secure the claim as, for example, prohibiting the defendant or other persons to take certain actions in relation to the subject matter of the dispute. In addition, the administrative court is empowered to suspend the contested act of the public administration body until the moment of its decision in the administrative case and the closure of the proceedings. The plaintiff has the right to demand that measures be taken to secure the claim in connection with great damage and/or irreparable negative consequences caused by the adoption of an action or omission of a public administration body at the time of court proceedings, such as a court decision prohibiting payment. Measures to secure the claim are regulated in detail by the Law "On the Establishment of Regional Administrative Tribunals"[1]. Italian law also regulates the application of temporary precautionary measures by a court. These are the cases when, in case of extreme necessity, at the request of the plaintiff, the administrative court decides on the immediate entry into force of measures to ensure a temporary claim. After hearing the motions of one of the parties to the case to take measures to secure the claim, the regional administrative tribunal may order hearing of the administrative case on the merits. If the public administration body does not implement the preventive measures established by the court or partially implements them, the interested party may submit a request to the regional administrative tribunal to take action by the tribunal to implement preventive measures. The regional administrative tribunal has the right to intervene in the implementation of preventive measures to ensure the claim, indicating the procedure for their implementation. Italian law also regulates in sufficient detail and clearly the submission of evidence by the parties in an administrative case. They shall be filed within twenty days following the filing of the statement of claim, by the body that issued the contested act, and by other interested persons. The main evidence is documentary. The Italian doctrine assumes that individuals cannot be required to present evidence which they are unable to do. Documents, explanations of public authorities, etc. are recognised by law as admissible evidence in Italy. The procedure of hearing of the case in the administrative court provides for the possibility of cancellation by the public administration of the contested act during the trial before the beginning of consideration of the administrative

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case. If during this period the public administration body cancels the contested act or brings it in line with the requirements of current legislation, the regional administrative tribunal closes the proceedings and distributes the costs between the parties in the administrative process. It is necessary to stipulate separately the terms of hearing of the case of claim by the administrative court. One of the main problems of the Italian judicial system is the unreasonable length of proceedings in court, which goes beyond reasonable time limits for hearing [16]. Italian law does not set a deadline for hearing of the case of claim and decision-making on it. Only the deadline for the beginning of the discussion of the statement of claim in court is set – two years from the moment of filing the statement of claim in court. The court itself may, at its discretion, postpone the commencement of proceedings within the specified period [17]. It is considered that the plaintiff withdraws his claim in the event that no proceedings take place within two years. Thus, only the agreement of the date of hearing can take two years, and the process itself can be stretched even longer. Shortened terms of hearing of the statement of claim are established only for a certain category of administrative cases. In this case, all procedural deadlines are reduced by half, including the appointment of the start date of the administrative case [18-20]. This category includes administrative cases related to decisions on the formation and operation of local governments, surety procedures for the design of buildings, distribution and execution of works of public importance, as well as decisions on the forcible seizure of land for public use.

The State Council is the appellate instance when considering administrative cases on appeals against acts of public administration. In exceptional cases, the State Council hears cases as the first and only instance. This occurs when appealing against acts of public administration related to the enforcement of decisions of general courts, when the execution of a court decision is entrusted to the central or public administration bodies of an interregional nature. The State Council also hears cases of special importance as the first instance, which are sent from the regional administrative tribunals to the State Council on the initiative of the Italian Government and with the consent of the parties to the proceedings. The procedure for hearing of administrative cases by the State Council as a first instance is similar to the procedure for hearing of administrative cases by regional administrative tribunals.

The main function of the State Council of Italy is to investigate appeals against decisions of regional administrative tribunals. An appeal against a court decision shall be filed within sixty days from the date of this decision by the regional administrative tribunal, and in disputes in cases related to the election process – within twenty days. Filing an appeal does not suspend the decision of the regional administrative tribunal, as the latter comes into force from the moment of adoption. Only upon hearing of the appeal may the decision of the regional administrative tribunal be reconsidered. However, in the presence of a petition and in case of possible serious consequences in connection with the execution of the decision of the regional administrative tribunal, the Italian State Council has the right to suspend the decision of the court of first instance until the end of the appeal. The process of reviewing an appeal by the State Council against a court decision is as simplified as possible. On the appointed date for the discussion of the appeal, the responsible counsellor of state shall publicly announce the prepared report on the administrative case. Decisions of the State Council are made by approving them by an absolute majority of

votes of state advisers of the department that investigates the administrative case. Advisers who have previously expressed their position regarding the advisory department on an issue that forms the subject of an appeal in an administrative case may not participate in decision-making and voting. Thus, counsellors of state who took part in the procedure of discussion by the State Council of the government bill, which was later adopted and became the subject of appeal in the State Council of Italy, are excluded from participation in the process.

The State Council of Italy may, by its decision on the outcome of the appeal, satisfy the appeal or refuse to satisfy it. Upon satisfaction of the appeal, the State Council may act of the public administration or return the administrative case for a new examination to the regional administrative tribunal. The case may be remanded only if the Italian State Council overturns the decision due to a violation of procedural law committed by the court of first instance, or if the regional administrative tribunal erroneously found no powers to investigate an administrative case.

CONCLUSIONS

The jurisdiction of administrative justice bodies is complex. The delimitation of competence between different bodies of administrative justice directly by the norms of the Constitution of Italy has avoided jurisdictional disputes between these authorities. In addition, the determination of the jurisdiction of public-law disputes by the bodies of administrative justice is determined by a number of legal acts of Italy. The main criterion for determining the jurisdiction of administrative courts is to appeal the act of public administration in violation of the legitimate interest. However, the current legislation of Italy establishes numerous exceptions to this rule, in many areas of legal relations there is a specificity of determining the jurisdiction of administrative cases.

The system of judicial bodies of administrative justice, the procedure of hearing of administrative cases of different categories, the legal status of "quasi-judicial" bodies of administrative justice, which are endowed by law with certain functions of justice, but which are not judicial authorities, were also defined. Exercise of power and fulfilment of the constitutional function of protection of rights, freedoms and interests of citizens from illegal decisions, actions or omissions of the state represented by its power entities is the main task of administrative justice, which is entrusted to the Italian State Council, regional administrative tribunals and "quasi-judicial" authorities. The division of jurisdiction between "quasi-judicial" bodies of administrative justice, administrative and courts of general jurisdiction was also determined, which allowed to clearly delineate the competence of different courts in order to most effectively protect the rights, freedoms and interests of individual and citizen.

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КОЛІЗІЙНЕ РЕГУЛЮВАННЯ ТРАНСКОРДОННОГО СПАДКУВАННЯ АВТОРСЬКИХ ПРАВ

Анотація. *Спадкування є одним із правових засобів які забезпечують ефективну реалізацію авторських прав, тому захист інтересів спадкодавців та їхніх правонаступників у справах транскордонного характеру є важливим завданням міжнародного приватного права. Сучасні національні системи спадкового та авторського права функціонують незалежно. Внаслідок впливу економічних, політичних та соціокультурних факторів уніфікація матеріально-правових норм цих галузей малоймовірна, тому колізійний метод регулювання залишається панівним у цій сфері. У статті висвітлені основні проблеми колізійного регулювання транскордонного спадкування авторських прав та запропоновані підходи до їх подолання. Автори приділяють увагу таким питанням як: форми прояву іноземного елементу у відносинах спадкування авторських прав; проблемам розмежування інтелектуального та спадкового статутів; особливостям застосування колізійної прив'язки «закон країни захисту»; принципу територіальності та деяким іншим. На основі проведеного аналізу, робиться висновок, що підпорядкування ключових питань спадкування авторських прав колізійним правилам інтелектуального статуту поширює на ці відносини принцип територіальності та потребу у їх мультинаціональному захисті. У статті підтримується думка науковців, які піддають критиці концепцію територіальності у питаннях охорони авторських прав, доводять її неефективність. Наприкінці роботи висловлюється думка про те, що інструментарій міжнародного приватного права дозволяє використати гнучкі підходи і не ставити знак рівності між авторським правом, що більше пов'язане з персональним статусом, та правами промислової власності, спрямованими на досягнення комерційних інтересів. Більшої гнучкості пропонується досягнути за рахунок деталізації обсягів колізійних норм та встановлення системи колізійних прив'язок, які дозволять обрати право, яке більше пов'язане з обставинам справи.*

Ключові слова: міжнародне приватне право, спадковий статут, інтелектуальний статут, lex loci protectionis, територіальність.

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CONFLICT OF LAW REGULATION IN CROSS-BORDER COPYRIGHT INHERITANCE

Abstract. *Inheritance is one of the legal means that ensure the effective implementation of copyright, therefore the protection of the interests of testators and their successors in cross-border*

matters is an important task of international private law. Modern national systems of inheritance and copyright operate independently. Due to the influence of economic, political and socio-cultural factors, the unification of substantive law of these industries is unlikely, so the conflict of law method of regulation remains dominant in this area. The paper highlights the main problems of conflict of law regulation of cross-border copyright inheritance and offers approaches to overcoming them. The authors address such issues as forms of manifestation of a foreign element in the relations of copyright inheritance; problems of distinguishing between intellectual and inheritance statutes; features of the application of the point of contact lex loci protectionis; the principle of territoriality, etc. Based on the analysis, it is concluded that the subordination of key issues of copyright inheritance to the conflict rules of the intellectual statute extends the principle of territoriality to these relations and necessitates multinational protection of these relations. The paper supports the opinion of scholars who criticise the concept of territoriality in matters of copyright protection, proving its ineffectiveness. Ultimately, the authors suggest that the tools of private international law allow for flexible approaches and do not equate copyright, which is more related to personal status, and industrial property rights, aimed at achieving commercial interests. It is proposed to achieve greater flexibility by detailing the scope of the conflict of law rules and establishing a system of conflict bindings, which will allow to choose the law that is more related to the circumstances of the case.

Keywords: international private law, inheritance statute, intellectual statute, lex loci protectionis, territoriality.

INTRODUCTION

The rapid development of communication technologies, freedom of movement of goods and services radically change the forms of creation and use of the results of human intellectual activity. In the EU, USA, Japan, and South Korea, the profitability of the so-called intellectual-spending industries is growing rapidly and currently they constitute the main part of foreign trade of these countries [1], therefore some countries and the international community at large should strive to stimulate creativity and create legal conditions for the effective implementation and protection of intellectual rights of citizens.

One of the legal means that ensures the effective exercise of these rights is the ability to testate copyright to descendants and have confidence in the protection of intangible and exclusive rights *mortis causa*. But to ensure a high level of guarantees in the era of globalisation and technological revolutions is quite difficult, especially considering the intangibility of copyright, which determines many complex legal issues. Nowadays, the main role in copyright protection is played by the system of international agreements administered by the World Intellectual Property Organisation. The provisions and standards established by international treaties generally create conditions for cross-border exchange of creative results, but they do not overcome the so-called *territorial nature* of intellectual property rights. International agreements can only minimise the negative consequences of the territorial nature of intellectual property rights: to ensure access of foreigners to national legal protection systems, to guarantee minimum standards of protection, to reduce material or time costs in the registration of rights in several countries, etc. [2]. Therewith, national legal systems of copyright protection function independently of each other, and the domestic legislation of countries contains conceptual differences. National systems of inheritance law, which is one of the most conservative branches of private law and is significantly influenced by socio-cultural, socio-economic, and religious

factors, also function independently, therefore unification in this area is unlikely in the near future. The unwillingness of the vast majority of countries to unify and harmonise inheritance law clearly illustrates the state of accession to the Hague Convention on the Law Applicable to Inheritance of the Deceased of 1 August 1989, which has so far been signed by only four countries: Argentina, the Netherlands, Luxembourg, and Switzerland, and ratified only by the Netherlands[1].

When in practice emerges the matter of inheritance of copyrights abroad, scholars are faced with the intersection of such complex legal relations as inheritance and copyright, as well as with the presence of a foreign element in their actual composition. In such situations, it is impossible to overcome the labyrinths of various legal systems and complex conflict of law issues without prior analysis of such fundamental matters as the multiplicity of statutes, the territorial nature of intellectual property rights, the qualification of conflict rules, etc. The problem of cross-border inheritance of copyright, as well as intellectual property rights in general, has not been the subject of comprehensive research by domestic and foreign lawyers. Some aspects of this subject were studied in the papers of leading Ukrainian scientists A. Dovhert [2], O. Orliuk [3]; at the dissertation level, certain issues were studied in the papers of O. Karmaz [4], S. Butnik-Siverskyi [5], Ye. Beltiukova [6], etc. Among modern foreign researchers, P. Goldstein and B. Hugenholz [7] should be mentioned, a group of specialists from the Max Planck Institute for Comparative and International Private Law, headed by prof. Yu. Bazedov [8], including A. Dutta, M. Fornaiser, A. Kur and others, and Russian scientists V. Dozortsev [9], S. Krupko [10], O. Lutkov [11]. These studies are mainly focused on the international legal regulation of copyright and copyright law in individual states, individual papers in international inheritance law have a general theoretical, regional, or comparative focus, but the problem of choosing the law applicable to the relations outlined above obtained next to no coverage.

The purpose of this paper is to highlight the main problems of conflict regulation of cross-border copyright inheritance at the national and international levels and to try to identify the most effective approaches to overcoming them from the standpoint of *de lege ferenda*.

1. MATERIALS AND METHODS

The general methodological framework of this study was the dialectical-materialist method of scientific knowledge, which allowed to study the conflict of law regulation of cross-border copyright inheritance in its inseparable connection with other legal institutions, based on the case law of different countries. The authors used general scientific research methods, such as analysis and synthesis of doctrinal, statutory, and law enforcement materials; systematisation of scientific and practical approaches to the studied problems; structural and functional approach to clarifying the features of the forms of legal regulation of cross-border inheritance relations. Comparative analysis was performed for provisions of international agreements comparable in the field of regulation, for acts of legislation of individual states and the European Union, decisions of national courts in identical cases, as well as conflict of law principles of non-state regulators, typical and unique approaches

[1] Official site of the Hague Conference on Private International Law. Retrieved from https://www.hcch.net/en/instruments/conventions/status-table/?cid=62

to the legal regulation of cross-border inheritance of copyright were identified, and tendencies in rule-making were identified in the given subject matter.

Special legal methods of cognition were applied in the study. In particular, the historical legal method was used to study the evolution of scientific concepts of copyright and the principle of territorial protection of intellectual property rights; method of systematic interpretation of legal provisions was used to identify the features of intellectual and inheritance statutes in private international law, textual analysis of the scope and points of contact of rules governing the choice of law in inheritance and intellectual property relations complicated by foreign elements. To summarise the results of modern scientific achievements, the papers of Ukrainian and foreign scholars were analysed, special attention was paid to current dissertation research on the problems of conflict regulation of inheritance relations and intellectual property rights of Ukrainian law schools. The articles of the author's team of the Max Planck Institute for Comparative and International Private Law, which cover the problems of intellectual property law in the context of globalisation and expert opinions on draft EU legislation on the unification of inheritance and tort law; a monograph by Professor Paul Goldstein, Professor at Stanford University and Adviser to the European Commission on Intellectual Property Rights, Professor Bernt Hugenholz of the University of Amsterdam, on contemporary issues of substantive and conflict regulation of international copyright law, including overcoming copyright protection issues. The paper pays considerable attention to the analysis of regulations of foreign countries, including the United States, Germany, Great Britain, Canada, France, Italy, etc. Crucial to the subject matter was the study of EU regulations, i.e. EU Regulation No 650/2012 of 4 July 2012 "on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession" (Rome IV)[1] and EU Regulation No 864/2007 of 11 July 2007 "On the law applicable to non-contractual obligations" (Rome II)[2].

Without touching on the fundamental aspects of the reform of international copyright, the paper focuses on such issues as forms of manifestation of a foreign element in the relations of copyright inheritance; problems of distinguishing between intellectual and hereditary statutes; features of the application of the point of contact lex loci protectionis; prospects for weakening the principle of territoriality in the settlement of cross-border inheritance of copyright, etc. It should also be noted that the format of this paper does not allow to describe all the problems that arise in this area; therefore, the study concerns the inheritance of only copyrights that do not require registration or compliance with other formalities.

[1] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. (2012, July). URL: http://data.europa.eu/eli/reg/2012/650/oj.

[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). (2007, July). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2007:199:TOC

2. RESULTS AND DISCUSSION

Inheritance of intellectual property rights has been developing for more than three hundred years. Lawyers of the 18th and 19th centuries considered the subjective right to literary and artistic works to be a real right, and in the same way it passed to heirs. The heirs had the opportunity to dispose of their work with the same freedom as the author: to republish, cede to another person, make changes, remove, etc. The freedom of the heir could be limited by a will and some mandatory rules of civil legislation [12]. A new order of inheritance has started taking shape only at the beginning of the 20th century, when the theory of exclusive rights and the theory of moral rights were gradually developed. Until the end of the last century, disputes related to cross-border copyright inheritance were isolated, but with the development of the technological environment, growing demand for intelligent products, with the emergence of new forms of turnover, the exclusive rights of authors began to be considered as highly profitable assets.

Stable profitability of commercial use of copyright and the availability of legal protection mechanisms have led to an increase in the number of litigation and cases in notarial and legal practice, as the heirs of famous artists are actively defending their rights around the world. To date, U.S. courts have heard cases of copyright inheritance for the song "*Happy Birthday to You*", which generates more than 2 million US dollars in royalties per year [13]. Litigation continues over the heirs of world-renowned painting geniuses, as copyright to works of Pablo Picasso expire in 2043, Henri Matisse – in 2024, and Auguste Renoir (co-authored with Spanish sculptor Richard Gino) – in 2043. Ukraine also has several cases related to the inheritance of copyright and their protection by heirs both within the country and in foreign jurisdictions. Among the most resonant is the case of copying without permission of the heirs of the painting "Rat on the Road" by the famous Ukrainian artist Maria Pryimachenko. An exact copy of fragments of this painting was placed on the fuselage of FinAir as a design work of the Finnish company "Marimekko", which became the basis for a copyright claim [14]. No less famous is the precedent with the porcelain statuette "Sitting Ballerina" by Ukrainian master Oksana Zhnikrup, reproduced by an American artist J. Koonsin in an installation in front of the Rockefeller Centre in New York without reference to the author of the original work of art [15]. In both cases, the rights of the heirs were protected and the personal non-proprietary rights of the authors were restored. However, for the most part, heirs do not have information about the infringement of their rights abroad, or are unable to properly protect them due to the complexity of procedures, differences and gaps in national legislation, unregulated forms of copyright exploitation in the digital environment, etc.

The specific feature of copyright inheritance is that its object constitutes a set of rights to the object, not the object itself. According to the general rule of the continental legal tradition, only the property (exclusive) rights of the authors are inherited – the right to use the work and the permission or prohibition to use the work. The moral rights of the author are inalienable and are not inherited, but the heirs have the right to protect the authorship of the work from encroachment that may damage the honour and reputation of the author. At present, it is especially important to guarantee authors and their heirs the exclusive right to grant permission for any distribution of works to the general public through wired or non-wired means of communication, to protect the right to inviolability and integrity of works published on the Internet.

2.1 Basic approaches to solving the problem of multiple statutes in cross-border copyright inheritance

Cross-border copyright inheritance constitutes a separate type of international inheritance. In the doctrine of international private law, the essence of international inheritance is considered as an act of succession that crosses the territorial boundaries of two legal orders. The paper of Ukrainian researcher Ye. Fursa contains a detailed definition of international inheritance as a "set of legal relations with a foreign element, which arise in the case of transfer of rights and obligations (inheritance) from a natural person who died (testator) to other persons (heirs) and as a result of such a transition, the latter have a set of rights and obligations within the inheritance, which are regulated by both international and national (foreign) legislation" [16]. In Ukraine, cross-border inheritance issues are governed by Section X of the Law of Ukraine "On International Private Law" (Articles 70-71), which establishes two formulas of attachment – the personal law of the testator (*lex personalis* in the form of *lex domicilii* or *lex patrie*) and the law where the property is situated (*lex rei sitae*) in relation to inheritance of immovable property[1]. As for the protection of intellectual property rights with a foreign element, according to Art. 37 of the above Law, applicable is the law of the state in which the protection of these rights is required (*lex loci protectionis*).

A foreign element in intellectual property relations may occur in the form of a subject, the author (right holder) may be a foreign person in relation to the country where the results of intellectual activity are protected; in the form of a legal fact – physical acts concerning the use of the results of intellectual activity are performed abroad. As for hereditary legal relations, a foreign element can be represented therein in all known forms. In case of a combination of these relations, the following manifestations of a foreign element may be inherent therein:

– according to subject composition: the author-testator is a foreign citizen or a citizen of Ukraine permanently residing abroad; the heirs are foreigners;

– according to object: the work that is part of the hereditary mass, in any form is outside Ukraine;

– the legal fact that became the basis for the discovery of the heritage took place abroad [17].

If there is at least one of the listed features in the legal relations, it will refer to their international (cross-border) nature and the need to apply the conflict of law regulation mechanism. In case of cross-border inheritance of copyright, two types of legal relations collide, requiring independent conflict of law regulation. Such a situation in international private law is quite common and is called *plurality of statutes*, and *statute* is usually understood as the competent legal order of a country chosen based on conflict of law provisions. Thus, in this case, the intellectual and inheritance statutes intersect, thereby requiring a clear distinction. The difficulty of distinguishing between these statutes is that, at the level of national law, their scope is usually not defined. Nowadays, only EU legislation contains rules that to a greater or lesser extent reveal the scope of the chosen law on the principles of *lex successionis* (inheritance statute), *lex loci protectionis* (law of

[1] Law of Ukraine No2709-IV "On Private International Law". (2005, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2709-15#Text

the country of protection), *lex loci originis* (law of the country of origin). Conflict regulation of cross-border copyright inheritance is complicated not only by the problem of multiple statutes, but also by the so-called "*splitting*" of each of them. This situation differs from the plurality of statutes in that it constitutes relations of the same nature, but to which more than one legal order can be applied. In the science of international private law, to define the situation when the regulation of cross-border private relations is subject to several legal orders, the terms "*statute bifurcation*", "*splitting of the conflict*", or "*depecage*" (from the French – *dépeçage*) can be used. Thus, the authors further attempt to consistently consider these issues. The hereditary statute is considered in the doctrine as a legal order determined by the provisions of international private law, to which the hereditary relations connected with several national legal systems gravitate by their nature, and which regulates them in essence. As noted above, in the vast majority of national legal systems, the scope of the inheritance statute is not defined, although there are a few exceptions. A major step forward in the development of inheritance law was EU Regulation No 650/2012 of 4 July 2012 "On jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession", this document is also known as "Rome IV", it continued the line of so-called "Romes" (I, II, III), dedicated to the unification of private law of the EU[1].

For our study, Part 2 Article 23 of the said Regulation is significant, since it contains a unified provision on the scope of law applicable to inheritance relations. It includes the following issues: (a) the grounds, time and place of the inheritance release; (b) the identification of the beneficiaries, the shares inherited by them and, accordingly, the obligations that may be imposed on them by the deceased; (c) hereditary legal personality; (d) deprivation of inheritance and incapacity to inherit due to misconduct; (e) the transfer to heirs and waivers of property, rights, and obligations forming part of the common inheritance; (f) the powers of heirs, executors of the will, and other guardians of the estate, (g) liability for inherited debts; (h) the free share of the inheritance; mandatory share in the inheritance and other restrictions imposed on the disposal of property; (i) any obligation to return funds, to account for gifts, to provide property by way of anticipation of a hereditary share or in cases of testamentary renunciation in determining the shares of different beneficiaries; and (j) distribution of inherited property[2].

There is no direct indication in the text of the Rome IV Regulation[3] regarding its extension to the inheritance of intellectual property rights or their exclusion from the scope of regulation of this document. But the general analysis of the text suggests the following: Regulations do not extend to definition of the nature of the rights of proprietary nature – "rights *in rem*" (item k Article 1.3 of Regulations); and establishes a rule according to which, when the domestic law of the Member States provides that certain objects or rights have a special regime of inheritance, such rules shall take precedence in application and

[1] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. (2012, July). URL: http://data.europa.eu/eli/reg/2012/650/oj.

[2] *Ibidem, 2012*

[3] *Ibidem, 2012*

be considered *overriding mandatory provisions* (Article 30 of the Regulation). This approach has been the subject of debate in academia, and the agreed position is contained in a comment by a task force of the Max Planck Institute for Comparative and International Private Law on the draft text of the Rome IV Regulation of 26 March 2010. Proceeding from a careful comparative analysis of the domestic legislation of EU Member States and neighbouring countries, experts noted: "Some national laws contain an exhaustive list of persons who can inherit after the author's death, in some countries the transfer of copyright after the author's death is completely excluded or severely restricted. Such rules form an integral part of the copyright of a particular national legal system and the application of other rules on succession will interfere with the structure and content of such rules if they contain rules of succession based on the principle of *lex loci protectionis*. Therefore, the Institute proposes to exclude intellectual property rights from the scope of the Regulation insofar as they define special rules of succession. This approach ensures that a decision made with the use of the conflict of law rules will be recognised in the country where protection is sought, especially in non-EU countries" [18; 19]. Thus, the attribution of key issues of cross-border inheritance of copyright to the regulation of intellectual property, at first glance, simply solves the issue of delimitation, this allows to refer to application of the classical principle of interpretation of the *lex specialis derogat generali*, if the law on copyright protection contains special provisions as to its inheritance, they are given priority over general provisions. Therewith, issues that do not have special regulation within the framework of intellectual property rights remain within the regulation of the inheritance statute. However, the simplicity of such a distinction is imaginary, and this approach creates other inherent complications: firstly, intellectual property relations are governed by the law of the country of protection (*lex loci protectionis*), a conflict of law formula that has no single interpretation and uniform application. Secondly, there are numerous differences in domestic law on copyright inheritance, thirdly, the factor of so-called *ubiquitous copyright infringement* on the Internet is ignored, which cannot be localised by means of the aforementioned principle.

2.2 Territoriality an the lex loci protectionis principle

The first of the above arguments has long been the subject of debate in the science of international private law. The *lex loci protectionis* principle is considered fundamental in the choice of the right to regulate intellectual property relations with a foreign element, it is closely related to the principle of territoriality established in the Berne Convention for the Protection of Literary and Artistic Works (Article 5.2)[1]. The special connection of this conflict of interest with the principle of territoriality is confirmed at the European level, in particular, in the EU Regulation "On the law applicable to non-contractual obligations" ("Rome II")[2]. Paragraph 26 of the Preamble states: "As regards intellectual property rights, the universally recognized *lex loci protectionis* should be maintained". In this regard, the German researcher A. Kur wrote: "A serious argument for choosing the law of the country

[1] Berne Convention for the Protection of Literary and Artistic Works. (1971, July). URL: https://zakon.rada.gov.ua/laws/show/995_051#Text (дата звернення: 20.03.2020).

[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). (2007, July). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2007:199:TOC

of defence as a guiding concept is the territorial principle with its main purpose of preserving the sovereignty of the legislator over specific rules of delimitation of the scope and content of protection provided within the borders defined by international law" [19].

The introduction of the territorial principle of protection of intellectual property rights was conditioned by the economic policy of individual states, intellectual property provides de facto monopoly rights, which are necessary to stimulate investment of market participants in intellectual achievements, with state support primarily to its own citizens and organisations. Even at present, the literature contains the opinion that the territorial nature of the rights in general excludes the conflict issue and extraterritorial application of legislation in this area is impossible because it is incompatible with existing international mechanisms [20]. But with the advent of the era of globalisation, the development of the world virtual space and due to other factors, the scientific literature increasingly criticizes the territorial nature of intellectual property rights, which is currently considered as an anachronism. Prof. J. Bazedow expressly states that "intellectual property rights still remain artifacts of positive law, and exclusive rights continue to be considered as derived from the power of the sovereign" [8]. In German academic circles, over forty years ago prof. Haimo Schack, in his dissertation research on the relations between copyright and international private law, expressed the need for a universalist approach to cross-border aspects of copyright protection, which completely denies territoriality, considering such a right to be universal, as it emerges from the moment of its creation on territory of the entire Earth, is a natural right and in essence can be attributed to fundamental human rights [21]. Such approach does not recognise the territoriality-extraterritoriality dichotomy of copyright and has supporters [22].

A more compromising position was expressed by American scientists P. Goldstein, S. Symeonides, and D. Chisum [23], who argue the need for a so-called flexible approach based on modern interpretation of territoriality as "reasonable" or "elastic". Prof. Donald Chizum, expert in patent law, noted that due to the growing interdependence of the global economy and the cost of multinational protection of intellectual property rights, "territorialism is becoming an unacceptable obstacle to international trade. The principle of territoriality requires "reconfiguration" with consideration of the features and differences of individual intellectual property rights" [23]. Online technologies are forcing the judiciary to gradually change its previously unshakable position, for example, in one case the European Court of Justice pointed to the need to strike a balance between the complexity of the national territorial nature of exclusive rights and the potentially widespread nature of infringements over the Internet. Summarising the above, the authors conclude that the principle of territoriality is increasingly criticised in the scientific literature, as noted by A. Solovyov, at this stage, "the idea of territoriality actually contradicts reality, especially in matters of copyright and related rights, where protection provided automatically from the moment of creation of the work" [25]. But at the legislative level, the principle of territoriality of intellectual property rights continues to prevail, as preference is given to the public law component of intellectual property relations and economic interests of individual states. The logical continuation of this approach and the guarantee of preventing the manifestations of extraterritoriality in conflict regulation is the preservation of strict formulas of attachment, and, above all, the *lex loci protectionis* point of contact. Therefore, it is relevant and important to clarify the issues that fall within

the scope of law, which is determined based on the above conflict of law principle, i.e. issues of intellectual statute.

Currently, the scope of the intellectual statute is not regulated, so researchers approach the analysis of case law, as well as project documents and recommendations for conflict of law regulation developed by national and international legal associations, expert groups and research institutions: leading research centres in Germany – Institute of Innovation and Competition and the Max Planck Institute for Comparative and International Private Law, the American Institute of Law, the Association of Private International Law of Korea and Japan, etc. [26-28]. Among the studied literature sources, the most detailed and convincing analysis was proposed by M. Suspitsyna in a dissertation study on the conflict of law regulation of intellectual property relations. The researcher includes the following issues in the scope of the intellectual statute:

"1) the emergence of exclusive rights, including the definition of types of individual protected results of intellectual activity and means of individualisation and rights to them; criteria for granting protection; compliance with formalities for the provision of legal protection;

2) the effect of exclusive rights, including existing restrictions on exclusive rights and their termination;

3) the ability of the right holder to dispose of the exclusive right and the form of such order;

4) non-contractual obligations in intellectual property and available remedies" [29].

As noted above, the *lex loci protectionis* point of contact of the intellectual property law is one of the most vague and ambiguous formulas. Prof. J. Bazedow addressed the complexity of the qualification of this provision in the study "Intellectual property on the world stage" [8], which provides about ten interpretations of the *lex loci protectionis* contained in legislation and case law. It can be interpreted as follows:

– the law of the State for which (or "in respect of which") protection is sought;

– the law of the state where (or "in which") protection is required;

– the law of the state under the laws of which the result of intellectual activity is protected by intellectual law, the violation of which is subject to proof;

– the law of the state with which intellectual activity has the closest connection, etc.

These differences in interpretation are crucial for case law. Previously, the binding *lex loci protectionis* point of contact was mainly understood as the law of the state where protection is required, which led to its confusion with the *lex fori* (the law of the country of the court). If the case is heard by a court of the state where the claim was filed and the copyright infringement also took place in that state, the results of the choice of law will coincide. However, if the dispute is heard in another country, such as the defendant's place of residence, the choice of law will be different, with restrictions on the copyright of the court of the country that have nothing to do with the substance of the dispute without any grounds. Therefore, foreign doctrinal sources and case law often prefer to understand the *lex loci protectionis* as the law of the country in respect of which protection is sought. Considering the strict territorial approach and appropriate conflict regulation, the recognition and enforcement of inheritance rights is complicated not only by the problems of interpretation of the conflict rule, but also by the need for multinational protection, i.e. protection in each state where the violation occurred or recognition is required. To have an

idea of the features of multinational protection, a brief analysis of the main differences between domestic legislation in this area is given below.

2.3 Conflict of law in copyright inheritance

Nowadays, there are two main models of inheritance in the world, which are based on different interpretations of the legal nature of inheritance relations. In continental Europe, inheritance is based on the principle of universal succession, known from Roman law, according to which the property passes to others unchanged as a whole at the same time, the heir is considered a continuation of the legal personality of the testator. The doctrine and practice of common law countries is based on the fact that the legal personality of the deceased disappears during the inheritance, therefore the property is administered (liquidated) under judicial supervision with the payment of debts, performance of tax and other obligations. The heirs receive only the net estate. These differences and conceptually different approaches to intellectual property also lead to differences in the legal regulation of copyright inheritance. Article 90 of the 1988 Copyright, Designs and Patents Act of the Great Britain stipulates the transfer of copyright by inheritance as personal or movable property, after the death of the author, his moral rights to the work pass to heirs (Article 95)[1]. Under the 1985 Copyright Act of Canada, both moral and exclusive copyright rights can be inherited, and moral rights can be inherited by legal entities [30]. Copyright in the United States, based on the utilitarian concept, establishes only the lowest standards of moral rights of authors and to a greater extent protects the rights that have economic meaning. Article 204 of the 1976 Copyright Law of the United States regulates the transfer of ownership of copyright, including inheritance[2].

Among the countries of the continental legal system, the procedure of copyright inheritance is most detailed in the Code of Intellectual Property of France of July 1, 1992. Apart from the possibility of inheritance of exclusive rights, Article L.121-1 stipulates the possibility of succession in respect of personal moral rights: “The author shall have the right to respect for their name, their authorship and their work. These rights apply to their person. They are lifelong, inalienable, they are not subject to the statute of limitations. In case of the author's death, they are passed on to their heirs"[3]. Some researchers see a contradiction in the text of this article, because personal inalienable rights, which are inalienable in nature, are transferable and inherited. Article 28 of the German Copyright and Related Rights Act of 9 September 1965 also stipulates the possibility of transfer of copyright by inheritance, Article 30 states that the successor of the author shall have the same rights as the author, unless otherwise provided[4].

Articles 23-24 of the Law of Italy on Copyright of April 22, 1941 establishes the scope and order of heirs of copyright, contains several provisions on the right to publish

[1] Copyright, Designs and Patents Act. (1988, November). Retrieved from http://www.legislation.gov.uk/ukpga/1988/48/contents (дата звернення: 25.03.2020).

[2] A Copyright Law of the United States. (1976, October). The U.S. Copyright Office. Retrieved from https://web.archive.org/web/20111009143055/http://www.copyright.gov/title17/circ92.pdf

[3] Law on the Intellectual Property Code No. 92–597 of July 1, 1992. WIPO Database. France. (1992, July). Retrieved from https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf

[4] Copyright Act of 9 September 1965. Germany Federal Ministry of Justice and Consumer Protection. Retrieved from http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html.

previously unpublished works of the testator[1]. The Danish Consolidated Copyright Act of 23 October 2014 contains two sections on inheritance and debt proceedings, paragraph 61 stipulates that copyright may be subject to inheritance legislation and that the author shall have the right to give instructions to another spouse or third party on the implementation of copyright; paragraph 62 stipulates the impossibility of creditors' claims for copyright, regardless of whether they belong to the author or their successors as a result of marriage or inheritance[2].

The above examples suggest large differences in approaches to regulating copyright inheritance in different countries. The copyright laws of some countries thoroughly regulate the scope and lines of heirs, establish a list of rights that can be inherited and which cannot. In other states, there is only an indication that copyright is inherited, without any details of succession. The need for multinational copyright protection leads to the fact that in one state, the same persons can be recognised as the author's heirs and have the appropriate rights, and in another country – they cannot. An example of the diametrically different approaches to the heirs' exercise of the right to protect the author's non-property rights abroad is the well-known 1994 case of Turner Entertainment Co. v. Houston. The company defended the right to colour the black-and-white film "Asphalt Jungle", directed by J. Houston in 1950, in a US court, because it received the exclusive rights to the film. The director's foreign heirs considered colourisation a violation of the author's right to the integrity of the work, but in the United States the director is not recognised as the author of a cinematographic work, for this and other reasons, protection was denied. Instead, when a French television channel announced the rental of a painted version of The Asphalt Jungle and the director's heirs filed a lawsuit banning the rental, they were found to be proper plaintiffs and the claim was satisfied. Similar examples can be provided in other categories of cases: heirs' disputes of the transfer of a work to the public domain or free use, disputes over relations with companies for collective management of copyrights, distribution and use of works on the Internet, etc., where heirs in each individual case must apply for the recognition and protection of their rights to the next jurisdiction, which requires high costs in the absence of confidence in the outcome of the consideration

CONCLUSIONS

Inheritance constitutes one of the most important guarantees of the right to private property and in many countries is one of the constitutionally guaranteed human rights. The presence of a foreign element in inheritance relations, as a rule, does not reduce the level of legal protection, the established conflict mechanisms ensure the effective implementation of the inheritance rights of foreigners. But in case of cross-border copyright inheritance, there are problems with the multiplicity of statutes, the interpretation of the *lex loci protectionis*, the territorial nature of intellectual property rights and the associated need for multinational

[1] Italian Copyright Statute. Law for the Protection of Copyright and Neighbouring Rights No. 633 of April 22, 1941. WIPO Database. Italy. (1941, April). Retrieved from https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf.

[2] Consolidated Act on Copyright No. 1144 of October 23 rd, 2014. (2014, October). The Ministry of Culture of Denmark. Retrieved from https://kum.dk/fileadmin/KUM/Documents/English%20website/Copyright/Act_on_Copyright_2014_Lovbekendtgoerelse_nr._1144__ophavsretsloven__2014__engelsk.pdf.

protection, etc. The authors conclude that the main reason is the dominance of the doctrine of intellectual property, which was formed more than a hundred years ago under the influence of political and economic factors. At present, the author's personal inalienable rights are closely linked to human rights, and forms of exercising exclusive rights in the digital environment need to be reviewed as soon as possible, rather than trying in any way to maintain biased approaches, subjecting legal regulation to the economic interests of individual countries.

The tools of international private law allow the use of flexible approaches and do not equate copyright, which is more related to personal status, and industrial property rights, aimed at achieving commercial interests. By maximising the scope of conflict of law rules, it is possible to achieve differentiated regulation, to establish an extensive system of conflict of laws, which will allow to choose the law most closely related to the relations and appropriate to the circumstances of the case. Thus, the current mechanism of conflict of law regulation of copyright inheritance requires in-depth research and raises issues that still need to be addressed.

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ДОГОВІР У МЕХАНІЗМІ ПРАВОВОГО РЕГУЛЮВАННЯ ВІДНОСИН ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

Анотація. *Актуальність досліджено у статті проблематики обумовлена посиленням ролі договірного регулювання відносин інтелектуальної власності в умовах інформаційного суспільства та переходу до інноваційного типу розвитку національної економіки. Ціль даного дослідження полягає у виявленні особливостей дії договору як правового засобу у механізмі правового регулювання відносин у сфері інтелектуальної власності на різних його стадіях. В контексті аналізу договору як засобу регулювання відносин у сфері інтелектуальної власності наголошено на доцільності розмежування двох груп правовідносин: які опосередковують статику, тобто належність об'єктів права інтелектуальної власності відповідним суб'єктам, і тих, які опосередковують динаміку, тобто перехід майнових прав інтелектуальної власності від одних суб'єктів до інших. Зазначено, що договір є чи не найважливішим правовим засобом комерціалізації прав інтелектуальної власності, забезпечуючи ефективне впровадження результатів творчої діяльності у виробництво та інші ділянки суспільного життя для задоволення як приватних інтересів їх творців, осіб, які інвестували кошти у їх створення, так і загальносуспільних інтересів. Відзначено тенденцію до все більш широкого використання договору, як правового засобу на стадії захисту прав інтелектуальної власності. Сторони можуть закріпити у договорі щодо розпоряджання майновими правами інтелектуальної власності способи захисту їх прав, які не передбачені у законі, врегулювати порядок вирішення спорів тощо. Отже, договір є ефективним правовим засобом на усіх стадіях правового регулювання відносин інтелектуальної власності – при юридичній регламентації означених відносин, набутті прав інтелектуальної власності, здійсненні цих прав, а також при їх захисті. Проведений в межах даної статті аналіз та його результати можуть використовуватися у подальших наукових дослідженнях проблем договірного регулювання відносин у сфері інтелектуальної власності, а також у правотворчій діяльності для удосконалення національного законодавства про інтелектуальну власність, що набуває особливого значення у контексті рекодифікації цивільного законодавства України.*

Ключові слова: майнові права, комерціалізація, об'єкт цивільного права, регулювання суспільних відносин, авторське право.

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CONTRACT IN LEGAL REGULATION OF INTELLECTUAL PROPERTY RELATIONS

Abstract. *The relevance was the study is conditioned by the strengthening role of contractual regulation of intellectual property relations in the information society and the transition to an*

innovative development of the national economy. The purpose of this study is to identify the features of the contract as a legal tool in the mechanism of legal regulation of intellectual property relations at different stages. In the context of the analysis of the contract as a means of regulating relations in intellectual property, emphasis is placed on the expediency of distinguishing two groups of legal relations: those that mediate statics, i.e. ownership of rights to intellectual property, and those that mediate the dynamics, i.e. transfer of rights to intellectual property from one subject to another. It is noted that the contract is perhaps the most important legal means of commercialisation of rights to intellectual property, ensuring the effective implementation of creative activities in production and other areas of public life to meet the private interests of their creators, those who invested in their creation, and public interests. A rising tendency is noted to use the contract as a remedy at the stage of protection of rights to intellectual property. The parties may stipulate ways to protect their rights in the contract on the disposal of rights to intellectual property, which are not stipulated by law, regulate the procedure for resolving disputes, etc. Thus, the contract is an effective remedy at all stages of governing intellectual property relations – in the legal regulation of these relations, the acquisition of rights to intellectual property, the exercise of these rights, as well as their protection. The results of the analysis conducted in this study can be used in further research on contractual regulation of intellectual property relations, as well as in law-making to improve national legislation on intellectual property, which is especially important in the context of recodification of civil legislation of Ukraine.

Keywords: property rights, commercialisation, object of civil law, regulation of public relations, copyright.

INTRODUCTION

Recent decades have seen an increase in interaction between countries, especially through trade and foreign direct investment. This has been shaped since the 1990s by means of reducing trade and investment barriers, reinforced by the signing of bilateral, regional, and multilateral trade and investment agreements. Intellectual property refers to any original work of human intellect, such as a work of art, literature, technology, or science. Intellectual property rights refer to legal rights granted to an inventor or creator to protect their invention or creation over a period of time. These legal rights provide the exclusive right to the inventor/creator or their successor to fully use their invention/creation for a certain period of time. It was determined that rights to intellectual property play an important role in the modern economy. It was also finally established that intellectual work related to innovation should be given due importance for the public good to come out of it. There has been a quantum leap in research and development spending with the associated leap in investment required to bring new technology to market [1-3].

During this period, there has been an increase in the number of trade agreements containing chapters on intellectual property, as well as the number of countries that have signed this programme, thereby helping to strengthen and harmonise intellectual property systems outside the process initiated by TRIPS. TRIPS, which stands for "Agreement on Trade-Related Aspects of Intellectual Property Rights", is an international agreement included in the package of documents establishing the World Trade Organisation. The agreement sets minimum standards for the recognition and protection of major intellectual property. In this context, countries requiring intellectual property are usually developed countries, while developing countries are in need of reform. [4] Despite the growing relevance of intellectual property trade agreements and their possible implications, this

issue has been marginally addressed in empirical analysis, with the exception of a recent 2016 study that examined the impact of trade agreements on intellectual property chapters on overall trade [5; 6].

Intellectual property law and contract law belong to those civil law institutions that play a crucial role in the information society and the transition to an innovative type of development of the national economy. Due to intellectual property rights, the results of human intellectual activity in various fields become objects of civil rights, and the relations regarding such results are embodied in legal form. However, the ownership of personal non-proprietary and proprietary rights to intellectual property is not capable of satisfying the interests of the author, performer, inventor, breeder, or other creator – for this there must be an effective legal mechanism for exercising these rights, especially their property component. And in this aspect the most important legal remedy is a civil contract. Therefore, it is no coincidence that in the literature on intellectual property, the contract is often interpreted as a form (means) of fulfilment (exercise) of rights to intellectual property. But to consider the contract only from such a position would be too narrow an approach. After all, in the modern doctrine of private law, the contract is quite fairly considered as a remedy, the effect of which is manifested at all stages of legal regulation, starting with the regulation of public relations and ending with the stage of law enforcement [7]. In domestic civil science there is an increased interest in the category of "mechanism of legal regulation" both at the level of general civil law issues and in terms of individual institutions of civil law. In terms of rights to intellectual property in this aspect, the scientific articles by R.B. Shyshka deserve particular attention [8; 9].

The mechanism of legal regulation of relations in the field of intellectual property, on the one hand, is designed to ensure the settlement of public relations. For this, at the level of legal provisions, the range of objects of intellectual property rights, the conditions for granting them legal protection, the subjects, the grounds for acquisition and the content of rights to the relevant objects, etc. are determined. Thus, the legal provisions determine to which object, to whom, and what rights belong. On the other hand, legal regulation should ultimately ensure the satisfaction of the interests of the subjects of relevant relations, related in a certain way to the use of rights to intellectual property, and in case of violation of subjective rights of authors, performers and other rights holders – their effective protection [10].

This applies entirely to the field of intellectual property. Therefore, the purpose of this study is to identify the features of the contract at different stages of legal regulation of intellectual property relations.

1. MATERIALS AND METHODS

The theoretical framework of the study comprises the articles of leading Ukrainian scholars in civil law, covering the general issues of legal regulation of public relations of private law and the place of the contract therein, and issues of contractual regulation of relations emerging in the field of intellectual property. The statutory framework of the study comprises the Civil Code of Ukraine, as well as other acts of civil legislation, in particular, special laws in the field of intellectual property. The paper also uses some materials of judicial practice of consideration and resolution of disputes related to the protection of rights to intellectual property.

Philosophical, general scientific, and special legal methods and means of cognition were used in the study. The dialectical method of cognition formed the basis of the study and allowed to analyse legal regulation of intellectual property relations as a developing phenomenon, to identify its main trends. In particular, the use of this method of cognition allowed to emphasise the importance of the contract as a legal instrument in regulation of intellectual property relations in modern conditions, which makes it appropriate to consider it not only as a basis for acquiring relevant rights or their form, but also as an effective means of legal regulation of such relations. Logical methods (analysis, synthesis, induction, deduction, generalisation, etc.) accompanied the entire research process. Thus, the application of the method of analysis allowed to consider the effect of the contract at all stages of legal regulation of intellectual property relations, namely the legal regulation of these relations, acquisition of rights to intellectual property, exercise of these rights, as well as their protection in case of violation, challenge, or non-recognition. The method of analysis was also used to distinguish two groups of relations in the field of intellectual property: those that mediate the ownership of rights to intellectual property to the relevant entities, and those within which the rights to intellectual property are transferred from one subject to another. This allowed to identify different possibilities of contractual regulation of these two groups of relations. The use of the method of generalisation allowed to reach the general conclusion that the contract as a legal instrument permeates the entire process of legal regulation of these relations, showing its effect at all stages. The system-structural method allowed to consider legal regulation of intellectual property relations as a system of interconnected elements – legal remedies, and to determine the place of the contract as one of such legal means at different stages of legal regulation of the studied relations. The formal legal method is used in the analysis of legal provisions governing intellectual property relations and the practice of their application. Thus, the analysis of the provisions of Article 429 of the Civil Code of Ukraine[1] and Article 16 of the Law "On Copyright and Related Rights"[2] allowed to identify the conflict between them and address the feasibility of contractual regulation of the legal regime of works made for hire. Also, this method is used in the processing of acts of generalisation of judicial practice, as well as court decisions in specific cases relating to the protection of rights to intellectual property.

The hermeneutic legal method was used in the process of interpreting the provisions of intellectual property law. In particular, the interpretation of the provisions of Part 2 Article 425 of the Civil Code of Ukraine[3] in its systemic interrelation with Article 1110 of the Civil Code of Ukraine allowed to distinguish between the terms of validity of rights to intellectual property and the terms in contracts on the disposal of such rights. Similarly, a systematic interpretation of the provisions of Articles 11 and 422 of the Civil Code of Ukraine allowed to conclude that in the context of the acquisition of rights to intellectual property, it is precisely the contract that should be considered as a legal fact (or element of legal composition) that serves as the basis for the acquisition of such rights.

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15.
[2] Law of Ukraine No 3792-XII "On Copyright and Related Rights". (2012, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3792-12/ed19931223#Text
[3] Civil Code of Ukraine, op. cit.

2. RESULTS AND DISCUSSION

The specific feature of the legal regulation of relations in the field of intellectual property is manifested in the fact that it must ensure a reasonable balance of interests of creators, right holders, and public interests. Neglecting at least one of them, or, conversely, unjustifiably exaggerating the importance of any of them, will reduce the effectiveness of legal regulation of relations in this area. Legal regulation as a dynamic process of the influence of law on public relations involves a certain occurrence in stages. Despite the existence of different opinions on the stages of legal regulation in the civilistic literature, the authors consider it appropriate to take as a basis the position of N.S. Kuznetsova, V.L. Yarotskyi, who distinguish the following stages: 1) legal regulation of social relations; 2) the emergence of subjective rights and obligations; 3) fulfilment of subjective rights and performance of obligations; 4) enforcement of law [7; 11]. Therefore, below is an attempt to showcase the effect of the contract at each of the said stages of legal regulation of intellectual property relations.

The first stage of legal regulation of relations in the field of intellectual property is their prescription, which lies in the ideal model of behaviour for participants in such relations being consolidated in civil law provisions. Therefore, the dominant element of the mechanism of civil law regulation at this stage is the provision of civil law. To perform the function of regulating public relations, the latter must be objectively expressed in certain external forms – sources of law. Sources of intellectual property law include, first of all, acts of civil legislation. Historically, the emergence and development of legal protection of the results of creative activity is associated with the adoption of relevant special legislation in the field of copyright, patents, trademarks, etc. in national legal systems. Even in the countries of Anglo-Saxon law, where the main source of law is traditionally considered to be the judicial precedent, there are corresponding laws in the field of intellectual property.

In the context of this study, the question of the place of the contract in the regulation of relations in the field of intellectual property is of interest. Modern civil law doctrine has repeatedly drawn attention to the fact that the contract is a means of governing the behaviour of the parties in civil law relations [12] and is at the level of sources of law [5]. S.O. Pohribnyi believes that in cases where a civil contract is used by entities for self-regulation of their civil relations (Article 6 of the Civil Code of Ukraine[1]), it particularly constitutes a form of expression of the civil law provisions [13]. With regard to the field of intellectual property, the issue of the role of the contract as a regulator of these relations has not yet received adequate coverage. In this aspect, the articles of O.V. Basai, O.V. Zhylinkova can be noted, which consider the contract to a greater extent as a basis for the acquisition of rights to intellectual property or a form of disposal of such rights, but at the same time paid attention to the regulatory function of the contract in intellectual property relations [14; 15]. Generally supporting the idea of contractual regulation of intellectual property relations, it is necessary to emphasise the expediency of distinguishing between two groups of legal relations in this area: first, it is legal relations that mediate the statics, i.e. the belonging of rights to intellectual property to the relevant subjects; secondly, these

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

are legal relations that mediate the dynamics, i.e. the transfer of rights to intellectual property from one subject to another.

Legal relations belonging to the first group are governed mainly by the provisions contained in the law. This is conditioned not only by the historical features of the becoming and development of intellectual property rights, but largely by the fact that such legal relations are absolute, where the range of obligated entities is predetermined (impersonal). The agreement provides for certainty regarding the subjects concluding it (parties), and is aimed at settling relations between the latter. Therefore, several issues related to intellectual property rights lie outside the scope of contractual regulation. For example, the types of rights to intellectual property and the conditions for granting them legal protection are determined by the national legislation of each state, considering its obligations under the corresponding international treaties. Pursuant to Articles 199, 418 of the Civil Code of Ukraine, the objects of intellectual property rights are only objects defined by law. Under such conditions, the contract cannot stipulate "new" categories of rights to intellectual property, which are not stipulated by law, or contain other conditions for granting them legal protection than ensured by law. This applies even to those institutions of intellectual property law where the law stipulates an inexhaustible list of types of relevant objects. For example, copyright law does not contain a closed list of types of works. But in any case, the emergence of copyright in a work requires that it be the result of creative activity, expressed in an objective form. Similarly, the law does not contain an exhaustive list of information that may constitute a trade secret, but if the information does not meet the conditions specified in the law for granting it legal protection (Article 505 of the Civil Code of Ukraine), it cannot be considered a trade secret.

In the context of the issue of contractual regulation of intellectual property relations and its limits, Part 2 Article 425 of the Civil Code of Ukraine[1], which among the sources of establishing the validity of rights to intellectual property, lists the Civil Code of Ukraine, another law, and the contract. The authors believe that such a legislative position is not entirely correct, as the terms and conditions of intellectual property rights traditionally belong to the scope of regulation of the law. In this aspect, it is advisable to distinguish between the validity of rights to intellectual property in absolute legal relations and the validity of agreements on the disposal of these rights. This is confirmed by the provisions of Article 1110 of the Civil Code of Ukraine, according to which the license agreement is concluded for a period established by the agreement, which must expire no later than the expiration of the exclusive property right to the object of intellectual property rights specified in the agreement. Thus, the term of the license agreement does not belong to the term of validity of rights to intellectual property, which are referred to in Article 425 of the Civil Code of Ukraine. Thus, the validity of rights to intellectual property is determined by the Civil Code of Ukraine and the relevant special laws.

The fuller regulatory function of the contract is manifested in relation to binding legal relations that mediate the turnover of rights to intellectual property. Thus, only the agreement determines the scope of rights to use the object of intellectual property rights, which are granted to the licensee under the license agreement or transferred to the purchaser under the agreement on the transfer of rights to intellectual property. The

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

contractual procedure determines the permissible ways of the use of the object by the licensee, circulation, territory of use, etc. In creative contracts, the parties specify the requirements for the work that the author undertakes to create (type of work, theme, genre, volume, etc.), the timing of its creation, the procedure for transferring the original or copy of the work to the customer, the customer's rights to use the work. Furthermore, in relation to licensing agreements, commercial concession agreements, agreements on the transfer of rights to intellectual property, etc., concluded with the participation of a foreign entity, the parties have the right to determine which country's law will be applicable to the agreement on the basis of the principle of autonomy (Articles 5, 43 of the Law "On International Private Law"[1]).

The regulatory function of the contract is especially relevant in cases where the legislation either does not contain legal regulation of certain relations, or the legislative regulation is imperfect, in particular, due to the existence of conflict of laws. An example in this regard is the definition of the legal regime of works for hire. As is known, there is a conflict of laws between Article 429 of the Civil Code of Ukraine[2] and Article 16 of the Law of Ukraine "On Copyright and Related Rights"[3]. At one time, the Supreme Court of Ukraine outlined a position on the application of the provision of Article 429 of the Civil Code of Ukraine in this case, which presumes the ownership of rights to intellectual property to the object created by the employee in connection with the performance of work for hire to the employee and the employer together. But this option is rather problematic from the standpoint of further exercise of such property rights. Therefore, it is considered appropriate to apply the contractual regulation of this issue here, which is especially relevant for IT companies, film studios, research institutions, etc. The second stage of legal regulation of intellectual property relations is the emergence (acquisition) of rights to intellectual property. At this stage, due to the occurrence of specific circumstances (legal facts, legal structures), a certain subject(s) acquire(s) moral and (or) intellectual property rights to a particular object. In this aspect, it should be noted that the contract may form the basis for the acquisition of exclusively intellectual property rights. According to Article 422 of the Civil Code of Ukraine[4], intellectual property rights emerge (acquire) on the grounds established by this Code, other law, or contract.

This raises the question of the place of the contract in the mechanism of acquisition of intellectual property rights. After all, in accordance with Article 11 of the Civil Code of Ukraine, the contract itself, in fact, is a legal fact that forms the basis for the emergence of subjective civil rights. And under Article 422 of the Civil Code of Ukraine, the role of the contract is reduced to the fact that it defines the circumstances that serve as the basis for the emergence (acquisition) of intellectual property rights. It is precisely the contract that should be considered as the legal fact (or an element of legal structure) that forms the basis of acquisition of rights to intellectual property. In this aspect, the provisions of Article 422 of the Civil Code of Ukraine require revision in part that the grounds for the emergence

[1] Law of Ukraine No 2709-IV "On Private International Law". (2005, June). URL: https://zakon.rada.gov.ua/laws/show/2709-15/ed20050623#Text

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

[3] Law of Ukraine No 3792-XII "On Copyright and Related Rights". (2012, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3792-12/ed19931223#Text

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

(acquisition) of rights to intellectual property may be determined by contract. The contract can act as an independent basis for the acquisition of rights to intellectual property, and be an element of the legal structure. For example, under a contract for the transfer of property rights to a work, the contract constitutes a legal fact, the occurrence of which is associated with the transfer of property rights to the work to the acquirer. However, in case of commissioning contract, the authors agree with O.I. Kharytonova's opinion that the basis for the relevant rights to the work is the legal composition ("legal body"), formed by this contract and the fact of creation of the work [16]. With regard to contracts on the disposal of property rights to industrial property that shall be subject to state registration by law (inventions, utility models, industrial designs, trademarks, etc.), the relevant rights pass to the purchaser from the moment of the respective state registration. Therefore, the basis for the acquisition of rights to intellectual property in this case is the legal composition, the elements of which are the contract on the transfer of property rights to the object of industrial property and the state registration of such rights by the acquirer.

Contracts under which the acquisition of rights to intellectual property should include a contract on the transfer of rights to intellectual property, license agreements on the granting of exclusive or single licenses. The basis for the acquisition of these rights may be a commissioning contract, if its terms and conditions stipulate the transfer of intellectual property rights to the object created by the creator to the customer. As for non-exclusive license contracts and commercial concession contracts, succession of rights to intellectual property does not occur thereunder – there is only a binding relationship between parties thereto and neither the licensee nor the user acquires any absolute rights in this case. The third stage of legal regulation of intellectual property relations is the exercise of rights to intellectual property. At this stage, by means of specific acts of conduct of the authorised entity, those legal opportunities are fulfilled, which are determined by the content of the moral and (or) proprietary rights to intellectual property of the said entity. As a result, the interests of the latter are satisfied. In this aspect, the contract is one of the important forms of exercising intellectual property rights, namely their property component. In general, the exercise of intellectual property rights can be understood as the commission of actions to use the object of intellectual property rights by the right holder(s) or authorised person at its discretion and/or dispose of property rights to satisfy the property interests of the right holder(s) [17].

In this regard, it should be emphasised that the use of the object of rights to intellectual property, as a rule, requires the subject to have the appropriate equipment, materials, financial resources, etc. The author, inventor, or other creator in most cases does not have such means and resources, and therefore mainly exercises their property rights to the created object by disposing of these rights, as a rule, by entering into contractual relations with relevant entities (publishers, film studios, producers, etc.). Under such conditions, the contract constitutes the legal means that allows to ensure the satisfaction of property interests of the creator, as the latter receives a fee (royalty) for the use of the results of creative activity. Therewith, the contract ensures the satisfaction of property interests and the subject with whom the creator enters into it, because under the contract such a subject is given the right to use the work, invention, etc. or the latter acquires intellectual property rights to the object. Ultimately, this also satisfies the interests of society, whose members have access to works of modern art, high-tech devices, quality

medicine, etc. In general, the contract is perhaps the most important legal means of commercialising intellectual property rights, as it ensures effective implementation of results of creative activity in production and other areas of public life so as to meet both the private interests of their creators, those who invested in such creation, and public interests [18-20].

Intellectual property law is an independent institution of civil law, which is covered by one of the six books of the Civil Code of Ukraine[1]. Objects of intellectual property rights constitute a separate type of objects of civil rights (Articles 177, 199 of the Civil Code of Ukraine), in respect of which there are *sui generis* rights – moral and (or) proprietary rights to intellectual property (Article 418 of the Civil Code of Ukraine) that differ from other categories of subjective civil rights. All this necessitates the separation of independent contractual structures that mediate the dynamics of rights to intellectual property. Therefore, contracts on the disposal of rights to intellectual property constitute an independent group in the system of contract law. On the other hand, the nature of rights to intellectual property, which act as an original "basis" for contractual relations in this area, is unique to the various objects of rights to intellectual property – works, performances, inventions, trademarks, etc. This, in turn, allows to enshrine unified contractual structures in civil legislation, in order to mediate relations on the disposal of rights to intellectual property, the scope of which covers various sub-institutions of rights to intellectual property (copyright, related rights, patent law, etc.). This trend has been implemented in the Civil Code of Ukraine, which in Chapter 75 stipulates contracts on the disposal of rights to intellectual property applicable to various objects of rights to intellectual property.

Based on content, contracts on the right to use the object in the area specified in the contract (license contract, commercial concession contract) and contracts on the transfer (alienation) of rights to intellectual property can be distinguished within this group of contracts. Furthermore, such contracts may be concluded that stipulate the order for creation of an object of intellectual property rights, where the constitutive element of the relations is the disposal of property rights to the created object. Along with contracts where the disposal of rights to intellectual property is their ultimate purpose, there are also other contracts containing elements of the disposal of rights to intellectual property. These include, in particular, contracts concluded between collective management organisations and subjects of copyright and (or) related rights, contracts on the pledge of rights to intellectual property, contracts between co-authors on the distribution of property rights to the objects created by them, production contracts, etc. [21-23]. The next (fourth) stage of legal regulation of intellectual property relations is the protection of rights to intellectual property in case of infringement, non-recognition, or challenge. In modern conditions, there is a rising tendency to use the contract as a legal remedy at the stage of protection of rights to intellectual property.

In accordance with Part 2 Article 16 of the Civil Code of Ukraine[2], the parties may stipulate means of protecting their rights in the contract for the disposal of rights to intellectual property, which are not stipulated by law. In this regard, it should be noted that

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

the possibility of determining ways to protect rights to intellectual property by the contract is limited due to the fact that such rights exist in absolute legal relations, where the scope of obligated entities is predetermined. As a rule, the right holder is not in contractual relations with potential infringers; therefore, the methods of their protection are predominantly determined by law. However, in some cases, ways to protect rights to intellectual property may still be determined by contract. For example, in one case it was found that according to paragraph 6 of the contract on alienation of rights to intellectual property, in case of alienator's non-performance of paragraphs 1-4 of the contract in terms of infringement of the exclusive right of the acquirer to use all known methods of protection without restriction of the territory of the exclusive right to permission or prohibition of use of the official work of the author N. “Publishing project of the newspaper "Soroka"” by other persons the alienator shall pay the purchaser a fine of twenty thousand percent of monetary compensation for transferred property rights. In this case, the commercial courts concluded that such terms and conditions of the contract are in conformity with the requirements of the legislation [24]. When concluding a contract on the disposal of rights to intellectual property, the parties may use the provisions of Article 259 of the Civil Code of Ukraine[1] on the possibility of changing the duration of the statute of limitations, stipulating in such a contract a statute of limitations of longer duration than that established by law. However, it should be emphasised that the contract may not change the procedure for calculating the statute of limitations (Article 260 of the Civil Code of Ukraine). Contractual settlement of the procedure for resolving disputes between the parties to agreements on the disposal of rights to intellectual property is becoming increasingly important. This refers to, for example, terms and conditions that stipulate the transfer of disputes arising from the contractual relations to the consideration of the court of arbitration, the use of mediation procedures, etc.

Ultimately, a contract can serve as an effective legal remedy for the settlement of a dispute arising from an infringement on a right to intellectual property. Thus, in practice, cases occur when the subject of rights to intellectual property (right holder) and the infringer reach an agreement on out-of-court settlement of the dispute. The legal form of such an agreement is a contract, which may contain, inter alia, the terms and conditions for the infringer's payment of the appropriate amount of money as compensation in favour of the right holder for property losses incurred in connection with the infringement of rights to intellectual property. This ensures the protection of rights to intellectual property, but the parties to the dispute do not bear the costs associated with the consideration of the case in court, further execution of the court decision, etc. Furthermore, this option saves a lot of time, considering that there is usually a fairly long period of time between filing a claim and the enforcement a court decision,

CONCLUSIONS

The mechanism of legal regulation of intellectual property relations can be considered as a system of legal means that ensure the orderliness of public relations in the field of intellectual property in order to satisfy the interests of creators, right holders, and public interests. The contract plays an important role among the elements of the legal regulation

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

of intellectual property relations. In modern conditions, the contract constitutes the legal tool that has its effect at all stages of legal regulation of intellectual property relations.

At the stage of legal regulation of intellectual property relations, the contract is one of the means of the said regulation. Therewith, it is advisable to distinguish between two groups of contractual regulation of such relations: those that mediate statics, i.e. the ownership of intellectual property rights to the relevant entities, and those that mediate the dynamics, i.e. the transfer of rights to intellectual property from one subject to others. The legal relations included in the first group are predominantly regulated by the legal provisions (types of rights to intellectual property and the conditions for granting them legal protection, the validity of rights to intellectual property, cases of free use of objects, etc.). The possibilities of contractual regulation of legal relations of the second group are much wider. There, the contract determines the scope of rights to use the object of intellectual property rights granted or transferred under the contract, methods of use, circulation, territory of use, requirements for the work that the author undertakes to create, the term of its creation, etc. At the stage of acquisition of rights to intellectual property, the contract performs the function of a legal fact (or element of legal composition), which serves as the basis for the acquisition of such rights. In this aspect, the provisions of Article 422 of the Civil Code of Ukraine require revision in part that the grounds for the emergence (acquisition) of rights to intellectual property may be determined by contract. Considering this, the authors propose to amend the wording of Article 422 of the Civil Code of Ukraine as follows:

"1. Rights to intellectual property arise (acquire) on the grounds established by this Code or other law, in particular from contracts".

In the exercise of rights to intellectual property, the contract constitutes a legal form of disposal of these rights, thereby ensuring the effective implementation of creative activities in production and other areas of public life so as to meet the private interests of creators, those who invested in such creation, and public interests. Considering that rights to intellectual property constitute an independent institution of civil law, as well as the fact that its objects are a separate type of objects of civil rights, in respect of which exist *sui generis* rights – moral and (or) proprietary rights to intellectual property, contracts on disposal of rights to intellectual property constitute an independent group in the system of contract law.

The importance of the contract at the stage of protection of rights to intellectual property from infringement, challenge, or non-recognition is key. A contract can serve as an effective means of out-of-court settlement of a dispute that has emerged as a result of an infringement of rights to intellectual property. Also, certain issues concerning the methods of protection of violated rights, the duration of the statute of limitations, the use of mediation procedures, etc. may be determined by contract.

In general, considering the development of modern private law, further study of the place of the contract in the mechanism of legal regulation of intellectual property, especially its regulatory function, appears to be rather promising; therefore, the authors hope that this study contributes to further theoretical investigation of this important issue and development of proposals to improve the legislation of Ukraine on intellectual property.

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ОСОБЛИВОСТІ ЗАСТОСУВАННЯ СТАТТІ 392 ЦИВІЛЬНОГО КОДЕКСУ УКРАЇНИ ПРИ ВИЗНАННІ ПРАВА ВЛАСНОСТІ НА НОВОСТВОРЕНЕ НЕРУХОМЕ МАЙНО (ЗА МАТЕРІАЛАМИ СУДОВОЇ ПРАКТИКИ)

Анотація. *Дослідження особливостей визнання права власності на новостворене нерухоме майно зумовлене його метою, яка полягає у визначенні підстав для застосування передбаченого статтею 392 Цивільного кодексу (ЦК) України способу захисту при визнанні права власності на новостворений об'єкт будівництва, а також виявленні прогалин і суперечностей у законодавстві України, судовій практиці, що виникають під час застосування відповідного способу захисту суб'єктивного права та виробленні пропозицій щодо їх усунення. У зв'язку з цим, основним методом даного дослідження став порівняльно-правовий, який дав змогу виявити та проаналізувати різні підходи до законодавчого закріплення та застосування такого способу захисту, як визнання права власності. У науковій статті встановлено, що, незважаючи на те, що при укладенні договору купівлі-продажу майнових прав на нерухоме майно, покупець отримує обмежене речове право, за яким він наділений певними, але не всіма правами власника майна. Обґрунтовано, що покупець, який виконав свої грошові зобов'язання за договором купівлі-продажу майнових прав на нерухоме майно, повністю сплативши вартість, установлену вказаним договором, вважається таким, що вчинив дії, спрямовані на виникнення юридичних фактів, необхідних і достатніх для отримання права вимоги переходу права власності на об'єкт будівництва. У зв'язку з цим доведено, що ефективність застосування при визнанні права власності на новостворене нерухоме майно способу захисту, передбаченого ст. 392 ЦК України, спрямована на нівелювання можливості вчинення подальших протиправних дій третіх осіб щодо такого майна, і досягається за допомогою примусового виконання рішення суду шляхом визнання права власності на конкретний об'єкт, а у випадку його знищення – шляхом отримання відповідного відшкодування. Практичне значення дослідження особливостей застосування ст. 392 ЦК України при визнанні права власності на новостворене нерухоме майно полягає у тому, що його результати покликані сприяти подальшим науковим розробкам, удосконаленню правового регулювання відносин, об'єктом яких є новостворене нерухоме майно, оптимізації реалізації права власності та правозастосування у цій сфері.*

Ключові слова: спосіб захисту, майнові права, об'єкт інвестування, державна реєстрація, договір купівлі-продажу.

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FEATURES OF APPLICATION OF ARTICLE 392 OF THE CIVIL CODE OF UKRAINE UPON RECOGNISING THE RIGHT OF OWNERSHIP OF NEWLY CREATED REAL ESTATE (A CASE STUDY OF JUDICIAL PRACTICE)

Abstract. *The study of the specific features of recognition of ownership of newly created real estate is conditioned by its purpose, which is to determine the grounds for application of remedy upon recognising ownership of newly created construction object, stipulated by Article 392 of the Civil Code of Ukraine. The purpose of the study also includes identification of gaps and discrepancies in the legislation of Ukraine and judicial practice, which arise during application of the appropriate remedy for a substantive right, and the development of proposals for their elimination. In this regard, the main method of this study was comparative law, which allowed to identify and analyse different approaches to the legislative consolidation and application of such a remedy as the recognition of property rights. Upon concluding an agreement on sale and purchase of property rights to immovable property, the buyer receives a limited real right, under which it is endowed with certain, but not all rights of the property owner. Nevertheless, in recognising the ownership of newly created real estate, the study proves the feasibility of applying the method of protection stipulated in Article 392 of the Civil Code of Ukraine. It is substantiated that the buyer, who has performed its monetary obligations under the agreement on sale and purchase of real property rights, having fully paid the contractual value, is considered to have committed actions aimed at the occurrence of legal facts necessary and sufficient to obtain the legal claim for the transfer of ownership of the construction object. In this regard, it has been proved that the effectiveness of the remedy stipulated by Article 392 of the Civil Code of Ukraine, which is applied upon recognising the ownership of newly created immovable property, is aimed at levelling the possibility of further unlawful actions of third parties in relation to such property, and is achieved through the enforcement of judgement by recognition of ownership of a specific object, and in case of its destruction – by obtaining appropriate compensation. The practical significance of the study of the application of Article 392 of the Civil Code of Ukraine upon recognising the ownership of newly created real estate is that its results are designed to promote further research, to improve the legal regulation of relations, the object of which is newly created real estate, to optimise the implementation of property rights and law enforcement in this area.*

Keywords: remedy, property rights, investment object, state registration, sale and purchase agreement.

INTRODUCTION

In accordance with Part 1 Article 16 of the Civil Code of Ukraine[1], every person shall have the right to go to court to protect their violated, unrecognised, or disputed rights, freedoms, or interests. Protection of civil rights is an action to prevent, stop the violation of rights, or restore the violated rights of individuals or legal entities. Every person shall have the right

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

to protection of their right and interest, which do not contradict the principles of civil legislation, the requirements of justice, good faith, reasonableness. The protection of substantive civil rights and interests is carried out in accordance with the procedure stipulated by law, i.e. by means of appropriate remedies [1; 2]. The remedy for the substantive civil rights constitutes a substantive coercive means stipulated by law, which facilitate the restoration (recognition) of the violated (disputed) rights and exercise influence on the offender. Provisions of civil legislation (Article 16 of the Civil Code of Ukraine)[1] stipulate certain ways to protect civil rights and interests, the list of which is not exhaustive, because the court may remedy civil rights or interests by other means prescribed in an agreement or law. Under Article 16 of the Civil Code of Ukraine, one of the ways to remedy civil rights is the recognition of a substantive right, which is applied when a certain substantive right of a person is questioned or disputed, denied, or when there is a real threat of such actions.

In the field of property rights, recognition of property rights constitutes an effective remedy. Thus, in accordance with Article 392 of the Civil Code of Ukraine[2], the property owner may file a lawsuit for recognition of their property right, if this right is disputed or not recognised by another person, as well as in case of loss of a document certifying the said property right. The application of the remedy prescribed by Article 392 of the Civil Code of Ukraine should promote the real restoration of the violated right by ensuring the termination of its non-recognition or dispute, as well as be aimed at eliminating the possibility of further unlawful actions of third parties against such property. The purpose of such remedy is achieved through the enforcement of a judgement by recognising the ownership of a particular object, and in case of its destruction – by obtaining appropriate compensation. At present, however, the issue of the possibility of applying Article 392 of the Civil Code of Ukraine to legal relations concerning investment in construction objects remains debatable both at the theoretical and practical levels. Moreover, such application concerns not only the loss of title establishing documents, but also the cases of their complete absence. This situation may arise from the lack of confirmation of the existence of the substantive right of the owner by the respective documents due to other persons obstructing the registration of ownership of the newly created immovable property subsequent to its commissioning. Furthermore, the existence of the owner's substantive right to the invested construction object may be doubted, unrecognised, or disputed by other persons, in particular in case of alienation of the investment object to third parties subsequent to commissioning of the building as a result of changes in the technical specifications of the investment object introduced during the construction [3-7]. In this regard, the purpose of this study is to determine the possibility and grounds for the application of the remedy stipulated by Article 392 of the Civil Code of Ukraine upon recognising the ownership of a newly created construction object, as well as to develop proposals to eliminate contradictions in the legislation of Ukraine and judicial practice, which arise upon application of the corresponding remedy of subjective rights. The practical significance of the study of the application of Article 392 of the Civil Code of Ukraine upon recognising the ownership of newly created real estate is that its results are

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

designed to promote further research, to improve the legal regulation of relations, the object of which is newly created real estate, and to optimize the implementation of property rights and law enforcement in this subject area.

1. MATERIALS AND METHODS

The issue of recognition of ownership of newly created real estate is understudied in the legal literature. Recognition of property rights in general has been the subject of research among such scholars as O.O. Kot [8], I.M. Panchenko [9], I.O. Dzera [10], etc. At the academic level, some issues of recognition of ownership of a self-built object, inheritance in the absence of a title deed, recognition of ownership of a derelict thing, the statute of limitations, etc. have been considered, indicating that the legislator either stipulates no possibility whatsoever for the recognition of ownership in some of these cases (for example, for objects of self-built construction or recognition of ownership by the testator) or stipulates another, special procedure for acquiring ownership of such objects, which is more complicated than the procedure for recognition of ownership under Article 392 of the Civil Code of Ukraine, and therefore should be governed by other rules of civil legislation [11-13]. The comment of scholars on legal positions of the Supreme Court, "Protection of property rights", edited by I.V. Spasybo-Fatieieva, deserves special mention [14]. However, the inconsistency of judicial practice necessitates the identification of features and grounds for recognition of ownership of newly created real estate under Article 392 of the Civil Code of Ukraine. The methodology of this study is determined by its purpose and lies in identification of features and grounds for the application of such a remedy as the recognition of ownership of newly created real estate; identification of gaps and discrepancies in the legislation of Ukraine and the judicial practice, which arise during the application of the corresponding remedy of subjective rights and proposals for their elimination. The legal framework of this study includes the Civil Code of Ukraine[1],the Law of Ukraine "On Property Valuation, Property Rights, and Professional Valuation in Ukraine"[2], the Law of Ukraine "On Financial and Credit Mechanisms and Property Management in Housing Construction and Real Estate"[3], Law of Ukraine "On Regulation of Urban Development"[4], Law of Ukraine "On State Registration of Real Rights to Immovable Property and Their Encumbrances"[5], Resolution of the Cabinet of Ministers of Ukraine "On the Procedure for Commissioning Completed

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

[2] Law of Ukraine No. 2658-III "On Valuation of Property, Property Rights and Professional Valuation Activities in Ukraine". (2001, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2658-14#Text.

[3] Law of Ukraine No 978-IV "On Financial and Credit Mechanisms and Property Management in Housing and Real Estate Transactions". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/978-15

[4] Law of Ukraine No 3038-VI "On Regulation of Urban Planning Activity". (2011, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3038-17

[5] Law of Ukraine No. 1952-IV "On the State Registration of Real Rights to Immovable Property and Their Encumbrances" (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1952-15#Text.

Facilities"[1], Resolution of the Cabinet of Ministers of Ukraine "On Procedure for Registration of Proprietary Rights to Immovable Property and Their Encumbrances"[2], etc.

The study uses general scientific and special legal methods of scientific knowledge. The main method of research is comparative law, which allowed to identify and analyse different approaches to the legislative consolidation and application of such a remedy as the recognition of ownership. Philosophical and functional methods allowed to outline the prerequisites for the development of an effective remedy of property rights to construction sites and to identify the interrelation of its elements. The dialectical method of cognition accompanied the entire procedure of scientific research and allowed to consider the trends of development and improvement of domestic civil legislation in the context of European integration. The use of the dialectical method of cognition provided an opportunity to consider the main features of the acquisition of ownership of newly created real estate. The formal legal method is used in the analysis of legal provisions governing relations in property rights and the practice of their application. Among other methods of research of the subject matter, the method of the analysis and synthesis were used to investigate the modern condition of the legislation and judicial practice and to propose improvement of the regulatory framework. Analysis of judicial practice of Ukrainian courts and the case law of the European Court of Human Rights allowed to establish the possibility and determine the grounds for the application of remedy of recognising the right of ownership of newly created real estate stipulated by Article 392 of the Civil Code of Ukraine.

The presented scientific ideas of the authors in the modern development of civil relations include target, methodological, substantive, legal, and effective components.

2. RESULTS AND DISCUSSION

Nowadays, investment and financing of housing construction with the use of funds raised from individuals and legal entities, including management, can be carried out exclusively through construction financing funds, real estate funds, mutual investment institutions, as well as by issuing targeted bonds of enterprises, the obligations under which are performed by transferring the object (part of the object) of housing construction. Legal relations arising between persons who alienate property rights to immovable property at the construction stage and persons who acquire such rights are formalised by agreements of sale and purchase of property rights to immovable property, according to which the buyer receives the right to own, dispose of, and use property rights, but the ownership of a particular apartment arises only in the future [15-16]. Thus, according to Article 656 of the Civil Code of Ukraine[3], property rights may be the subject of a sale and purchase agreement. Therewith, the general provisions on sale and purchase of property rights shall apply to the sale and purchase agreement, unless the content or nature of these rights

[1] Cabinet of Ministers of Ukraine Decree No. 461 “On the Procedure for the commissioning of completed construction projects”. (2011, April). Retrieved from https://zakon.rada.gov.ua/laws/show/461-2011-%D0%BF.

[2] Decree of the Cabinet of Ministers of Ukraine No. 1127 “On the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances”. (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF.

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

specify otherwise. Admittedly, property rights can act as the subject of a wide array of other civil agreements [17].

As noted in the legal literature, the property right to immovable property at the construction stage is a limited real right [18]. Analysis of the legislative definition of property rights, which is stipulated by Article 3 of the Law of Ukraine "On Valuation of Property, Property Rights and Professional Valuation in Ukraine"[1] also testifies to its understanding as different from the ownership of *jus in re*, as well as other specific rights and rights of claim. That is, the property right to immovable property at the construction stage constitutes the right of its holder to claim ownership of such immovable property in the future. However, at the construction stage, the holder of the property right is endowed with certain, but not all rights of the property owner. The latter receives only the right to acquire ownership of a particular property only subsequent to an occurrence of an array of investitive facts (completion of construction, commissioning, address assignment, etc.), and not the ownership of real estate *per se*.

Thus, under the agreement on sale and purchase of property rights, the buyer receives not ownership of individually determined real estate with all its inherent properties, but ownership of property that is non-existent at the construction stage, which may come into existence provided the occurrence of all the circumstances prescribed by the construction documentation. Therewith, the legislator does not restrict the holder of ownership to immovable property in performing any operations on these rights that are not prohibited by law, including the assignment of the right of claim (cession) under such agreements. However, in the context of the issue of property rights, the case law of the European Court of Human Rights should be noted. In one of its judgments, it pointed out that the concept of property in the meaning of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms[2] covers both available property and assets, including requirements concerning which the applicant may claim that it has at least a “legitimate expectation” of effective acquisition of property rights (Pine Valley Development Ltd. and others v. Ireland) [19]. That is, the property right as a "right of expectation" is a limited real right, which certifies the competence to acquire ownership of real estate in the future and forms an integral part of the property [18; 20]. Such a legal conclusion is stipulated in the judgement of the Supreme Court of Ukraine in case 6-265цс16 [21].

Acquisition of property rights is a certain legal structure with which the law connects the emergence of a person's substantive right of ownership of certain objects [22]. Part 1 Article 328 of the Civil Code of Ukraine prescribes that the property right is acquired on the grounds that are not forbidden by the law, in particular from transactions. As for the moment of occurrence of ownership of the newly created real estate, there are certain features stipulated by Part 2 Article 331 of the Civil Code of Ukraine, according to which the right of ownership of newly created real estate arises from the completion of construction. In this case, if the agreement or law prescribe the commissioning of real estate, the right of ownership shall also arise from the moment of such commissioning

[1] Law of Ukraine No. 2658-III “On Valuation of Property, Property Rights and Professional Valuation Activities in Ukraine”. (2001, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2658-14#Text.

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

(commissioning of completed facilities is governed by the relevant Procedure approved by the Resolution of the Cabinet of Ministers of Ukraine No. 461 of April 13, 2011[1]). If the right of ownership of immovable property is subject to state registration in accordance with the law, the right of ownership shall also arise from the moment of state registration. Notably, in accordance with the Letter of the Ministry of Justice of Ukraine No. 19-50-2309 of June 22, 2007[2], until the completion of the construction of the invested real estate and its commissioning, the investor shall hold not the ownership of this object, but the property rights to it. The investor cannot alienate the apartment as a real estate object prior to the acceptance of the construction object into operation and registration of ownership of the specified apartment, but can alienate its property rights to the apartment. Thus, the analysis of the provisions of Article 331 of the Civil Code of Ukraine[3] in systematic connection with the provisions of Articles 177-179, 182 of the Civil Code of Ukraine, gives grounds to conclude that the ownership of newly created real estate as an object of civil rights arises from the moment of its state registration.

The procedure for state registration of real rights to immovable property and the list of documents required for its implementation is determined by the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1127 of December 25, 2015[4]. Thus, paragraph 78 of the above Procedure prescribes that for state registration of ownership of certain individually identified immovable property (apartment, residential, non-residential premises, etc.) located in the object of immovable property, the construction of which was performed with the involvement of funds of individuals and legal entities, the owner of such property shall submit, in particular, a document confirming the acquisition of ownership of the investment object, which is stipulated by law (investment agreement, equity agreement, agreement on sale and purchase of property rights, etc.). That is, in case of acquisition of property rights to real estate, the document confirming the ownership of the construction object is the agreement on sale and purchase of property rights. In this case, the buyer who has performed its monetary obligations under the agreement on sale and purchase of property rights to real estate, having paid in full the contractual value, shall be considered as such that has committed actions aimed at the occurrence of legal facts necessary and sufficient to obtain the right of claim to transfer ownership of the construction object. As noted in the legal literature, the State Register of Real Rights to Immovable Property is an information system that ensures processing, storage, and provision of information on registered real rights to immovable property and their encumbrances, the objects and subjects of such rights, and the state registration itself lies in the entry of information according to a special procedure, which involves data accuracy verification [23]. Considering the above, it is important to point out that the

[1] Cabinet of Ministers of Ukraine Decree No. 461 "On the Procedure for the commissioning of completed construction projects". (2011, April). Retrieved from https://zakon.rada.gov.ua/laws/show/461-2011-%D0%BF.

[2] Letter of the Ministry of Justice of Ukraine No. 19-50-2309. (2007, June). Retrieved from https://zakon.rada.gov.ua/laws/show/v2309323-07.

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

[4] Decree of the Cabinet of Ministers of Ukraine No. 1127 "On the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF.

essence of state registration of rights is reflected in the official recognition and state confirmation of the acquisition, change, or termination of real rights to immovable property that have already taken place based on decisions of relevant bodies, agreements, or other title establishing documents by means of relevant entries into the State Register of Rights, and not the direct creation of such facts by the specified entries. In this regard, the certificate of ownership is only a document that formalises the respective right, but is not a transaction based on which this right arises, changes, or terminates, i.e. the certificate of ownership does not give rise to the defendant's right, but only records the fact of its presence. The relevant legal position is set out by the Commercial Court of Cassation of the Supreme Court of Ukraine in decisions No. 925/797/17 of 27.06.2018 [24], No. 927/849/17 of 10.04.2018 [25], No. 917/927/17 from 03.04.2018 [26] and is confirmed by the provision of paragraph 78 of the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances[1], which states that in case of acquisition of property rights to real estate, the agreement on sale and purchase of property rights constitutes the document confirming the acquisition of ownership of an object of construction registered with the person.

Remedy of property rights is carried out in accordance with the procedure stipulated by the legislation, and if such a special procedure is not established, the property rights are remedied on the general grounds enshrined in civil legislation. Article 392 of the Civil Code of Ukraine stipulates that the owner of property may file a lawsuit for recognition of their property right, if this right is disputed or not recognised by another person, as well as in case of loss of a document certifying their property right [27]. Accordingly, the plaintiff here will be an entity that considers itself the owner of certain property, but cannot properly exercise its powers due to the existence of doubts concerning this right from third parties or the need to procure title establishing documents. The defendant in this claim may be any person who does not recognise, denies, or disputes the right of the plaintiff to exercise the powers of possession, use, and disposal of the disputed property, or has their interest in this property.

Prerequisite for the application of Article 392 of the Civil Code of Ukraine[2] is the absence of other ways to recognise the relevant right of ownership of property except the judicial. It is obvious that a special recognition of the right of ownership of property by the court can take place even when the plaintiff does not have the necessary title establishing documents regarding its affiliation. Thus, the Supreme Specialised Court of Ukraine for Civil and Criminal Cases in its decision of February 7, 2014 "On judicial practice in cases of protection of ownership and other real rights"[3] outlined legal positions on the application of Article 392 of the Civil Code of Ukraine and noted that the need for such a method of protection of property rights arises, in particular, when the existence of the subjective right of the owner is not confirmed by relevant documents, doubtful, not recognised by other

[1] Decree of the Cabinet of Ministers of Ukraine No. 1127 “On the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances”. (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF.

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

[3] Resolution of the Plenum of the High Specialized Court of Ukraine for the Consideration of Civil and Criminal Cases No. 5 “On Judicial Practice in Cases of Protection of Ownership and Other Property Rights”. (2014, February). Retrieved from https://zakon.rada.gov.ua/laws/show/v0005740-14.

persons, or is disputed. That is, the possibility of consideration of cases on the recognition of property rights stipulated by Article 392 of the Civil Code of Ukraine in courts can be justified not only by the loss, but also by the complete absence of title establishing documents. Therefore, if a person who considers themselves the owner of the newly created real estate, after the completion of construction and commissioning of the object, cannot properly exercise their powers in connection with other persons obstructing the registration of ownership of the newly created immovable property, the rights of such a person shall be subject to remedy by means of filing a claim for recognition of ownership of property belonging to this person, which is a proper and effective way to protect substantive rights.

As noted in the legal literature, any civil agreement must meet certain requirements, compliance with which is necessary [28]. Thus, the content of the agreement on sale and purchase of property rights to real estate must contain a technical description of the apartment as an investment object in the building with the specification of the address of the building, its number, floor, size of the total project and residential area, number of rooms. It is important to attach a plan (scheme) to the agreement, which outlines the corresponding investment object. After all, the agreement is a way of legal regulation of the behaviour of the parties in civil obligations, as the will of the parties is consolidated in the contractual terms, which shall be consistent with provisions of relevant legislation [27]. Pursuant to Article 2 of the Law of Ukraine "On Financial and Credit Mechanisms and Property Management in Housing Construction and Real Estate Transactions"[1] the construction object is a building, structure, or complex of buildings, the construction of which is organised by the developer and carried out by the manager at the expense of funds received for management, and the investment object is an apartment or premises for social and domestic purposes (built into residential buildings or separately located non-residential premises, garage, parking space, etc.) in the construction object, which after completion of construction becomes a separate property.

According to Article 13 of the Law of Ukraine "On Financial and Credit Mechanisms and Property Management in Housing Construction and Real Estate Transactions"[2], the system of operation of construction financing funds provides, in particular, determination of the specifications of construction objects and investment objects, the transfer of the list of investment objects in the construction objects by the developer to the manager of the construction financing fund, the assignment of the chosen investment object by the manager to the principal, which confirms the order for construction of this investment object as a part of the construction object, transfer of the ownership rights to the investment objects by the manager to the principals who have fully invested these objects under the sale and purchase agreement , as well as state registration of principals' ownership of the investment objects, compliance with the deadlines for construction, compliance with the technical specifications of construction project and investment objects, the use of measures to eliminate the identified shortcomings, commissioning of the construction object by the developer, written notice of the manager, ordering technical documentation for the construction object and for each investment object, transfer of data on the actual area of

[1] Law of Ukraine No 978-IV “On Financial and Credit Mechanisms and Property Management in Housing and Real Estate Transactions”. (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/978-15
[2] *Ibidem*, 2003.

investment objects to the manager of the construction financing fund, the performance of final settlements by the principal with the manager according to the actual area of investment objects, etc.

The commissioning of completed construction objects is preceded by a technical inventory of the property. Thus, in accordance with Part 1 Article 393 of the Law of Ukraine "On regulation of urban planning activities"[1], technical inventory of real estate is a set of works to determine the composition, actual area, volume, technical condition and/or determine changes in these specifications for a certain period of time with the preparation of corresponding documents (materials of technical inventory, technical passport) with the use of the Register of construction activities. Furthermore, construction objects, houses, buildings, structures, apartments, other residential and non-residential premises, which constitute independent real estate, are assigned the appropriate address (Part 3 Article 263 of the Law of Ukraine "On Regulation of Urban Development"[2]). In case when subsequent to the assignment of the address there was an adjustment of the design documentation, which may affect the determination of the address of the construction object (change of location of the object, main entrance, etc.), the customer shall specify the need for the adjustment (change, assignment) of address in the respective notice of such changes.

That is, subsequent to the completion of construction and commissioning of the building, certain parameters of both the construction object and the investment object (apartment), for which the agreement on sale and purchase of property rights was concluded, may change, which should be specified in the said agreement. Therewith, if all available documents, schemes, plans, examinations, technical data sheets attest to the fact that it is the same investment object (the apartment which is a subject of the agreement, and the apartment which is created in the course of construction), there are no obstacles to the application of the provisions of Article 392 of the Civil Code of Ukraine[3] y in case of alienation of such an investment object to third parties under the guise of another object subsequent to the commissioning of the building. Moreover, the application of Article 392 of the Civil Code of Ukraine in cases of alienation of the investment object to third parties under the guise of another object after putting the house into operation, should be considered a proper and effective remedy for the investor.

Notably, the reasoning of the possibility of applying Article 392 of the Civil Code of Ukraine with regard to newly created real estate, despite the contradictory nature of the judicial practice on this issue, is provided, in particular, in the decision of the Supreme Court of Ukraine of 13 April 2016 in case No. 6-160цс16 [29], which states that protection of property rights to newly created property that was commissioned and issued (registered) to another person, in case this person does not recognise the plaintiff's rights to the disputed property shall be performed in accordance with the procedure prescribed by the legislation, and if such a special procedure is not defined, the protection of property rights is performed

[1] Law of Ukraine No 3038-VI “On Regulation of Urban Planning Activity”. (2011, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3038-17

[2] *Ibidem*, 2011.

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

on the general principles of civil legislation (in particular, based on Article 392 of the Civil Code of Ukraine[1]).

Furthermore, Article 387 of the Civil Code of Ukraine stipulates the right of the owner to claim their property from a person who illegally, without appropriate legal basis, took possession of it. Therewith, considering the provisions of Article 396 of the Civil Code of Ukraine, which extends the application of real right remedies inherent in the owner to the acquirers of other real rights to another's property, one can conclude that vindication as a separate remedy is available not only to the owner [30-31]. In turn, the defendant in the vindication claim is the illegal holder of the owner's property, who may not be aware of the illegality of possession and maintenance of such property. In this case, illegal owners are considered to be both persons who directly illegally seized someone else's property, and persons who acquired property not from the owner, i.e. from a person who did not have the right to dispose of it. The basis for the vindication claim is circumstances confirming the legitimacy of the plaintiff's claim for return of property from someone else's illegal possession (these are facts confirming the ownership of the claimed property, its disposal from the plaintiff's possession, its being in kind with the defendant, etc.). That is, vindication and other property rights may be available to the owner of rights to immovable property. However, their application must consider the condition of property creation, because it is impossible to vindicate property that does not exist. In other words, as a general rule, vindication, as well as a negative claim against real estate, is possible subsequent the completion of construction and commissioning of the respective objects.

CONCLUSIONS

Therefore, considering the ambiguity of judicial practice on the application of the remedy of substantive rights under Article 392 of the Civil Code of Ukraine in legal relations, the object of which is the newly created real estate, it was established that to properly remedy the violated rights to the newly created object of construction by terminating non-recognition or contesting ownership, it is advisable to apply the remedy prescribed by Article 392 of the Civil Code of Ukraine, namely the recognition of ownership of newly created real estate. This conclusion was drawn in spite of the fact that, upon conclusion of an agreement on sale and purchase of property rights to real estate, the buyer receives a limited real right, under which it is endowed with certain but not all rights of the property owner, and which certifies the right of its owner to acquire ownership of real estate in the future. After all, a buyer who has performed its monetary obligations under the said agreement, having fully paid the contractual value, shall be considered as such that committed actions aimed at the occurrence of legal facts necessary and sufficient to obtain the right to transfer ownership of the construction object.

Ownership of newly created real estate arises from the moment of completion of construction, commissioning of real estate, and from the moment of state registration of ownership. Thus the state registration does not constitute a way of acquisition of the property right and merely confirms the fact of acquisition, change, or the termination of the real rights to immovable property. Furthermore, the issuance of a certificate of ownership does not give rise to the ownership, but only registers the fact of presence of

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

such a right. Applying to the court to recognise the buyer's ownership of the property invested by them, in accordance with the provisions of Article 392 of the Civil Code of Ukraine, may take place in cases where the property is already built and commissioned, but for which no title establishing documents were procured due to the seller or other persons obstructing the registration of ownership of the investment object under the agreement on sale and purchase of property rights to immovable property, the value of which is paid by the buyer in full, and in case the seller does not recognise the buyer's right to investment object or alienates it to third parties under the guise of another object. In this regard, when recognising the ownership of newly created real estate, the effectiveness of the remedy stipulated in Article 392 of the Civil Code of Ukraine is aimed at eliminating the possibility of further illegal actions of third parties in respect of such property. This is achieved through the enforcement of a judgement by recognising the ownership of a particular object, and in case of its destruction – by obtaining appropriate compensation. Therewith, in cases when the construction of real estate object has not yet been completed and it has not been commissioned, but has been fully invested, an effective way to remedy the violated rights is the recognition of property rights to the investment object in the object of unfinished construction.

Thus, to harmonise the judicial practice and develop common approaches in choosing an effective way to protect the rights of subjects of legal relations, the object of which is newly created real estate, it is necessary to expand the scope of grounds for judicial recognition of property rights under Article 392 of the Civil Code. Such grounds should include not only the loss, but also the absence of title establishing documents in connection with other persons obstructing the registration of ownership of the relevant investment object subsequent to the commissioning of the construction object; non-recognition of the investor's rights to the relevant investment object, or its alienation to other persons.

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ПОНЯТТЯ ТА СПОСОБИ ГАРМОНІЗАЦІЇ ПРИВАТНОПРАВОВОГО ЗАКОНОДАВСТВА УКРАЇНИ В СФЕРІ НАДАННЯ ТРАНСПОРТНИХ ПОСЛУГ ІЗ ЗАКОНОДАВСТВОМ ЄВРОПЕЙСЬКОГО СОЮЗУ

Анотація. *Стаття присвячена гармонізації приватноправового законодавства України в сфері надання транспортних послуг із законодавством Європейського Союзу. Метою дослідження є формулювання поняття та визначення основних способів гармонізації приватноправового законодавства України в сфері надання транспортних послуг із законодавством Європейського Союзу. Основним методом наукової роботи є метод правового аналізу, використання якого дало змогу визначити можливі шляхи гармонізації національного законодавства в окресленій сфері до європейських стандартів. На підставі аналізу норм національного законодавства та законодавства Європейського Союзу розмежовано терміни «гармонізація», «адаптація» та «наближення». Запропоновано під гармонізацією приватноправового законодавства в сфері надання транспортних послуг із законодавством Європейського Союзу розуміти процес коригування законодавства України на підставі правових актів ЄС, зокрема, директив та регламентів, з метою приведення національного законодавства у відповідність до їх положень. За результатами проведеного дослідження встановлено, що гармонізація приватноправового законодавства України в сфері надання транспортних послуг із законодавством ЄС відбувається трьома способами, а саме: 1) приєднання України до міжнародних нормативно-правових актів, які діють на території ЄС, чи підписання двосторонніх договорів про співпрацю у сфері надання транспортних послуг з країнами ЄС; 2) розроблення та прийняття нормативно-правових актів України у сфері надання транспортних послуг, які враховують положення права ЄС; 3) імплементація в національне законодавство положень регламентів та директив ЄС шляхом внесення змін та доповнень до чинних нормативно-правових актів України. Практичне значення результатів дослідження полягає у тому, що теоретичні положення та висновки можуть стати основою для подальших наукових досліджень правового регулювання договірних відносин з надання транспортних послуг в умовах євроінтеграційних процесів. Матеріали статті можуть бути використані в навчальному процесі для підготовки навчально-методичного забезпечення і викладання відповідних тем у розрізі навчальних курсів цивільного, договірного та зобов'язального права, а також спеціальних цивілістичних дисциплін.*

Ключові слова: гармонізація, адаптація, наближення, договірні відносини, надання транспортних послуг, європейські стандарти.

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THE CONCEPT AND METHODS OF HARMONISATION OF THE PRIVATE LAW LEGISLATION OF UKRAINE IN THE FIELD OF PROVISION OF TRANSPORT SERVICES WITH THE LEGISLATION OF THE EUROPEAN UNION

Abstract. *The article is devoted to the harmonisation of private law legislation of Ukraine in the field of transport services with the legislation of the European Union. The purpose of the study is to formulate the concept and determine the main ways to harmonise the private law of Ukraine in the field of transport services with the legislation of the European Union. The main method of scientific work is the method of legal analysis, the use of which made it possible to identify possible ways to harmonise national legislation in this area to European standards. Based on the analysis of the norms of national legislation and the legislation of the European Union, the terms "harmonisation", "adaptation" and "approximation" were distinguished. It was proposed to understand the harmonisation of private legislation in the field of transport services with the legislation of the European Union as the process of adjusting Ukrainian legislation on the basis of EU legislation, in particular directives and regulations, in order to bring national legislation in line with their provisions. According to the results of the study, the harmonisation of private law of Ukraine in the field of transport services with EU law occurs in three ways, namely: 1) Ukraine's accession to international regulations in force in the EU, or the signing of bilateral agreements on cooperation in in the field of providing transport services with EU countries; 2) development and adoption of regulatory legal acts of Ukraine in the field of transport services, which take into account the provisions of EU law; 3) implementation into national legislation of the provisions of EU regulations and directives by making changes and additions to the current regulations of Ukraine. The practical significance of the research results is that the theoretical provisions and conclusions can become the basis for further research on the legal regulation of contractual relations for the provision of transport services in the context of European integration processes. The materials of the article can be used in the educational process for the preparation of educational and methodological support and teaching of relevant topics in terms of training courses in civil, contract and contract law, as well as special civil disciplines.*

Keywords: harmonisation, adaptation, approximation, contractual relations, provision of transport services, European standards.

INTRODUCTION

Having chosen the European integration course, Ukraine has embarked on the path of social, economic and legal reforms. The success of the implementation of the tasks set before the state largely depends on the extent to which national legislation meets the standards of European law. After the entry into force of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy

Community and their Member States, on the other hand[1], one of the priority areas of Ukrainian legislation, including in the field of transport services, has become its maximum approximation to the norms of the acquis communautaire. This seems important not only from the standpoint of law-making and law enforcement – to improve the mechanism of regulation of contractual relations for the provision of transport services, but also from an economic point of view, as the provision of such services provides about 8% of Ukraine's gross domestic product. However, the process of harmonisation of Ukrainian legislation in the field of transport services is complicated by the presence of a large number of different legal acts, some of which are outdated and do not correspond to modern dynamics of contractual relations, as well as different legislative approaches to consolidate contractual structures that mediate transport services in codified acts of private law. At the same time, it can be stated that in the mechanism of legal regulation of contractual relations for the provision of transport services still remains a priority to ensure the legal protection of the transport service provider, rather than its customer, including natural person – consumer. Whereas Art. 3 of the Constitution of Ukraine stipulates that a person, his life and health, honour and dignity, inviolability and security are recognised as the highest social value. In addition, a conceptual revision requires a legislative approach to the balance of the application of dispositive and imperative methods of legal regulation of private law relations in the field of transport services [1]. The above gives grounds to assert that the civil doctrine requires scientific and theoretical study of ways to harmonise the private law of Ukraine in the field of transport services with the legislation of the European Union and the effectiveness of their application.

Contractual relations for the provision of transport services have repeatedly been the subject of research in the works of Ukrainian and foreign civilians, including I.O. Bezliudko [2], M.I. Brahinskii, V.V. Vitrianskii [3], I.V. Bulhakova [4], T.V. Hriniak [5], U.P. Hrishko [6], I.A. Dikovska [7], O.V. Klepikova [8], T.O. Koliankovska [9] and many others. However, such scientific developments usually concerned certain types of contracts that mediate the obligation to provide transport services, or only certain aspects of such contractual relations. At the same time, despite such a large number of scientific works, there is no study in the civil doctrine of the concept and methods of harmonisation of private law of Ukraine in the field of transport services with the legislation of the European Union [10-12]. In this regard, there is no doubt about the necessity to determine the theoretical basis for the process of approximation of national legislation in the field of transport services to European standards. Therefore, such research is aimed at meeting the current needs of science and practice [13; 14]. The purpose of this research is to formulate the concept and determine the main ways to harmonise the private law of Ukraine in the field of transport services with the legislation of the European Union [15-17].

1. MATERIALS AND METHODS

The materials for writing this scientific article were regulations, scientific works of Ukrainian civilians in the field of contract law and researches in the field of European

[1] The Association Agreement between Ukraine, on one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand. (2014, June). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011.

integration processes. The regulatory framework used in the research includes: the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand; Consolidated versions of the Treaty on European Union[1]; regulations and directives of the European Union in the field of transport services, in particular Regulation (EU) of the European Parliament and the Council 392/2009 on the liability of carriers of passengers by sea in the event of accidents[2], Regulation (EC) of the European Parliament and of the Council 261/2004 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing[3], Council Regulation 2027/97 on air carrier liability in the event of accidents[4], Regulation (EC) of the European Parliament and of the Council 1371/2007 on rights and obligations of rail passengers[5], Regulation of the European Parliament and the Council (EU) 181/2011 concerning the rights of passengers in bus and coach transport[6], Directive 2008/68/EC of the European Parliament and the Council on the inland transport of dangerous goods[7], Council Directive 92/106/EEC on the establishment of common rules for certain types of combined transport of goods between Member States[8], Directive 2002/6/EU amending Directive 97/67/EU on the completion of the internal market for postal services[9], Directive 2002/39/EU amending Directive 97/67/EU concerning the further opening of postal services of Communities for competition[10]; The Civil Code of Ukraine[11]; Economic Code of Ukraine[12]; National Transport Strategy of Ukraine till 2030[13]; Methodology for determining the criteria of the European integration component

[1] Consolidated versions of the Treaty on European Union (1992, February) and of the Treaty on the Functioning of the European Union (1957, March); (2010, March). Retrieved from https://zakon.rada.gov.ua/laws/show/994_b06.

[2] Regulation (EC) of the European Parliament and the Council No. 392/2009. (2009, April). Retrieved from https://eur-lex.europa.eu/legal-content/BG/TXT/?uri =CELEX:32009R0392.

[3] Regulation (EU) of the European Parliament and the Council No. 261/2004. (2004, February). Retrieved from https://zakon.rada.gov.ua/laws/show/994_912.

[4] EU Council Regulation No. 2027/97. (1997, October). Retrieved from https://zakon.rada.gov.ua/laws/show/994_a93.

[5] Regulation (EU) of the European Parliament and of the Council No. 1371/2007. (2007, October). Retrieved from http://doszt.gov.ua/content/media/Reglament-1371-UA.pdf.

[6] Regulation of the European Parliament and of the Council (EU) No. 181/2011 amending Regulation (EU) No. 2006/2004. (2011, February). Retrieved from https://minjust.gov.ua/m/str_45893.

[7] Directive of the European Parliament and the Council No. 2008/68/EC. (2008, September). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0068.

[8] Council Directive No. 92/106/EEC. (1992, December). Retrieved from https://minjust.gov.ua/m/str_45893.

[9] Directive No. 2008/6/EC of the European Parliament and of the Council supplementing Directive No. 97/67/EC. (2008, February). Retrieved from https://minjust.gov.ua/m/str_45879.

[10] Directive No. 2002/39 / EC amending Directive No. 97/67/EC. (2002, June). Retrieved from https://minjust.gov.ua/m/str_45879.

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

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

[13] National Transport Strategy of Ukraine for the period up to 2030: Order of the Cabinet of Ministers of Ukraine No. 430-r. (2018, May). Retrieved from https://zakon.rada.gov.ua/laws/show/430-2018-%D1%80.

of state target programs[1]; Action plan for the implementation of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand[2]; Strategic plan for the development of river transport for the period up to 2020[3]; Rules for the carriage of goods in direct mixed rail-water service[4]; Rules for transportation of dangerous goods by inland waterways of Ukraine[5]; Aviation rules of Ukraine "Rules of air transportation and service of passengers and luggage"[6] and other regulations. Draft laws of Ukraine "On Railway Transport"[7], "On Inland Water Transport"[8], "On Multimodal Transportation"[9], "On Amendments to the Law of Ukraine "On Postal Services""[10],"On Amendments to Certain Laws of Ukraine Concerning Compulsory Liability Insurance of carrier for Damage Caused to Life, Health of Passengers and Third Parties"[11] etc.

The methodological basis of this scientific article was general scientific and special legal methods of scientific knowledge. In particular, the use of the method of legal analysis made it possible to determine in the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand[12], the main directions of approximation of Ukrainian private legislation in transport services to European standards. The modelling method was

[1] Methodology for determining the criteria of the European integration component of the state target programs: Order No. 62 of the Ministry of Economy and European Integration of Ukraine. (2005, March). Retrieved from https://zakon.rada.gov.ua/laws/show/z0438-05.

[2] Action plan for the implementation of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand: Resolution No. 1106 of the Cabinet of Ministers of Ukraine. (2017, October). Retrieved from https://www.kmu.gov.ua/ua/npas/pro-vikonannya-ugodi-pro-asociaciyu-mizh-ukrayinoyu-z-odniyeyi-storoni-ta-yevropejskim-soyuzom-yevropejskim-spivtovaristvom-z-atomnoyi-energiyi-i-yihnimi-derzhavami-chlenami-z-inshoyi.

[3] Strategic plan for the development of river transport for the period up to 2020: Order No. 543 of the Ministry of Infrastructure of Ukraine. (2015, December). Retrieved from https://mtu.gov.ua/documents/446.html.

[4] Rules for the carriage of goods in direct mixed rail-water service: Order No. 334 of the Ministry of Transport of Ukraine. (2002, May). Retrieved from https://zakon.rada.gov.ua/laws/show/z0566-02.

[5] Rules of transportation of dangerous goods by inland waterways of Ukraine: Order of the Ministry of Infrastructure of Ukraine No. 126. (2017, April). Retrieved from https://zakon.rada.gov.ua/laws/show/z0556-17.

[6] Aviation rules of Ukraine: Order of the State Aviation Service of Ukraine No. 1239. (2018, November). Retrieved from https://zakon.rada.gov.ua/laws/show/z0141-19.

[7] Draft Law of Ukraine No. 7316 on Railway Transport of Ukraine. (2017, November). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id= &pf3511=62929.

[8] Draft Law of Ukraine No. 1182-1 on Inland Water Transport. (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66739.

[9] Draft Law of Ukraine No. 2685 on Multimodal Transportation. (2019, December). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67796.

[10] On Amendments to the Law of Ukraine No. 2984-VI "On Postal Services". (2011, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2984-17#Text.

[11] On Amendments to Certain Laws of Ukraine Concerning Compulsory Liability Insurance of carrier for Damage Caused to Life, Health of Passengers and Third Parties: Draft Law of Ukraine (2016, May). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59039.

[12] The Association Agreement between Ukraine, on one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand. (2014, June). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011.

used as a universal for scientific argumentation of a number of conclusions and proposals in the development of recommendations aimed at improving the current legislation in the field of regulation of contractual relations for the provision of transport services. The concept of harmonisation of private law of Ukraine in the field of transport services with EU law was clarified using the methods of analysis and synthesis. The dialectical method of research provided an opportunity to highlight the dynamics of amendments to the legislation of Ukraine in the field of transport services. The systematic method was used to systematise the ways of approximation of national legislation in the outlined area to European standards. The use of the method of legal forecasting made it possible to identify possible areas for harmonisation of private law of Ukraine in the field of transport services with the legislation of the European Union. The comparative legal method was used when comparing the norms of individual legislative acts of Ukraine with each other, as well as the provisions of acts of the European Union and national legislation.

2. RESULTS AND DISCUSSION

Ukraine's implementation of the Association Agreement with the EU has led to the frequent use of the terms "harmonisation", "adaptation" and "approximation" in national legislation, which gives rise to theoretical discussions in scientific doctrine on the relationship between these concepts [18; 19]. Definitions of these terms are enshrined in law. Thus, in accordance with the Methodology for Determining the criteria of the European integration component of state target programs, approved by the Order of the Ministry of Economy and European Integration of Ukraine of March 16, 2005[1], the term "legislative adaptation" is used as a synonym for approximation and is understood as process of bringing the laws of Ukraine and other regulations into line with the acquis communautaire. At the same time, the acquis communautaire is the EU legal system, which includes (but is not limited to) EU legislation adopted within the EU, the common foreign and security policy, cooperation in the field of justice and home affairs [20]. And harmonisation is the process of bringing national standards into line with EU standards[2]. Thus, the meaning of the terms "harmonisation", "adaptation" and "approximation" indicates that they are synonymous [21; 22].

The norms of the Association Agreement between Ukraine and the EU on the regulation of transport services use all three of these terms (in particular, in Article 114 – "adaptation", in Article 138 – "approximation", in Article 368 – "harmonisation"). Whereas in the founding treaties of the EU the term "harmonisation" is most often used (Part 5 of Article 2, Part 2 of Article 19, Part 4 of Article 79, Part 2 of Article 83, Article 84, Article 113 of the Treaty on functioning of the EU on March 25, 1957[3]). An analysis of the Consolidated Version of the EU Treaty and the Treaty on the Functioning of the EU with protocols and declarations[4] makes it possible to conclude that the concept of

[1] Methodology for determining the criteria of the European integration component of the state target programs No. 62. (2005, March). Retrieved from https://zakon.rada.gov.ua/laws/show/z0438-05.
[2] *Ibidem,* 2005.
[3] Consolidated versions of the Treaty on European Union (1992, February) and of the Treaty on the Functioning of the European Union (1957, March); (2010, March). Retrieved from https://zakon.rada.gov.ua/laws/show/994_b06.
[4] *Ibidem,* 2010.

"harmonisation" characterises the process of bringing legislation in line with EU law within the EU and is a statutory obligation of Member States. Therefore, in the future the authors propose to understand the harmonisation of private law of Ukraine in the field of transport services with EU law, the process of adjusting Ukrainian law on the basis of EU legislation, in particular directives and regulations, in order to bring national legislation in line with their provisions. The directives and regulations of the European Parliament and the Council in the field of transport, to the content of which Ukraine undertakes to gradually approximate its legislation, set out in Annexes XXXII[1] and XXXIII[2] to Chapter 7 "Transport", Section V "Economic and Sectoral Cooperation" of the Association Agreement. In total, the annexes indicate 49 EU directives and regulations and schedules for their implementation in Ukrainian legislation. Thus, "civil law must comply with trends in the development of contract law of the European Union" [23; 24].

It is worth agreeing with the position expressed in the legal literature that the provisions of the Association Agreement with the EU on harmonisation are framework in nature, and their implementation requires the adoption of relevant regulations, creation of necessary institutional mechanisms and implementation of certain actions at the international level. and the Union [25]. After all, as noted by A.A. Hryniak, O. Kot and M.D. Pleniuk, the essence and meaning of law become apparent through the regulation of a particular phenomenon [26]. Such a legal act, which determines the principles of approximation of national legislation to European standards, is the National Transport Strategy of Ukraine for the period up to 2030[3], approved by the Cabinet of Ministers of Ukraine from May 30, 2018. According to the provisions of this strategy, the priorities of the executive authorities of Ukraine are: 1) ensuring the implementation of the requirements of EU legislation in the field of transportation and harmonisation of Ukrainian legislation with EU legislation by improving the regulatory framework; 2) ensuring the creation of equal and transparent conditions in the market for the provision of transport services, namely: the adoption of regulations on the liberalisation of the transport market and non-discriminatory open competition in accordance with EU legislation; guaranteeing equal, open and transparent access of operators to the transport infrastructure; development of a transparent national market for freight forwarding services, etc.

In addition, the National Transport Strategy of Ukraine[4] has formed areas for ensuring the development of certain modes of transport, in particular:

– railway transport (liberalisation of the railway transport market on the basis of equal access to railway infrastructure and fair competition between carriers; regulatory and legal support of the railway transport market by adopting a new Law of Ukraine "On Railway Transport"[5] and relevant bylaws; reforming public administration in the transport sector in accordance with EU standards, introduction of a mechanism for admission to the

[1] Appendix XXXII to Chapter 7 "Transport". Retrieved from https://www.kmu.gov.ua/storage/app/media/ugoda-pro-asociaciyu/32_Annex.pdf.

[2] Appendix XXXIII to Chapter 7 "Transport". Retrieved from https://www.kmu.gov.ua/storage/app/media/ugoda-pro-asociaciyu/33_Annex.pdf.

[3] National Transport Strategy of Ukraine for the period up to 2030: Order of the Cabinet of Ministers of Ukraine No. 430-r. (2018, May). Retrieved from https://zakon.rada.gov.ua/laws/show/430-2018-%D1%80.

[4] *Ibidem*, 2018.

[5] Draft Law of Ukraine No. 7316 on Railway Transport of Ukraine. (2017, November). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id= &pf3511=62929.

railway market of carriers of various types of property (licensing, safety certification), structural reform of PJSC "Ukrzaliznytsia" – financial and organisational separation of the infrastructure operator and the carrier);

– road transport (gradual liberalisation of international road haulage; introduction of a new approach to the licensing of road hauliers, including, in particular, requirements for business reputation, financial capacity, professional competence of staff and ensuring the procedure for access to the road transport market in accordance with EU legislation);

– water transport (simplification of formalities for registration of cargo and vessels in commercial ports; institutional and legislative support for Ukraine to fulfil its obligations as a flag state, port state and coastal state in accordance with international treaties of Ukraine and EU legislation; introduction of simplified conditions for registration of vessels under the State flag of Ukraine, the creation of an international register of vessels, the gradual liberalisation of freight transport by inland waterways, the opening of inland waterways for foreign vessels);

– air transport (liberalisation of air traffic by removing restrictions on a parity basis on the number of designated airlines, points and frequencies during flights between Ukraine and the world; signing and implementation of the Common Aviation Area Agreement with the EU while holding bilateral talks on air traffic liberalisation) and other.

To implement these areas, the Cabinet of Ministers of Ukraine approved the Action Plan for the implementation of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, dated October 25, 2017, Resolution No. 1106[1]. In 2018, in cooperation with the EU, the Cabinet of Ministers of Ukraine developed a draft action plan for 2019-2021 for the implementation of the National Transport Strategy of Ukraine[2], which is at the stage of public discussion on the website of the Ministry of Infrastructure of Ukraine. The pages of the legal literature identify various ways to harmonise national legislation with EU law, including: 1) accession to legal acts that establish international standards in a given area; 2) harmonisation of the provisions of the national regulatory framework with the provisions of the resolutions of the institutions of the European Union; 3) mutual recognition of national standards of Ukraine and the EU; 4) adoption of national legal acts that take into account to some extent the provisions of EU law; 5) incorporation of EU legal acts into national law; 6) parallel adoption by countries of regulations that are identical or similar in content to EU acts, etc. [27]. The authors will try to identify ways to harmonise the national legislation of Ukraine with the legislation of the EU in the field of transport services. One of the ways to harmonise national legislation is for Ukraine to accede to international regulations in force in the EU, or to sign bilateral agreements on cooperation in the provision of transport services with EU countries. Thus, in accordance

[1] Action plan for the implementation of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand: Resolution of the Cabinet of Ministers of Ukraine No. 1106. (2017, October). Retrieved from https://www.kmu.gov.ua/ua/npas/pro-vikonannya-ugodi-pro-asociaciyu-mizh-ukrayinoyu-z-odniyeyi-storoni-ta-yevropejskim-soyuzom-yevropejskim-spivtovaristvom-z-atomnoyi-energiyi-i-yihnimi-derzhavami-chlenami-z-inshoyi.

[2] On approval of the action plan during 2019–2021 for the implementation of the National Transport Strategy of Ukraine for the period up to 2030. Retrieved from https://mtu.gov.ua/projects/view.php?P=193.

with the Resolution of the Cabinet of Ministers of Ukraine of November 21, 2018, No. 991, Ukraine acceded to the Protocol of 1988 to the International Convention on Trademarks of 1966, with the amendments in 2003, 2004, 2006, 2008, 2012, 2013 and 2014 to it[1].

Annex XXXII to the Association Agreement declares the conclusion and implementation of a large-scale Common Aviation Area Agreement and, regardless of the conclusion of the said Agreement, to ensure the implementation and coordinated development of bilateral air services agreements between Ukraine and EU Member States. According to paragraph 1788 of the Government's Action Plan for the implementation of the Association Agreement, the conclusion of the Common Aviation Area Agreement was scheduled for December 31, 2018. However, according to the website of the State Aviation Service of Ukraine, the negotiation process is still ongoing. The signing of the Agreement was twice postponed at the initiative of the EU. In order to find a compromise and agree on the content of the Common Aviation Area Agreement, consultations are continuing at various levels with the involvement of all stakeholders in the negotiation process. The second way to harmonise the private law of Ukraine in the field of transport services with EU law is the adoption of national regulations of Ukraine, which take into account the provisions of EU law.

Thus, according to the Association Agreement, within 8 years from the date of its entry into force, the provisions of Council Directive 92/106/EEC of 7 December 1992 establishing common rules for certain types of combined transport of goods between Member States must be enshrined in Ukrainian law[2]. Today, the carriage of goods in direct mixed traffic (combined or mixed carriage of goods) are governed by Art. 913 of the Civil Code of Ukraine[3] and Art. 312 of the Economic Code of Ukraine[4], the Rules of carriage of goods in direct mixed rail-water service, approved by the order of the Ministry of Transport of Ukraine dated May 28, 2002[5]. Transportation of goods in direct mixed rail-water service by other modes of transport has not received proper legal regulation. Therefore, in order to eliminate the legislative gap and harmonise domestic norms with the provisions of this directive, the Ministry of Infrastructure of Ukraine has developed a draft Law of Ukraine "On Multimodal Transportation", which is posted on the website of the Ministry for public discussion. The latter defines the legal and organisational principles of multimodal transportation in Ukraine and aims to create conditions for their development and improvement. The lion's share of the articles of this draft legal act is devoted to the regulation of contractual relations for the provision of transport services, in particular, defines the concept of multimodal contract, outlines its essential conditions, establishes the rights and obligations of the parties, their responsibilities (Articles 8-15) and others[6].

[1] On accession to the Protocol of 1988 to the International Convention on Trademarks of 1966, with the amendments: Resolution of the Cabinet of Ministers of Ukraine. (2018, November). Retrieved from https://zakon.rada.gov.ua/laws/show/991-2018-%D0%BF.

[2] Council Directive No. 92/106/EEC. (1992, December). Retrieved from https://minjust.gov.ua/m/str_45893.

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

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

[5] Rules for the carriage of goods in direct mixed rail-water service: Order of the Ministry of Transport of Ukraine No. 334. (2002, May). Retrieved from https://zakon.rada.gov.ua/laws/show/z0566-02.

[6] Draft Law of Ukraine No. 2685 on Multimodal Transportation. (2019, December). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67796.

In the field of railway transport, a draft Law of Ukraine "On Railway Transport of Ukraine" (Reg. No. 7316 of November 17, 2017)[1] has been developed to implement seven Directives and four Regulations at once. This draft law provides for a comprehensive reform of railway transport management and de-monopolisation of the railway transportation market. By the way, in the Verkhovna Rada of Ukraine, in addition to this bill, several other draft Laws of Ukraine "On Railway Transport of Ukraine" were registered (in particular, No. 3650 of December 14, 2015, No. 4593 of May 5, 2016, No. 9512 of January 30, 2019, No. 1196-1 of September 6, 2019)[2]. The development of draft acts on licensing conditions, determination of fees for access to railway infrastructure, recommendations for the development of safety management systems by railway enterprises, rules of equal access to railway infrastructure[3] are underway. According to Regulation (EU) No 1371/2007 of the European Parliament and the Council on the rights and obligations of rail passengers, the rights of passengers[4] to become national law include: 1) the right to cancel a trip if a passenger receives information that a train arrives at the destination station with a delay of at least 1 hour; 2) the right to demand a return to a station of departure if it is impossible to reach the final destination due to the delay; 3) the right to food, drinks and a place in the hotel in case of long waits; 4) the right to compensation for lost luggage (up to 1300 or up to 330 euros, depending on whether a passenger can or cannot prove the value of things); 5) the right of persons with disabilities to access stations, platforms, train rolling stock and other equipment of persons with disabilities or mobility impairments; 6) the right to information and others.

To comply with Art. 369 of the Association Agreement by the order of the Ministry of Infrastructure of Ukraine dated December 18, 2015, No. 543, the Strategic Plan for the development of river transport for the period up to 2020[5] was approved. In accordance with this strategy in the short term (up to 3 years, i.e. until 2018) it was planned to adopt the Law of Ukraine "On Inland Water Transport of Ukraine"[6]. However, as of today, the draft law has not been adopted. At the same time, it should be noted that the Verkhovna Rada of Ukraine registered a total of several draft laws on inland water transport of Ukraine[7] (No. 2475a of August 4, 2015, No. 2475a-d of July 9, 2018, No. 2475a-1 of

[1] Draft Law of Ukraine No. 7316 on Railway Transport of Ukraine. (2017, November). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id= &pf3511=62929.

[2] Draft laws of Ukraine about railway transport of Ukraine: Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc2_5_1_J?ses=10009&num_s=2&num=&date1=&date2=&name_zp=%EF%F0%EE+%E7%E0%EB%B3%E7%ED%E8%F7%ED%E8%E9+%F2%F0%E0%ED%F1%EF%EE%F0%F2&out_type=&id=.

[3] Report on the implementation of the Association Agreement between Ukraine and the EU for 2019: Results and plans. Retrieved from https://www.kmu.gov.ua/storage/app/sites/1/55-GOEEI/ar-aa-implementation-2019-4.pdf.

[4] Regulation (EU) of the European Parliament and of the Council on the rights and obligations of rail passengers No. 1371/2007. (2007, October). Retrieved from http://doszt.gov.ua/content/media/Reglament-1371-UA.pdf.

[5] Strategic plan for the development of river transport for the period up to 2020: Order of the Ministry of Infrastructure of Ukraine No. 543. (2015, December). Retrieved from https://mtu.gov.ua/documents/446.html.

[6] Draft Law of Ukraine on Inland Water Transport No. 1182-1. (2019, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66739.

[7] *Ibidem*, 2019.

August 19, 2015, No. 2475a-2 of August 20, 2015, No. 2475a-3 of June 16, 2017, No. 2475a-4 of March 7, 2018, 1182-1-d of January 17, 2020). Undoubtedly, the adoption of a special legal act that would regulate contractual relations for the provision of transport services in the field of river transport is extremely important. Because, as noted above, the Charter of Inland Water Transport of the USSR of 1955, the rules of which are much outdated, still remains in force on the territory of Ukraine. Certain regulations aimed at improving the legal regulation in the field of transportation have been adopted. For example, pursuant to Directive No. 2008/68/EU of the European Parliament and the Council of September 24, 2008 on the transport of dangerous goods by inland waterway[1], the order of Ministry of Infrastructure of Ukraine of April 4, 2017 approved the Rules for the Transport of Dangerous Goods by Inland Waterways of Ukraine[2]. Pursuant to Regulation (EU) No. 261/2004 of the European Parliament and the Council on the establishment of general rules on compensation and assistance to passengers in the event of refusal and cancellation or long delay of flights of February 11, 2004[3] and Council Regulation No. 2027/97 on the liability of air carriers in connection with the carriage of passengers and luggage from October 9, 1997[4] by the order of the State Aviation Service of Ukraine adopted on November 26, 2018. Aviation rules of Ukraine "Rules of air transportation and service of passengers and luggage"[5].

The third way to harmonise national legislation in the field of transport services is the implementation in the legislation of Ukraine of the provisions of EU Regulations and Directives by amending existing regulations. Thus, in order to harmonise national legislation with EU legislation in the field of postal services, a draft Law of Ukraine "On Amendments to the Law of Ukraine "On Postal Services"[6] was developed. It implements the provisions of Directive 97/67/EU of December 15, 1997[7], as amended by Directive 2002/39/EU of June 10, 2002[8] and Directive 2008/6/EU of February 20, 2008[9], which

[1] Directive of the European Parliament and the Council on the inland transport of dangerous goods No. 2008/68/EC. (2008, September). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0068.

[2] Rules of transportation of dangerous goods by inland waterways of Ukraine: Order of the Ministry of Infrastructure of Ukraine No. 126. (2017, April). Retrieved from https://zakon.rada.gov.ua/laws/show/z0556-17.

[3] Regulation (EU) of the European Parliament and the Council No. 261/2004. (2004, February). Retrieved from https://zakon.rada.gov.ua/laws/show/994_912.

[4] Council Regulation of the EU No. 2027/97. (1997, October). Retrieved from https://zakon.rada.gov.ua/laws/show/994_a93.

[5] Aviation rules of Ukraine: Order of the State Aviation Service of Ukraine No. 1239. (2018, November). Retrieved from https://zakon.rada.gov.ua/laws/show/z0141-19.

[6] On Amendments to the Law of Ukraine "On Postal Services": Draft Law of Ukraine, developed by the Ministry of Infrastructure of Ukraine. Retrieved from https://mtu.gov.ua/projects/view.php?P=192.

[7] Order of the Cabinet of Ministers of Ukraine No. 222-2015-r on approval of the plan developed by the Ministry of Infrastructure for the implementation of Directive No. 97/67/EC of the European Parliament and of the Council of 15 December 1997 (2015, March). Retrieved from https://zakon.rada.gov.ua/laws/show/222-2015-%D1%80#Text.

[8] Directive No. 2002/39/EC amending Directive No. 97/67/EC concerning the further opening-up of Community postal services to competition. (2002, June). Retrieved from https://minjust.gov.ua/m/str_45879.

[9] Directive 2008/6 / EC of the European Parliament and of the Council supplementing Directive 97/67/EC on the complete completion of the internal market of Community postal services (2008, February). Retrieved from https://minjust.gov.ua/m/str_45879.

establish common rules for the development of the internal market of the Community postal services and improving the quality of services, including: the provision of universal postal services; financing of universal postal services on the terms that guarantee the provision of services on a permanent basis; tariff principles and transparency of accounts for the provision of universal postal services; setting quality standards for the provision of universal postal services and implementing a system to ensure compliance with these standards and others. The draft law proposes a new concept of a designated postal operator that means the operator or postal operators, which in accordance with the law are intended to provide universal postal services throughout the territory of Ukraine. At the same time, universal postal services are postal services of the established quality level, which are provided to users on a permanent basis throughout Ukraine at prices (tariffs) regulated by the state. Universal postal services include most postal services: postal items weighing up to 2 kg; parcels weighing up to 10 kg; cecograms weighing up to 7 kg; registered and with declared value postal items[1]. However, the public was shocked by the information that the draft law does not define the procedure for appointing a new entity – a designated postal operator, which may create the ground for the formation of a new monopoly in the market of postal services, including mail transportation [28].

The Verkhovna Rada of Ukraine is considering a draft Law of Ukraine "On Amendments to Certain Laws of Ukraine Concerning Compulsory Liability Insurance of carrier for Damage Caused to Life, Health of Passengers and Third Parties" (Reg. No. 4642 of May 11, 2016)[2]. Adoption of this bill will ensure, inter alia, harmonised with European legislation liability and insurance regime for the carriage of passengers by sea (compliance with EU Regulation No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents[3]). During 2019, as part of the adaptation of Ukrainian legislation to EU legislation in the field of road transport, the government developed a draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Regulation of the Road Transport Services Market in Ukraine to Comply with the European Union Act"[4]. According to the Annex to the Association Agreement with the EU, national legislation should reflect the provisions of Regulation (EU) No 181/2011 of the European Parliament and of the Council on the rights of passengers in bus and coach transport of February 16, 2011[5]. Such rights of passengers in the field of road transport include: 1) the right to purchase a ticket and transportation on non-discriminatory terms; 2) the right to receive information on request for transport services in alternative formats accessible to disabled

[1] On Amendments to the Law of Ukraine "On Postal Services": Draft Law of Ukraine, developed by the Ministry of Infrastructure of Ukraine. Retrieved from https://mtu.gov.ua/projects/view.php?P=192.

[2] On Amendments to Certain Laws of Ukraine Concerning Compulsory Liability Insurance of carrier for Damage Caused to Life, Health of Passengers and Third Parties: Draft Law of Ukraine (2016, May). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59039.

[3] Regulation (EC) of the European Parliament and the Council No. 392/2009 (2009, April). Retrieved from https://eur-lex.europa.eu/legal-content/BG/TXT/?uri =CELEX:32009R0392.

[4] Report on the implementation of the Association Agreement between Ukraine and the EU for 2019: Results and plans. Retrieved from https://www.kmu.gov.ua/storage/app/sites/1/55-GOEEI/ar-aa-implementation-2019-4.pdf.

[5] Regulation of the European Parliament and of the Council (EU) on the rights of passengers in bus and coach transport No. 181/2011 amending Regulation (EU) No. 2006/2004 (2011, February). Retrieved from https://minjust.gov.ua/m/str_45893.

persons and persons with reduced mobility, for example, such as large font, plain language, Braille, electronic messages that can be obtained using adaptive technologies, or audio recordings; 3) the right to receive compensation and assistance in case of accidents; 4) the right of passengers to continue the trip, travel on a changed route and reimbursement of the fare in case of cancellation or long delay of the flight; 5) the right to receive assistance in case of cancellation or delay of dispatch and others. However, as noted by the Government of Ukraine in the Report on the Implementation of the Association Agreement between Ukraine and the European Union for 2019, the transport sector needs increased attention and accelerated implementation of commitments.

CONCLUSIONS

The entry into force of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, has led to the harmonisation of national legislation, including in the field of transport services, with European standards. Annexes XXXII and XXXII to Chapter 7 "Transport" of Section V "Economic and Sectoral Cooperation" of the Association Agreement define 49 directives and regulations of the European Union in the field of transport services and schedules for their implementation in the legislation of Ukraine. However, the provisions of this Agreement are framework in nature, and their implementation requires the adoption of new regulations, amendments to existing legislation, and so on. Based on the above study, the authors propose to harmonise the private legislation of Ukraine in the field of transport services with EU legislation to understand the process of adjusting Ukrainian legislation on the basis of European Union legislation, in particular directives and regulations, in order to bring national legislation in line with their provisions. Harmonisation of private law of Ukraine in the field of transport services with the legislation of the European Union is in three ways, namely: 1) Ukraine's accession to international regulations in force in the European Union, or the signing of bilateral agreements on cooperation in the provision of transport services European Union countries; 2) development and adoption of regulations of Ukraine in the field of transport services, which take into account the provisions of European Union law; 3) implementation in the legislation of Ukraine of the provisions of regulations and directives of the European Union by making changes and additions to the current regulations of Ukraine. At the same time, the process of approximation of private law of Ukraine in the field of transport services to European standards requires systemic changes in national legislation, faster pace and a thorough approach to defining regulations and directives that are implemented in current legislation. Therefore, the topic of harmonisation of private law in the field of transport services with European Union law is interesting for further research to identify conflicts between the laws of Ukraine and the provisions of regulations, directives of the European Union and ways to eliminate them.

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СУЧАСНИЙ СТАН ТА ТЕНДЕНЦІЇ ПРАВОВОГО РЕГУЛЮВАННЯ ДІЯЛЬНОСТІ ПРОФЕСІЙНИХ СПІЛОК В УКРАЇНІ

Анотація. *У статті здійснюється наукове опрацювання актуальної проблеми як для науки трудового права, так і для нормотворчої діяльності щодо сучасного стану та тенденцій правового регулювання діяльності професійних спілок в Україні. Актуальність дослідження обумовлене значенням соціального діалогу як в сфері праці, так і в інших сферах життєдіяльності українського суспільства для сталого розвитку національної економіки та держави у сучасних умовах. Мета статті полягає у наданні науково обґрунтованих висновків та пропозицій із удосконалення правового регулювання діяльності професійних спілок в Україні. У роботі із застосуванням загальнонаукових і спеціальних методів наукового пізнання (діалектичного, формально-логічного, порівняльно-правового, системного аналізу) розглянуто правовий статус професійних спілок; порівняно норми чинного національного трудового законодавства та законодавства в сфері прав професійних спілок з нормами проектів Трудового кодексу України, Закону України «Про працю» тощо, які передбачають права професійних спілок. Зроблено висновок про необхідність: 1) у сучасному і майбутньому національному трудовому законодавстві та законодавстві в сфері прав професійних спілок максимально зберегти норми, які спрямовані на забезпечення належної діяльності професійних спілок як представників і захисників трудових прав своїх членів у відносинах з роботодавцями та підтримання високого авторитету і статусу професійних спілок на підприємствах, установах, організаціях; 2) запровадження нових форм та методів діяльності професійних спілок в Україні, а також координації їх діяльності та об'єднання з професійними спілками, що діють на наднаціональному рівні; 3) забезпечити рівність прав всіх професійних спілок в Україні та можливість користування правами, повноваженнями і гарантіями діяльності, передбаченими національним трудовим законодавством та законодавством в сфері прав професійних спілок, в повному обсязі.*

Ключові слова: професійна спілка, соціальний діалог, трудові права, працівник, роботодавець, трудові правовідносини.

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CURRENT STATE AND TRENDS IN THE LEGAL REGULATION OF TRADE UNIONS IN UKRAINE

Abstract. *The paper investigates the relevant issues in both the science of labour law and the rule-making activities on the current state and trends in the legal regulation of trade unions in Ukraine.*

The relevance of the study is conditioned by the importance of social dialogue both in world of work and in other spheres of life of Ukrainian society for the sustainable development of the national economy and the state in modern conditions. The purpose of the paper is to provide scientifically sound conclusions and proposals for improving the legal regulation of trade unions in Ukraine. The study applied general scientific and special methods of scientific knowledge (dialectical, Aristotelian, comparative legal, system analysis) to inspect the legal status of trade unions; the provisions of the current national labour legislation and the legislation in the field of trade union rights were compared with the provisions of the draft Labour Code of Ukraine, the Law of Ukraine "On Labour", etc., which stipulate the rights of trade unions. The study concludes on necessity of the following: 1)to preserve to the full the provisions aimed at ensuring the proper operation of trade unions as representatives and defenders of labour rights of their members in relations with employers and maintenance of high authority and status of trade unions in enterprises, institutions, organisations in current and future national labour legislation and legislation on trade unions; 2) to introduce new forms and methods of activity of trade unions in Ukraine, as well as to coordinate their activities and association with trade unions operating at the supranational level; 3) to make maximum effort to ensure equality of rights of all trade unions in Ukraine and the possibility of exercising the rights, powers, and guarantees of activities stipulated by national labour legislation and legislation in the field of trade union rights.

Keywords: trade union, social dialogue, labour rights, employee, employer, labour relations.

INTRODUCTION

Nowadays, the society is witnessing a significant downturn in Ukraine's economy, caused primarily by quarantine restrictions aimed at combating the spread of coronavirus infection (COVID-19). In the earlier published macroeconomic forecast for 2020, the Cabinet of Ministers of Ukraine has worsened the forecast for inflation, wages, and gross domestic product even more. This is stated in the Resolution of the Cabinet of Ministers of Ukraine No. 253 of March 29, 2020: "To amend the Resolution of the Cabinet of Ministers of Ukraine No. 555 of May 15, 2019 "On approval of the Forecast of economic and social development of Ukraine for 2020-2022"[1]. In particular, according to the amended forecast, the inflation rate will increase to 11.6% from 8.7%, and Ukraine's GDP in annual terms will fall by 4.8% from the previously projected 3.9% [1].

The author addresses the fact that since March 12, 2020, quarantine has been introduced in Ukraine for all educational institutions [2]. Since March 17, 2020, the operation of shopping and entertainment centres, fitness centres, restaurants, and cafes has been temporarily banned. Since March 18, 2020, the government has banned regular and irregular transportation of passengers by road in suburban, long-distance, intra-regional and inter-regional traffic; transportation of more than 10 passengers simultaneously in trams, trolleybuses, and motor transport, in buses performing regular passenger transportation on city routes; transportation of passengers by subway in Kyiv, Kharkiv, and Dnipro; transportation of passengers by rail in all types of domestic connections (suburban, urban, regional, and long-distance) [3]. Since April 6, 2020, the government has been forbidden to stay in public places without wearing a mask or respirator; movement of groups of more than two people (except in cases of operational necessity and

[1] Resolution of the Cabinet of Ministers of Ukraine No 253. (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/253-2020-%D0%BF#Text

accompaniment of children); stay of persons under 14 years of age, unaccompanied by parents, in public places; visiting parks, squares, recreation areas, forest parks, and coastal areas (except for walking pets by one person and in case of operational necessity); visiting sports and children's playgrounds; visiting institutions and facilities providing palliative care, social protection, institutions and facilities providing social services; being on the streets without identity documents, etc. [4].

Razumkov Centre's economic programmes expert V.R. Sidenko notes that Ukraine was not economically prepared for the introduced restrictions as the country has neither reserves nor money. Therewith, the state has chosen the simplest way to fight the infection: to stop and ban everything [5]. The above prohibitions led to the suspension of activities of numerous enterprises and institutions, which in turn began to send employees on unpaid leave or dismiss them. This could not but affect the level of unemployment in Ukraine. Thus, the report of the State Employment Service, published on May 5, 2020, states: "As of May 4, 2020, the number of the unemployed registered with the State Employment Service amounts to 456.8 thousand people, which indicates a surplus of almost 148.5 thousand people, or 48% increase compared to the statistics on the same date last year" [6]. In view of the above, at present, it is becoming increasingly important to establish high-quality interaction between labour and capital through social dialogue so as to mitigate the adverse effects of Ukraine's economic downturn [7-10]. According to Article 1 of the Law of Ukraine "On Social Dialogue in Ukraine", social dialogue constitutes a process of defining and converging positions, reaching joint agreements and making agreed decisions by the parties to social dialogue, representing the interests of employees, employers, and executive authorities and local governments, on the development and implementation of state social and economic policy, regulation of labour, social, economic relations[1].

Trade unions are one of the parties to social dialogue. Historically established in the era of the birth of capitalism to collectively protect the labour rights and interests of employees, trade unions still have considerable authority in society and the state. Therewith, recent years have demonstrated a tendency to weaken the legal status of trade unions through amendments to national legislation. In this regard, the scientific analysis of the current state of legal regulation of trade unions in Ukraine and its development trends is considered to be important.

1. MATERIALS AND METHODS

The paper is based on the study of scientific achievements of Ukrainian and foreign scholars and the results of research on national legislation on the rights of trade unions. The study explored the scientific articles of representatives of the science of labour law, which highlighted the problems of legal regulation of trade unions in Ukraine and abroad. The study investigated the provisions of the Constitution of Ukraine[2], the Labour Code of

[1] Law of Ukraine No 2862-VI "On Social Dialogue in Ukraine". (2010, December). Retrieved from https://zakon.rada.gov.ua/laws/show/2862-17#Text.

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

Ukraine[1], the laws of Ukraine "On trade unions, their rights and guarantees of activity"[2], "On social dialogue in Ukraine"[3], "On the National Police"[4] and an array of draft laws, such as the draft Labour Code of Ukraine No. 1658 in the wording prepared for the second reading of 24.07.2017, the draft Labour Code of Ukraine No. 2410 of 08.11.2019, the draft Law of Ukraine "On Labour" No. 2708 of 28.12.2019, the draft Law of Ukraine "On Amendments to some legislative acts of Ukraine (on certain issues of trade unions) No. 2681 of 27.12.2019[5]. To achieve the purpose of the study, which is to provide scientifically sound conclusions and proposals on improvement of the legal regulation of trade unions in Ukraine, the appropriate research algorithm was selected, inherent in the set of collected materials, conditions, and forms of labour. The methodological framework of the study included general scientific and special scientific methods, the use of which is conditioned by the purpose of the study and the necessity of the use of the theoretical achievements of the science of labour law in national legislation. The paper used the dialectical method, the Aristotelian method, the comparative legal method, and the method of system analysis. In their interaction, the said methods allowed to carry out a full-fledged completed legal study. Each of the methods was used at a particular stage of the study, thus the methodology is balanced, sound, and comprehensive.

The basis of the research methodology is the dialectical method as an objectively necessary logic of the cognition process, which allows to consider the studied phenomenon in its development, the interrelations associated with the material conditions of social life. This method allowed the study to reveal the essence of such a complex institution of civil society as a trade union. The dialectical method allowed to consider the legal regulation of trade unions in the specific historical conditions of modern Ukraine and to determine the appropriateness of the reform measures proposed in recent years, aimed at weakening the role of trade unions in protecting labour rights. The Aristotelian method provided an opportunity to study the current state of legal regulation of trade unions in Ukraine and to suggest directions for its development. With the help of the Aristotelian method, the shortcomings of the legislative provisions in the field of trade union rights, which may affect the quality of guarantees of labour rights of employees in labour relations, were identified, and proposals for their elimination were provided.

The comparative legal method was used during consideration and comparison of provisions that stipulate the rights of trade unions, comprehensive draft acts of labour legislation with the corresponding provisions of the Labour Code of Ukraine. The use of the comparative legal method also allowed to determine the differences between the provisions of the Labour Code of Ukraine in the field of trade union rights and the relevant provisions of special legislation, in particular the Law of Ukraine "On the National Police".

[1] Labour Code of Ukraine. (1996, Jule). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08#Text

[2] Law of Ukraine No 1045-XIV “On trade unions, their rights and guarantees of activity”. (1999, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1045-14#Text.

[3] Law of Ukraine No 2862-VI “On Social Dialogue in Ukraine”. (2010, December). Retrieved from https://zakon.rada.gov.ua/laws/show/2862-17#Text.

[4] Law of Ukraine No 580-VIII “On the National Police” of July 2, 2015. Retrieved from https://zakon.rada.gov.ua/laws/show/580-19#Text.

[5] Draft Law of Ukraine No 2681 “On Amendments to Certain Legislative Acts of Ukraine (Regarding Certain Issues of Trade Unions’ Activities). (2019, December). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67792.

The method of systematic analysis was used in the study of scientific positions on the appointment of trade unions in the state, as well as the relevant rules of national legislation. System analysis convincingly proves the need to ensure the high legal status and authority of trade unions in Ukraine, to preserve the positive developments of legislators of different historical periods on the rights of trade unions, the introduction of new forms and methods of trade unions.

2. RESULTS AND DISCUSSION

The right of every person to establish and join trade unions for the protection of their interests is stipulated by the most authoritative international instrument, the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948 [1]. The rights of trade unions and the guarantees of their activities are stipulated in more detail at the international level, for instance, in the conventions and recommendations of the International Labour Organisation, which is a specialised agency of the United Nations. In particular, in accordance with Articles 2 and 3 of the ILO Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention (1948)[2], workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation, as well as the right to join such organisations with a single condition to be subject to the constitutions of the latter. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof[3].

I. Ya. Kiselyov, a researcher of labour law of foreign countries, notes that the right to unite in trade unions constitutes one of the most important rights in a civilised society, and its implementation is an indicator of the existence of democracy therein. Trade union freedom presupposes political and financial independence of trade unions from the state, political parties, entrepreneurs, and the church, which is usually carefully verified upon the state registration of trade unions in market economies [11]. At present, the world witnesses a high authority of trade unions and the tendency to unite them at the supranational level. In recent years, the international trade union movement has evolved from disparate to various regional and intergovernmental organisations into a fairly powerful mechanism for representing workers who are employed primarily in transnational corporations (TNCs). Thus, at the 2nd Congress of IndustriALL, which is one of the largest and most influential international unions, which took place in Rio de Janeiro on October 3-7, 2016, the Secretary General of this trade union J. Raina noted the following: “In the struggle against capital, we need the maximum possible unity. Workers in the world do not need 600 different unions: unions must join forces to benefit workers” [12]. As noted in the legal

[1] Universal Declaration of Human Rights, adopted by the United Nations General Assembly. (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.
[2] ILO Convention on Freedom of Association and Protection of the Right to Organize No 87. (1948). Retrieved from https://zakon.rada.gov.ua/laws/show/993_125#Text.
[3] *Ibidem*, 1948.

literature, one of the legal forms of international trade unions is the conclusion of international framework agreements with transnational corporations (TNCs), which are beneficial primarily to employees as they prevent the management of TNCs to take advantage of international wage differentiation, working conditions, competition between workers in different countries, as well as greater mobility of capital than that of workforce [13-15].

The current legislation of Ukraine gives citizens the right to establish and take part in trade unions, stipulates a fairly high legal status of trade unions, providing them with every opportunity to act as independent representatives and defenders of labour rights and interests of workers [16; 17]. This is evidenced by the stipulation of the legal status of trade unions in the Constitution of Ukraine (Article 36), as well as a wide scope of rights and powers of trade unions to influence labour relations enshrined in the Law of Ukraine "On trade unions, their rights and guarantees of activity" and the Labour Code of Ukraine. Extensive powers of trade unions, stipulated by the main national labour law of Ukraine, the Labour Code of Ukraine (LCU), are of particular importance for the proper operation of trade unions and security of their authority in labour relations. These powers allow them to influence management decisions made by the employer within the enterprise. This prompts the employer to take the opinion of the trade union into consideration and agree with it on appropriate decisions. Thus, in accordance with Part 1 Article 27 of the LCU, the employer must agree with the relevant elected body of the primary trade union organisation to set a test for employment for a period of three to six months. Article 43 of the LCU provides for several cases of termination of an employment contract at the initiative of the employer with the prior consent of the elective body of the primary trade union organisation (trade union representative). Pursuant to Part 1 Article 45 of the LCU at the request of the elected body of the primary trade union organisation (trade union representative) the employer must terminate the employment contract with the head of the enterprise, institution, organisation, if they violate labour legislation, collective agreements, Law of Ukraine "On trade unions, their rights and guarantees of activity". Article 64 of the LCU stipulates that overtime work may be carried out only with the permission of the elective body of the primary trade union organisation (trade union representative) of the enterprise, institution, organisation. In accordance with Part 1 Article 71 of the LCU, involvement of individual employees to work on weekends is allowed only with the permission of the elective body of the primary trade union organisation (trade union representative) of the enterprise, institution, organisation, and only in exceptional cases specified by law and in part 2 of the said article. Part 4 Article 79 of the LCU stipulates that the order of annual leave is determined by schedules approved by the employer in agreement with the elected body of the primary trade union organisation (trade union representative), and is communicated to all employees. In accordance with Part 3 Article 80 of the LCU, annual leave at the initiative of the employer, as an exception, may be postponed only with the written consent of the employee and in agreement with the elective body of the primary trade union organisation (trade union representative) in case the provision of annual leave for a previously agreed period may adversely affect normal course of operation of the enterprise, institution, organisation, and provided that part of the

leave of at least 24 calendar days will be used in the current working year [1].

Notably, the trend of the recent years in Ukraine has been an attack on the rights of trade unions. This is eloquently evidenced by the provisions of the latest drafts of the Labour Code of Ukraine and the draft Law of Ukraine "On Labour"[2], which were submitted to the Verkhovna Rada of Ukraine for consideration. These draft laws propose that most of the above decisions of the employer at best only inform the trade union. Thus, Article 39 "Term of probation upon employment" of the draft Labour Code of No. 1658 in the wording prepared for the second reading of 24.07.2017, does not stipulate the rights of the elective body of the primary trade union organisation upon establishing probation for employment for a period of three to six months. Article 98 of the Draft No. 1658 establishes only the possibility of terminating an employment contract with the head of a legal entity at the proposal of the elective body of the primary trade union organisation in case the head violates labour legislation, evades concluding a collective agreement or fails to perform obligations. Part 2 Article 153 of the Draft No. 1658 stipulates that the employer may apply overtime work with the obligatory prior notification of the elective body of the primary trade union organisation (trade union representative). In accordance with Part 4 Article 162 of the Draft No. 1658, the involvement of employees in work on their days-off is carried out by a written order (instruction) of the employer, which the relevant employees must read and understand prior to starting work on the day-off. A copy of the order (instruction) on the involvement of employees to work on the day-off shall be submitted to the elective body of the primary trade union organisation (trade union representative) no later than the next working day after its signing[3].

Draft Labour Code of Ukraine No. 2410 dated November 8, 2019, submitted by the People's Deputies of Ukraine N.Yu. Korolevska, S.M. Larin, V.P. Bort, O.S. Kachnyi, Yu.V. Malt, V.F. Kaltsev, in Articles 39, 98, 153, 162 stipulates the same rules regarding the powers of trade unions as the above-mentioned Project No. 1658 [18]. In the draft Law of Ukraine “On Labour” No. 2708 of 28.12.2019, introduced by the Cabinet of Ministers of Ukraine, trade unions are mentioned only in the Final Provisions. In particular, the Cabinet of Ministers of Ukraine is instructed to organise work on the development of a draft law on the activities of trade unions in Ukraine within six months from the date of publication of this Law[4]. Special attention needs to be paid to the draft Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine (Regarding Certain Issues of Trade Unions’ Activities” No. 2681 of December 27, 2019. The explanatory memorandum to the draft law No. 2681 explains that the legislative framework that regulates this area is outdated, thereby revealing the necessity of introducing changes in the context of updating legislation and strengthening the role of the individual worker in trade unions. The purpose of the act is to harmonise the provisions of the Labour Code of Ukraine and of the Law of Ukraine "On trade unions, their rights and guarantees of activity" with modern working conditions, as well as to eliminate duplication of functions by trade unions as a subject to

[1] Labour Code of Ukraine. (1996, July). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08#Text
[2] Draft Law of Ukraine No 2708 “On Labor”. (2019, December). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67833.
[3] Labor Code of Ukraine. (1996, Jule). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08#Text
[4] *Ibidem*, 1996.

which such functions do not belong[1].

This purpose appears to be right, it is quite justified in terms of reforming national legislation and living conditions of the population of Ukraine. However, the analysis of the provisions of the draft law itself suggests yet another attempt to weaken the position of trade unions as defenders of labour rights of their members. Moreover, certain provisions of the draft Law No. 2681 do not comply with the provisions of international acts ratified by Ukraine, in particular the International Covenant on Economic, Social, and Cultural Rights and the ILO Convention No. 87– Freedom of Association and Protection of the Right to Organise Convention[2]. In the legal literature, attention is drawn to the following shortcomings of the Draft No. 2681. Thus, V.V. Zhernakov points out that Draft No. 2681 established a limit on the number of trade unions in one enterprise (not more than 2 primary trade unions) and a quantitative qualification for one trade union (not less than 10 people). Furthermore, it was proposed to regulate the mandatory reporting of elected trade union bodies to their members and to establish control commissions in trade unions and associations of trade unions. The scholar notes that these rights belong exclusively to the organisations themselves, and they independently choose the ways to exercise the powers granted to them by current legislation. V.V. Zhernakov emphasises that as long as trade unions do not violate the law and do not affect the rights and legitimate interests of other entities, they are independent and free in their actions [19]. The provisions of the Draft No. 2681 on deprivation of the elective body of the primary trade union organisation of the powers stipulated by Paragraph 9 Part 1 Article 247 of the LCU also raise doubts regarding the decision to require the employer to terminate the employment contract (agreement) with the head of the enterprise, institution, organisation, in case it violates the Law of Ukraine "On trade unions, their rights and guarantees of activity", labour legislation, evades participation in negotiations concerning the conclusion or change of the collective agreement, does not perform obligations under the collective agreement, admits other violations of the legislation on collective agreements. This also includes the provisions on deprivation of the employer of the obligation stipulated by Part 2 Article 249 of the LCU, on the provision of premises for the work of an elective trade union body and a meeting of employees who are members of a trade union with all necessary equipment, communications, heating, lighting, cleaning, transport, security in accordance with the procedure stipulated by the collective agreement.

The author of this study believes that, both at present and in the future, it is necessary to preserve in the national labour legislation the rules aimed at ensuring the proper functioning of trade unions and maintaining their high authority and status as representatives and defenders of labour rights of their members in relations with employers. This will contribute to social peace in labour-capital relations and ultimately create the conditions for sustainable development of the national economy and statehood. At present, another problematic issue is that some trade unions cannot fully exercise their rights and powers under general labour legislation and legislation in the field of trade union

[1] Draft Law of Ukraine No 2681 "On Amendments to Certain Legislative Acts of Ukraine (Regarding Certain Issues of Trade Unions' Activities). (2019, December). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67792.

[2] ILO Convention on Freedom of Association and Protection of the Right to Organize No 87. (1948). Retrieved from https://zakon.rada.gov.ua/laws/show/993_125#Text.

rights [20-25]. Thus, nowadays the national legislation allows to create trade unions in law enforcement agencies, in particular the National Police of Ukraine. In accordance with Part 1 Article 114 of the Law of Ukraine "On the National Police"[1], to protect their rights and legitimate interests, police officers may form trade unions and trade associations in accordance with the Law of Ukraine "On trade unions, their rights and guarantees of activity". In 2017, the All-Ukrainian Trade Union of the Ministry of Internal Affairs of Ukraine was established in Ukraine, which operates on the basis of national legislation and the Statute of the All-Ukrainian Trade Union of the Ministry of Internal Affairs of Ukraine, approved by the Constituent Congress of the All-Ukrainian Trade Union of the Ministry of Internal Affairs of Ukraine (Minutes No. 1 dated October 6, 2017).

The All-Ukrainian Trade Union of the Ministry of Internal Affairs of Ukraine constitutes an all-Ukrainian voluntary non-profit public organisation, which is established on territorial and branch grounds and unites civil servants, employees of the Ministry, territorial bodies, institutions, agencies under the Ministry of Internal Affairs of Ukraine with the purpose of representation, implementation, and protection of their labour, socio-economic rights and interests[2]. Currently, the bodies and departments of the National Police of Ukraine have established and operating centres of the above-mentioned trade union [26-28]. Their activities mainly cover the provision of the membership fees: financial assistance to union members in connection with the birth of a child, for treatment due to illness of a union member or his close relatives, for the burial of a union member or his close relatives; gifts to minor children of trade union members for the holidays; tickets for union members to theatres and other cultural institutions; reimbursement to trade union members and their family members of the cost of vacation packages for health resort institutions and wellness facilities, etc. The most important task of any trade union is to protect the labour rights of its members, and trade unions that operate in the bodies and divisions of the National Police of Ukraine cannot implement them in full. First of all, this is conditioned by the fact that the main omnibus act governing service in the National Police of Ukraine – the Law of Ukraine "On National Police" does not stipulate the legal status of police unions and does not prescribe approval or permission on certain issues of service and dismissal from it in a trade union as is the case with regard to labour relations of employees in the Labour Code of Ukraine. The author believes that to ensure the proper functioning of trade unions in the bodies and units of the National Police of Ukraine for the protection of labour rights of police officers, it is necessary to increase the legal status of these organisations in relation to service in the National Police of Ukraine. For this purpose, it is expedient to prescribe the provisions of the Labour Code of Ukraine regarding the rights of trade unions in the Law of Ukraine “On the National Police”.

CONCLUSIONS

1. In the current and future national labour legislation and legislation in the field of trade union rights it is necessary to preserve the rules aimed at ensuring the proper functioning

[1] Law of Ukraine No. 580-VIII “On National Police” dated 2 July 2015. Retrieved from https://zakon.rada.gov.ua/laws/show/580-19#Text (accessed date: 18.04.2020).

[2] Charter of the All-Ukrainian Trade Union of the Ministry of Internal Affairs of Ukraine. Retrieved from https://mvs.gov.ua/upload/file/statut_vps_re_str..pdf.

of trade unions as representatives and defenders of labour rights of their members in relations with employers and maintaining high authority and status of trade unions at enterprises, institutions, organisations.

2. There is a necessity of introducing new forms and methods of activities of trade unions in Ukraine, as well as of coordinating these activities and uniting them with supranational trade unions.

3. It is necessary to ensure the equality of rights of all trade unions in Ukraine and the possibility of exercising in full the rights, powers, and guarantees of activities stipulated by national labour legislation and legislation in the field of trade union rights.

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РОЗПОДІЛ РИЗИКУ ЗАВДАННЯ ШКОДИ В ДЕЛІКТНИХ ЗОБОВ'ЯЗАННЯХ З ПОЗИЦІЙ ЕКОНОМІЧНОГО АНАЛІЗУ ПРАВА

Анотація. *Завдання шкоди майновим та (або) немайновим правам осіб трапляється досить часто. Право на відшкодування такої шкоди є беззаперечним. Втім, цивілістичною доктриною неоднозначно вирішуються питання розподілу ризику завдання шкоди в деліктних зобов'язаннях. Тому, метою цієї публікації є обговорення підходів до розподілу ризику завдання шкоди в деліктних зобов'язаннях та визначення їх ефективності з економіко-правових позицій. У статті на підставі економічного та системного аналізу з використанням діалектичного, порівняльного, логічно-догматичного та інших методів, в тому числі економічної науки, характеризуються підходи до визначення мети деліктного права та його можливості забезпечити ефективний розподіл ризику завдання шкоди. Доводиться, що деліктне право може мати прямі регуляторні наслідки шляхом стримування поведінки та розподілу ризиків. Робиться висновок, що завданням деліктного права є оптимальний розподіл ризику шкоди між заподіювачем і потерпілим та забезпечення здійснення ризикової діяльності лише за умови, що її соціальна цінність виправдовує створений ризик. На підставі економічного аналізу деліктного права обґрунтовується, що розподіл ризику завдання шкоди в деліктних зобов'язаннях здійснюється за допомогою інститутів страхування та відповідальності. Страхування є економічно ефективним, якщо йдеться про компенсацію завданої шкоди. Проте лише відповідальність поряд із функцією компенсації може також виконувати функцію стимулювання до запобігання шкоди. У зв'язку з цим ризик завдання шкоди у деліктних зобов'язаннях переважно покладається на особу, що таку шкоду завдала. У зобов'язаннях з відшкодування шкоди, завданої джерелом підвищеної небезпеки особа, яка на відповідній правовій підставі (право власності, інше речове право, договір підряду, оренди тощо) володіє транспортним засобом, механізмом, іншим об'єктом, використання, зберігання або утримання якого створює підвищену небезпеку, несе такий ризик навіть за відсутності її вини у завданні шкоди. Підставами для покладення на потерпілого такого ризику є його намір чи непереборна сила. Саме такий підхід до розподілу ризику завдання шкоди в деліктних зобов'язаннях є справедливим та економічно ефективним і сприяє суспільному добробуту.*

Ключові слова: делікт, відповідальність, цивільне право, страхування, ризик, зобов'язання.

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DISTRIBUTION OF RISK OF HARM IN DELICTUAL RESPONSIBILITY FROM THE STANDPOINT OF ECONOMIC ANALYSIS OF LAW

Abstract. *Damage to property and (or) non-property rights of persons occurs quite often. The right to compensation for such damage is indisputable. However, civil doctrine ambiguously addresses the issue of risk sharing in tort obligations. Therefore, the purpose of this paper is to discuss approaches to the distribution of risk of harm in delictual responsibility and to determine their effectiveness from an economic and legal standpoint. The paper, based on economic and systematic analysis using dialectical, comparative, logical-dogmatic and other methods, including economics, describes the approaches to determining the purpose of tort law and its ability to ensure effective distribution of risk of harm. It has been proven that tort law can have direct regulatory consequences by restraining behaviour and sharing risks. It is concluded that the task of tort law is the optimal distribution of risk of harm between the perpetrator and the victim and to ensure the implementation of risky activities only if its social value justifies the risk. Based on the economic analysis of tort law, it has been substantiated that the distribution of the risk of damage in tort liability is carried out through the institutions of insurance and liability. Insurance is cost-effective when it comes to compensation for damage. However, only liability, in addition to the function of compensation, can also perform the function of preliminary prevention of harm. Therefore, the risk of causing harm in tort liability is mainly borne by the person who caused the damage. In obligations to compensate for damage caused by a source of increased danger, a person who on the appropriate legal basis (property rights, other property rights, contracts, leases, etc.) owns a vehicle, mechanism, other object, the use, storage or maintenance of which creates an increased danger, bears such risk even in the absence of guilt in causing harm. The grounds for imposing such risk on the victim are his intention or force majeure. It is this approach to the distribution of harm risk in tort liability that is fair and cost-effective and contributes to public well-being.*

Keywords: delict, amenability, civil law, insurance, risk, obligations.

INTRODUCTION

Recently, significant attention has been paid by both scholars and practitioners to the problem of compensation for damage caused to a person or property by wrongful acts not related to breach of contract. In particular, the issues of approaches and basic principles of compensation for injuries suffered are raised in order to prevent it. It is believed that the reduction of the role of tort law to compensation for accidental wrongful damage seems relatively limited and the purpose of tort law should be much broader [1]. According to Michael Faure, there is a significant difference between how lawyers see the system of liability and its essence in terms of economic efficiency [2]. Lawyers believe that the system of liability for tortious act is aimed at compensating for the damage caused, in this regard, the protection and subsequent compensation of victims is the main purpose of the law. Therefore, the rules of liability are clearly aimed at compensating the victims, and the

benchmark against which the liability system is evaluated is whether it is able to provide this compensation. The economic analysis of tort law takes a different position. Economists emphasise that bringing a potential offender to justice should help prevent accidents. The basic idea is that the subjects respond to the potential danger of effectively developed liability by taking optimal precautions. In this perspective, the purpose of the tort liability system is not ex post compensation, but rather preliminary prevention [2]. That is, from the standpoint of economic analysis of the right to responsibility is entrusted not only (and not so much) compensatory function, but also the function of providing appropriate incentives to minimise risks. Accordingly, the study of tort liability, as well as the establishment of effective incentives to prevent harm is possible through economic analysis of law [3].

Economic analysis of law, as noted by L. Kaplow and S. Shavell, seeks to answer two main questions about legal norms: what are the consequences of legal norms on the behaviour of the subjects and whether such consequences are socially desirable. This makes it possible to describe the behaviour of individual subjects, based on the assumption that it is promising and rational, and in terms of welfare – socially desirable [4]. The basic principle of economic analysis of law is the category of efficiency. This category, having an economic meaning, can become an important criterion in the creation of legal norms aimed at minimising risks. However, no less important is the basic value for law – justice. According to Bruce Chapman, the tools of economic analysis of law (in particular, efficiency) are informative for age-old debates about the adequacy of public consensus and morality for law [5]. Therefore, the study of tortious liability should be based on the methodology of economic analysis of law along with traditional methods of legal science, and the distribution of risk of harm should be based on equity, taking into account the concept of economic efficiency. The purpose of this paper is to discuss approaches to the distribution of harm risk in tort liability and to determine their effectiveness from both a legal and economic standpoint.

1. MATERIALS AND METHODS

The main challenge facing the law is not only to reflect economic relations, but also to stimulate and develop them. Therefore, the understanding of law should be based on the recognition of law as the dominant form of organisation and existence of economic relations, as the law reflects the relations that have actually developed and exist (including economic). Given that the main task of tort law should be to minimise the risk of harm, the effectiveness of which depends on the chosen approaches in the construction of legal norms, respectively, the study of minimising the risks of harm, the basic principles of distribution of such risks should be based on integrated methods of scientific research. cognition in their unity and interaction. This will allow to optimally distribute the risk of harm between the perpetrator and the victim and to ensure the implementation of risky activities only if its social value justifies the risk.

In the study of the distribution of risk of harm in tort liability, it seems appropriate to expand the scope of scientific research and use new methods for private law, inherent in other branches of science, including economics. Accordingly, the justification of the distribution of damage risk and the development of proposals should be carried out on a functional basis with the borrowing of the methodological apparatus from the economy.

For the systematic study of these issues it is necessary to use system analysis, the methodological basis of which is dialectics. The use of these techniques provides a systematic understanding of approaches to the distribution of risk of harm in tort liability and decision-making in certain situations where their effectiveness is ambiguous. Based on the system analysis, tort liability is considered as a separate system that has its own structure, within which there is a problem of risk sharing. The development of an adequate theory for solving this problem is the task facing the doctrine of civil law. The solution of this problem depends on the right goal and adequately chosen means, which, in turn, is due to the complexity of the system and the correctness of its description. Therefore, within the framework of the systematic analysis of tort liability and the distribution of the risk of harm, a structural analysis is chosen, which allows to understand the relationships between the components of such obligations and their impact on the environment – general well-being. The comparative method was used to establish the essence of the terms "non-contractual obligations", "delictual obligations" and "indemnity obligations" and revealed differences between them. This made it possible to distinguish between liability for compensation of harm and tort liability, and to treat the latter as liability for compensation arising from wrongful acts. In addition, the distribution of risk of harm through the institution of legal liability and the institution of insurance was analysed using a comparative method. This allowed us to determine that only the institution of legal liability is able to provide adequate incentives for the parties to reduce the risk of harm. This approach will ensure the implementation of risky activities only if its social value justifies the risk.

The use of logical-dogmatic method along with the method of hermeneutics made it possible to establish the essence of the concept of "source of increased danger" and approaches to the distribution of risk of harm by a source of increased danger through the prism of its perception by lawmakers and researchers. In particular, with the help of such methods the concept of "source of increased danger" was interpreted through the analysis of the signs of the source of increased danger given in the decision of the Plenum of the Supreme Court of Ukraine and the scientific literature. Also, these methods allowed to identify the distribution of risk of damage by a source of increased danger in the current legislation of Ukraine. The method of using judicial or arbitration practice has helped to establish the position of judicial practice on the distribution of risk of harm by a source of increased danger. It has been established that courts, in adjudicating cases of compensation for damage caused by a source of increased danger, take the position that a person carrying out activities that are a source of increased danger is liable for the damage if he does not prove that the damage was caused by force majeure or intent of the victim. Therefore, in all other cases, even in the absence of the fault of the owner of the source of increased danger, the courts decide in favour of the victim.

The methods of economic science, in particular, alternative analysis and boundary analysis, allowed to investigate the distribution of risk of harm in tort liability in the context of choosing the most effective behaviour and the need to abandon such choice and identify the best ways to minimise the negative consequences of the risks. Along with the comparative method, this made it possible to consider legal liability as an effective system of incentives for individuals to reduce or avoid the risk of harm in tort liability, which can contribute to public good.

2. RESULTS AND DISCUSSION

2.1 Approaches to determining the purpose of tort law and the content of certain concepts in the field of non-contractual obligations

Foreign scholars are quite active in discussing economic approaches to the analysis of tort law, while the main task is to achieve optimal cost reduction for damages. In their view, in order to create optimal incentives, liability rules should encourage the parties to minimise the overall social value of harmful acts. Relevant variables for this are the cost of accidents, the costs of avoiding harm (precautionary measures) and the administrative costs of the justice system [3]. However, the classical dual structure of tort law creates difficulties from a regulatory standpoint, as it provides a poor episteme that is suitable for a modern understanding of risk [1]. It is important to generally understand that the tort system is an integral part of risk management, and vice versa. The idea of tort law as a regulator allows a new look at risk management and court participation, along with common tools such as private and public regulation. This is explained by the fact that the practice of tort law and most scholars traditionally understand the system of tort jurisdiction as a mechanism for resolving individual disputes with its very important principle of ensuring justice in bipolar relations between plaintiff and defendant. According to this concept, tort law gives the victim the opportunity to bring the offender to justice for his wrongful conduct, and when such lawsuit is filed, the court distributes responsibilities for risk-taking. The court determines the extent to which the plaintiff or defendant is responsible for risk management, and whether the ex post defendant must reimburse the victim for the costs associated with the negative consequences of the risk. Accordingly, litigation may have implications for setting certain standards: filing a lawsuit may indicate that the issue is being challenged, which in turn may affect perceptions of what behaviour is considered "reasonable", what social norms and evidence are taken into account by the court in a process that can inform the general public and contribute to the development of certain policies [6].

According to L. Kaplow and S. Shavell, tort law is a means by which society can reduce the risk of harm by establishing the obligation of potential perpetrators to pay for the harm they cause [4]. After all, in most legal systems, tort law imposes a duty of care (custody) on one party, which, if violated, becomes liable for the damage caused to the other party (victim) as a result of this violation [7]. Accordingly, tort law can have direct regulatory consequences by restraining behaviour and sharing risks. In general, tort law promotes social welfare, while implementing the goal of resolving individual disputes. Its legitimacy as a risk management mechanism is based on the ability to promote "optimal" risk management, when business risks are regulated to ensure a socially optimal level of activity [6]. The neoclassical model of tort law, according to Michael Faure, assumes that the perpetrators and victims are rational individuals who will respond to the rules of tort law, seeking to maximise their usefulness and self-interest [8]. The purpose of tort law is rational decision-making that maximises the efficient use of resources. Efficiency becomes the standard for all proposed solutions and is measured by the maximum value, which, in turn, is manifested in the willingness to pay [9]. However, maximising one's own usefulness is not always the dominant factor. Subjects are willing to limit their selfish interests and treat others fairly if such behaviour is mutual [8]. Therefore, the analysis of

tort law should be based on the principles of combining economic efficiency and fairness. In this regard, it is advisable to consider the distribution of risk of harm in tort liability in accordance with these approaches. However, before proceeding to the actual distribution of risks, it is advisable to clarify the meaning of certain concepts in the field of non-contractual obligations and to determine the place of tort among them.

In the scientific literature, tort liabilities are a group of non-contractual obligations aimed at compensating for damage caused to a person or property as a result of a wrongful act not related to breach of contract [10]. According to I. V. Plakhina, the obligation to cause harm in all legal systems is considered as one of the institutions of civil law and is called non-contractual obligations, or tortious. However, in her opinion, the concept of "non-contractual obligations", in particular in continental law, has a broader meaning, as it covers, along with tort, obligations for unjust enrichment and some others [11]. S.D. Grinko (Rusu) believes that it is impossible to talk about the similarity of the concepts of "indemnity obligation" and "liability for damage" and their identity with the concept of "tort liability". Accordingly, it would be erroneous to equate any "indemnity obligation" with "liability for damages". Delictual obligations, as obligations to compensate for damage caused by wrongful decisions, acts or omissions, arise from the fact of an offense. This gives a reason to conclude that liability for damage is the content of the obligation to commit an offense in the obligation to compensate for the damage. Hence the admissibility of using the term "tortious liability for harm caused" in the sense of tort liability [12].

Instead, K.V. Manuilova notes that the content of the tort liability (the author identifies the concept of "liability for damages" and "tort liability") includes not only the obligation of the person responsible for causing damage, to compensate for the damage (delictual obligations), but also the right of the creditor (victim) to demand restoration of his property sphere to the condition in which it was before offense. Thus, tort liability does not exhaust the content of the liability for damage, but is only one of its elements. Also, not every obligation to compensate for the damage caused can be considered as a measure of liability, as there may be cases where liability is not included in the content of a particular delictual obligation [13]. According to O.O. Soroka, such a mixture of "liability for damages" and "tort liability" is a legacy of the Soviet era, due to the very structure of the Central Committee of the USSR in 1963, Chapter 40^1 of which was entitled "Obligations arising from infliction of harm" and in many articles it regulated the prosecution for damages, including cases of compensation for damage caused by lawful acts, cases of imposition of the obligation to compensate the damage to the person specified in the law, regardless of his guilt. The change in the concept of liability for damages has led to a distinction between the concept of "liability for damages" and "tort liability" [14]. However, unfortunately, the author does not provide arguments in favour of this distinction, and the obligation to compensate damages analyses from the standpoint of civil liability. It seems appropriate to support the position of T. S. Kivalova and in the analysis of civil non-contractual legal relations to talk not about "offense" but about "harm" as the basis and defining feature of such legal relations, and civil protective relations should be considered in the context of civil liability and remedies [15]. A similar opinion is expressed by S. D.

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

Grinko, pointing out that it is wrong to assume that any obligations arising from damages are tortious. The institution of compensation solves and should solve a more global task – to ensure the elimination of the consequences of harm, restoration of violated rights of victims through obligations to compensate for damage, which may be the result not only of illegal but also lawful actions [16]. Accordingly, in this paper, we will assume that the grounds for liability for damages can be both wrongful and lawful acts. Tort liabilities are obligations to compensate for damage arising from wrongful acts.

2.2 Distribution of risk of harm by a source of increased danger

A special type of tort liability is an obligation arising from the infliction of harm by a source of increased danger. The Supreme Court of Ukraine in its ruling[1] noted that Art. 1187[2], 1188[3] of the Civil Code of Ukraine refer to special torts, which provide for the peculiarities of the subjective composition of responsible individuals (when the obligation to compensate the damage is not imposed on the direct perpetrator, but on another person specified in the law – the owner of the source of increased danger) and establish liability for infliction of damage regardless of the fault of the perpetrator. According to Art. 1187 of the Civil Code of Ukraine, the source of increased danger is the activity associated with the use, storage or maintenance of vehicles, machinery and equipment, use, storage of chemical, radioactive, explosive and flammable and other substances, keeping wild animals, service dogs and fighting dogs breeds, etc., which creates an increased danger for the person carrying out this activity and other persons.

A special feature of such activities in accordance with paragraph 5 of the resolution of the Plenum of the High Specialised Court of Ukraine for Civil and Criminal Cases "On some issues of application by courts in resolving disputes about compensation of harm caused by a source of increased danger"[4] from 01.03.2013 No. 4 increased likelihood of harm due to the inability to fully control them. Civil liability for damage caused by activities that are a source of increased danger occurs in the case of its purposefulness (for example, the use of vehicles for their intended purpose), as well as the involuntary manifestation of harmful properties of objects used in this activity (for example, in the case of damage due to involuntary movement of the car). Scientists identify the following signs of a source of increased danger, which are interrelated and should be assessed together: 1) the impossibility of full control by a person; 2) the presence of harmful properties; 3) high probability of harm [13; 17], pointing out that the increased probability of accidental harm to others occurs only in the presence of uncontrollability of the source of increased danger. Randomness explains the reason for uncontrollability, as it indicates its occurrence against the will of the person, which is due to objective reasons – the insufficient level of development of science and technology [17]. How should the risk of harm be distributed as a source of increased danger?

[1] Resolution of the Supreme Court of Ukraine No. 6-108tss13. (2013, November). Retrieved from http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/C667B49AAB191957C2257C92003A6DC5.

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

[3] Civil Code of Ukraine, *op. cit.*

[4] Resolution No. 4 of the Plenum of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases. (2013, March). Retrieved from http://zakon2.rada.gov.ua/laws/show/v0004740-13.

The distribution of risk of harm through the institutions of legal liability and insurance is common. Based on the economic analysis of tort law and its fulfilment of the function of compensation to victims, insurance is a more cost-effective system than liability. However, legal liability performs another social function – creating incentives to prevent harm [4]. This is due to the fact that, knowing about the costs enshrined in the rules of liability, the parties will be properly motivated to take optimal care to prevent accidents, respectively, as a result, should reduce the overall social costs of accidents [8]. There are three types of costs that result from the damage: 1) costs associated with the damage to the injured party (the cost of medical care and lost ability to work); 2) social costs arising from accidents (costs to avoid accidents); 3) costs associated with the administration of the tort system (administrative costs of the justice system) [18]. If the purpose of tort law is to consider such a distribution of risk of harm between the perpetrator and the victim, which will ensure the implementation of risky activities only if its social value justifies the risk, the insurance institution is not able to create conditions for this goal, as it can cover only the first type of expenses [19]. The current legislation of Ukraine, in particular the Law of Ukraine "On compulsory insurance of civil liability of owners of land vehicles"[1], in order to ensure compensation for damage caused to life, health and/or property of road accident victims, provides for civil insurance – legal liability. That is, there is a distribution of the risk of civil liability. However, can such insurance contribute to public welfare, because there are concerns in the papers on the subject that the sale of such insurance policies may lead to an increase in the number of road accidents or compensation for damage will be less than the damage caused. Accordingly, in this case, liability insurance is not socially desirable [4], although from the point of view of economic analysis of the law, insurance is a more cost-effective system of compensation, as both victims and perpetrators can significantly protect themselves from risk by passing this risk to a third party. And if the main task of society was to compensate for the damage, the insurance system would be better than the system of tort liability [19].

However, society requires effective incentives to reduce the risk of harm, which only the institution of liability can provide. According to Michael Faure, the purpose of the liability system is not ex post compensation, but rather preliminary prevention. However, this starting point has two important consequences. First, if the entities are not affected by the financial consequences used as a means of liability, then such an incentive is unsuccessful if other legal norms (regulations) do not offer an alternative. Second, bringing ex-prosecutors to justice ex post (after an accident), provided that its purpose is clearly defined, can be a preliminary incentive for optimal prudence. Thus, from an economic point of view, the system of responsibility performs an important social function to eliminate dangers [2]. Accordingly, the purpose of allocation of risk in harm-doing is to achieve a reasonable balance between the public interest and the rights and interests of individuals protected by law.

The current legislation of Ukraine the risk of causing damage by a source of increased danger is laid upon a person who on the appropriate legal basis (property rights, other right to thing, contracts, leases, etc.) owns a vehicle, mechanism, other object, the

[1] Law of Ukraine No. 1961-IV. (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1961-15#Text.

use, storage or maintenance of which creates increased danger (Part 2 of Article 1187 of the Civil Code of Ukraine). It is also possible to distribute such risk between several entities: in cases of misappropriation of a vehicle, mechanism, other object and due to the interaction of several sources of increased danger (Part 4 of Article 1187, Article 1188 of the Civil Code of Ukraine)[1]. It should be noted that such division is a rather debatable issue, which is discussed in legal doctrine. Complicating the problem is the situation when the victim is also guilty of causing harm. According to the Principles of European Tort Law[2], there are two approaches to dividing the risk of harm between several perpetrators. Thus, according to Article 3:102[3], if each offender was harmed at the same time, the activities of each of them are considered to be the cause of the victim's harm. That is, in this case we can talk about joint and several liability. And the determining factor must be the task of harm at the same time. Compensation in this case must be carried out by all offenders in full. But in the case of interaction of harmful activities, when each of them could be sufficient to cause harm, but it remains unclear which of the subjects actually caused such damage, each activity is considered as a probable reason that it could cause harm to the victim. Then compensation for damage is made in proportion to its alleged infliction. According to the current civil legislation of Ukraine, damage caused by the interaction of several sources of increased danger is reimbursed on general grounds, namely: 1) damage caused to one person through the fault of another person is reimbursed by the guilty person; 2) in the presence of guilt only of the person who was harmed, it is not reimbursed to him; 3) in the presence of fault of all persons whose activities have caused harm, the amount of compensation is determined in the appropriate proportion depending on the significant circumstances. If other persons have been harmed as a result of the interaction of sources of increased danger, the persons who jointly caused the damage are obliged to compensate it regardless of their fault (Article 1188 of the Civil Code of Ukraine). As can be seen from this article, compensation for damage on the basis of fault occurs only when it comes to inflicting damage to the owners of sources of increased danger as a result of their interaction. If the victims are third parties, the distribution of the risk of harm is carried out in the ways described above. The only feature here is only that the risk in such cases is imposed on the owners of sources of increased danger in solidarity [20].

Regarding the apportionment of the risk of harm in the event of the victim's fault, under Article 3:106 of the Principles of European Tort Law[4], such damage is laid on the victim to the extent appropriate to the likelihood that it could have been caused by activities, occurrence or other circumstances in his own sphere. According to Ukrainian national legislation, the risk of damage caused by a source of increased danger is transferred to the victim in the cases provided for in Part 5 of Art. 1187 of the Civil Code of Ukraine. The grounds for imposing such a risk on the victim are his intent or force majeure. This position is supported by judicial practice. Thus, the Shevchenkivsky District

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/page20#Text.
[2] Principles of European Tort Law. (2005, January). Retrieved from http://www.egtl.org/docs/PETL.pdf.
[3] Civil Code of Ukraine, *op. cit*.
[4] Principles of European Tort Law. (2005, January), op. cit.

Court of Lviv, ruling in the above-mentioned case No. 466/8841/13-ц[1] on the claim for recovery of material and compensation for non-pecuniary damage caused by a source of increased danger, noted that in accordance with Part 5 of Art. 1187 of the Civil Code of Ukraine, a person who carries out activities that are a source of increased danger, is responsible for the damage, unless he proves that the damage was caused by force majeure or intent of the victim.

Therefore, in all other cases, including in the absence of fault of the owner of the source of increased danger, the latter compensates the victim. However, it is necessary to take into account the rule of Art. 1193 of the Civil Code of Ukraine[2], according to which if the gross negligence of the victim contributed to the occurrence or increase of damage, then depending on the degree of guilt of the victim (and in case of guilt of the person who caused the damage – also depending on the degree of his guilt) the amount of compensation is reduced, unless otherwise provided by law. This approach is supported both by legal doctrine and in line with the principles of European law. In particular, in Art. VI. – 5:102 Principles, Definitions and Model Rules of European Private Law. The Draft Common Frame of Reference[3] states that if the fault of the victim contributed to the occurrence or extent of the damage, the compensation should be reduced according to the degree of such fault. However, account should not be taken of (a) the minor guilt of the victim, (b) the guilt which was insignificant in causing the harm; or (c) contributing to the victim's bodily injury caused by a motor vehicle in a road accident, unless such assistance did not mean disregarding such caution as was clearly required by the circumstances.

CONCLUSIONS

The economic analysis of tort law made it possible to determine that the task of tort law is the optimal distribution of risk of harm between the perpetrator and the victim and to ensure the implementation of risky activities only if its social value justifies the risk. The distribution of risks in tort liability can be carried out through the insurance system (transfer of risks to a third party) and the system of liability (imposition of risks on the perpetrator or victim). From the standpoint of economic analysis of law, insurance is a more cost-effective system than liability system. However, based on the functional effect of liability, i.e. its impact on the offender, legal liability performs another social function – preliminary prevention of harm. The function of encouraging individuals to reduce or avoid the risk of harm in tort liabilities is carried out by establishing as a general rule of transferring risk on the perpetrator. Leaving the risk on the victim can take place only in cases of force majeure or intent of the victim. This distribution is fair and cost-effective and aims to achieve social well-being. However, a more in-depth study of the distribution

[1] Case No. 466/8841/13-c. (2014, February). Retrieved from https://youcontrol.com.ua/ru/catalog/court-document/37065007/.

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

[3] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. (2010, January). Retrieved from https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EN_EPL_20100107_Principles__definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference__ DCFR_.pdf.

of risk of harm by multiple individuals, in particular the principles, types and methods of such distribution, is of particular interest for further research.

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ТЕНДЕНЦІЇ РОЗВИТКУ КРИМІНАЛЬНОГО ЗАКОНОДАВСТВА УКРАЇНИ (НА ПРИКЛАДІ ЗЛОЧИНІВ ПРОТИ ПРАВОСУДДЯ)

Анотація. *У статті здійснено спробу дослідження розвитку кримінального законодавства України на прикладі злочинів проти правосуддя. З цією метою автор звернувся до дослідження кримінального законодавства через аналіз його розвитку в глобалізованому світі та в Україні. В цьому контексті кримінальне законодавство запропоновано йменувати як глобалізаційне, а кодифікацію – уніфікованою, що викликано зближенням держав у світі через імплементацію конвенцій та інших міжнародно-правових актів та, як наслідок, гармонізацію кримінального законодавства. У історичній ретроспективі було сформовано історичну мапу злочинів, проступків та провинностей проти правосуддя, що були притаманні кримінальному законодавству в Україні в XI-XX ст. ст. (на підставі стадії та первинної можливості їх вчинення). Встановлено, що окремі тенденції щодо встановлення кримінальної відповідальності за вчинення кримінальних правопорушень у сфері правосуддя вплинуть на формування злочинів проти правосуддя: 1) імплементація міжнародно-правових актів; 2) забезпечення захисту діяльності міжнародних судів, юрисдикцію яких визнала Україна; 3) встановлення системи кримінальних правопорушень проти правосуддя через виокремлення їх груп в структурі відповідного розділу (поділ розділу на глави). Такими групами можуть бути: 1) кримінальні правопорушення у сфері здійснення правосуддя; 2) кримінальні правопорушення у сфері забезпечення здійснення правосуддя; 3) кримінальні правопорушення у сфері сприяння здійсненню здійсненню правосуддя. Використання названих підходів дозволило сформувати перспективи кримінального законодавства щодо злочинів та кримінальних проступків проти правосуддя. Акцентовано увагу на те, що кримінальні правопорушення (злочини) проти правосуддя є такими діяннями, що суттєво відрізняються за тяжкістю вчиненого, їх суспільною небезпечністю, а тому поділ цих кримінальних правопорушень на злочини та кримінальні проступки має впливати на процесуальні особливості притягнення винуватих за їх вчинення до кримінальної відповідальності.*

Ключові слова: інститут кримінального права, покарання, загальноцивільний кодекс, карна політика, судочинство.

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CRIMINAL LEGISLATION TRENDS IN UKRAINE (EVIDENCE FROM CRIMES AGAINST JUSTICE)

Abstract. *The paper investigates the development of criminal legislation of Ukraine as exemplified in crimes against justice. To this end, the author approached the study of criminal law through the*

analysis of its development in the globalised world and in Ukraine. In this context, it is proposed to refer to criminal legislation as globalisational and to codification – as unified. This is caused by the rapprochement of countries in the world through the implementation of conventions and other international regulations and, consequently, the harmonisation of criminal legislation. In historical retrospect, the author constructed a historical map of crimes, misdemeanours, and offences against justice inherent in the criminal legislation of Ukraine in the 11th-20th centuries (based on the stage and initial possibility of their commission). It was determined that certain trends of establishing criminal liability for commission of criminal offences in justice will affect the development of crimes against justice: 1) implementation of international regulations; 2) ensuring the protection of the activities of international courts whose jurisdiction is recognised by Ukraine; 3) establishment of a system of criminal offences against justice through their division into groups in the structure of the corresponding section (division of the section into chapters). Such groups may be: 1) criminal offences in administration of justice; 2) criminal offences in enforcement of justice; 3) criminal offences in support of enforcement of justice. The use of these approaches allowed to develop the prospects of criminal legislation on crimes and misdemeanours against justice. Emphasis is placed on the fact that criminal offences (crimes) against justice are such acts that significantly differ in the severity of the offence, their social danger, and therefore the division of these criminal offences into crimes and misdemeanours should affect the procedural features of bringing the respective perpetrators to criminal responsibility.

Keywords: criminal law institution, punishment, general civil code, criminal policy, legal proceedings.

INTRODUCTION

Acceleration of social, economic, and political processes in the world, rapprochement of Ukraine with the European Community indicate the need to revise the content and form of the main institutions of criminal law – crime and punishment. In the EU Member States, the Laws on Criminal Liability are different in name and content: criminal (Criminal Codes of Finland[1], Canada[2], Denmark[3], the Netherlands[4], the Czech Republic[5]), penal (Penal Codes of Spain[6], Portugal[7], Switzerland[8], Italy[9]) or general civil penal codes (Norway

[1] Criminal Code of Finland. (2017, April). Retrieved from http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf.

[2] Criminal Code of Canada. (2017, March). Retrieved from http://laws-lois.justice.gc.ca/eng/acts/C-46/.

[3] Criminal Code of Kingdom of Denmark. (2017, December). Retrieved from https://www.unodc.org/res/cld/document/criminal_code_of_denmark_as_of_2012_danish_version_html/Danish_Criminal_Code_as_of_2012.pdf.

[4] Criminal Code of Netherlands. (2012, October). Retrieved from http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf.

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[6] Criminal Code of Spain. (2019, November). Retrieved from http://perso.unifr.ch/derechopenal/assets/files/legislacion/l_20121008_02.pdf.

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[9] Criminal Code of Italy. (2017, August). Retrieved from http://www.anvu.it/wp-content/uploads/2016/03/codice-penale-navigabile-4-marzo-2016.pdf.

General Civil Penal Code[1]). The tasks and goals of these current regulations differ and are associated with various historical events (late 19th century – early 21st century) [1]. The development of criminal legislation is a complex cyclical process, within a long period of which it is possible to distinguish individual stages of development, described by different selection criteria. It is important to address the modifications that have occurred in the systematisation of regulations during the independence of Ukraine, as this period is marked by significant changes in legislation, as well as progress towards democracy, harmonisation with continental Europe.

The development of criminal legislation in Ukraine and other countries is based on the continuity of criminal law provisions, the current state of society and the country, as well as international legal obligations that are inherent in a civilised and globalised world. The influence of such different approaches indicates the development of specific similar and at the same time different criminal (penal) codes, which thus preserve unity and differentiation. The need to adopt a new Criminal Code[2] in Ukraine is primarily associated with the dynamic development of the State, which seeks to raise the level of legal regulation of criminal law relations to European standards, which is mandatory in view of the obligations of the government in the Agreement on association with the EU (Articles 8, 22, 24)[3]. It is evident that such a large work on the preparation of a new Criminal Code requires the consolidation of the highest level of criminal (penal) policy or strategy that will allow to plan such changes in the near future [2; 3]. It is obligatory to test and endorse the new Criminal Code in Ukraine in the future in a separate region of Ukraine, conduct surveys of professional participants in criminal (court) proceedings on their attitude towards such changes, record expectations from society on the results of the new Criminal Code of Ukraine[4], and adjust new version of the Criminal Code of Ukraine [4; 5].

Considering the global trends in the development of criminal law provisions and Criminal (Penal) Codes in general, it should be noted that the period, which the criminal legislation is currently undergoing, should be referred to as globalisational, and codification should be referred to as unified. This is conditioned by the rapprochement of countries in the world through the implementation of conventions and other international regulations, which has led to the harmonisation of criminal legislation. Thus, it should come as no surprise that the so-called "new" criminal codes will retain most of the rules in the same form as in previous versions, due to the international obligations assumed by states in previously adopted conventions, international acts and agreements.

Notably, the new Criminal Code of Ukraine must preserve the historical continuity that is inherent in criminal legislation. This means that the institutions of criminal law, which can be traced back to different historical periods, must continue existing in a slightly updated form, represented by the new Criminal Code of Ukraine. This applies to different

[1]General Civil Penal Code of Norway. (2020, January). Retrieved from http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf.

[2] The Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text.

[3] Association Agreement between Ukraine and the European Union, the European Atomic Energy Community and their Member States. (2014, March). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011/ed20140321#Text.

[4] The Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text.

times of Ukraine's development, including within different state formations: Kyivan Rus, the Principality of Galicia–Volhynia, the Grand Duchy of Lithuania, the Polish–Lithuanian Commonwealth, the Austro-Hungarian Empire, the Russian Empire, Poland, Romania, Hungary, and Czechoslovakia.

1. MATERIALS AND METHODS

To analyse the prospects for further development of criminal legislation, the latest developments of the domestic doctrine of criminal law have been studied, the legislation on crimes has been explored, the main dynamics have been traced, regulations have been studied, allowing to shed light on practical problems. The structure of the scientific paper on criminal law contains traditional elements: problem statement, initial provisions and their theoretical development are put forward, empirical data is collected and analysed, the conclusion is substantiated, matters requiring further study are outlined, etc. The theoretical framework of the paper includes scientific articles of Ukrainian and other lawyers in criminal law. To identify trends in the criminal legislation of Ukraine, the author used an example of the study of crimes against justice in historical retrospect and the development of promising areas. A set of scientific methods was used for this, including general scientific and special methods of scientific cognition. Methods of logic, analysis and synthesis, induction and deduction, analogy were used in the construction of a scientific paper, establishing trends in criminal legislation in the globalised world and Ukraine, the transition from individual crimes against justice to their totality, and establishing the content of crimes against justice as an institution of criminal law. The Aristotelian method was used to outline the scope of regulations necessary to establish development trends in criminal legislation of Ukraine. The comparative legal method was used to compare the consolidation of the institution of crimes against justice in Ukraine and other countries, and the historical legal method was used to establish the historical preconditions for the development of the institution of crimes against justice in Ukraine. In particular, the division of criminal offences in the history of Ukrainian criminal law was identified as early as in the Austro-Hungarian Criminal Code of Franz Joseph I in 1852, which operated in the Ukrainian lands of Galicia and Bukovina. These scientific visions of legal phenomena are based on the principles of scientific unity of theory and practice, scientific objectivity, which eliminates the bias of research results, as well as does not make them dependent on policy or ideological approaches. The dominant method in the methodological approach is comparative law, which allowed to investigate and compare the institution of crimes against justice in other countries. The normative-dogmatic method is used to analyse the content of the provisions of the current domestic criminal legislation, and the method of system-structural analysis – to determine the place of crimes in the legal system. The comparative method allowed to conduct a comparative and analytical review of the Criminal Code of Ukraine[1] and the Law of Ukraine "On Criminal Liability"[2] and to conclude that it is necessary to divide criminal offences into crimes and misdemeanours.

The method of legal forecasting enabled the identification of possible areas for improvement of national criminal legislation and individual laws of Ukraine. The modelling method was used to design the future structure of the object upon the development of proposals and recommendations aimed at improving criminal legislation and the practice of its application. The entire process of scientific cognition was accompanied by a dialectical method, which was used to consider the trends of development of the Ukrainian legislation and stages of its improvement. The dogmatic method

[1] The Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text.

[2] Law of Ukraine No. 2341-III "On Criminal Liability". (2001, April). Retrieved from http://code.leschishin.org/crc/crc02.php.

facilitated the interpretation of legal categories. The formal legal method was used in the analysis of legal provisions on criminal offences and misdemeanours. In the context of modern development of the criminal legislation, the ideas proposed by the author herein contain objective, substantial, and methodological components. These methods were used in an integrated manner to ensure the comprehensiveness of the study and the reliability of its results.

2. RESULTS AND DISCUSSION

2.1 Trends in the development of criminal legislation in the globalised world

An important issue to be addressed is the title of the new Law on criminal liability. In Ukraine, there are currently two synonymous names of one regulation that establishes criminal liability – the "Criminal Code of Ukraine" [1] and the "Law on Criminal Liability"[2]. Depending on the adopted act, countries of the world used either "Criminal Code" or "Penal Code". The difference between the Criminal Code and the Penal Code is the presence of an emphasis that connects the purpose of this act [6; 7]. The Criminal Code aims to draw the line between criminal and non-criminal, while the Penal Code does not stop there and moves forward to another purpose – punishment of the guilty for the crime committed [8]. An interesting new approach should be the division of criminal offences into crimes and misdemeanours, which has already been stipulated in the current Criminal Code of Ukraine since January 1, 2020[3]. Preservation of such a division of criminal offence (which has already been traced in the history of Ukrainian criminal law, for example, the Austro-Hungarian Criminal Code of Franz Joseph I in 1852, which operated in the Ukrainian lands of Galicia and Bukovina until 1932) will affect not only the institutions of the General, but also the institutions of the Special Part of the new Criminal Code of Ukraine[4] [9]. It will be necessary to compile a separate book of the Special Part in the new Criminal Code of Ukraine[5], which would establish criminal liability for misdemeanours (with their division into sections). Such approach would help the law enforcer to quickly resolve the issue of investigation (inquiry or pre-trial investigation) and jurisdiction of criminal proceedings (cases), and the citizen – to determine the possible consequences of a crime or criminal offence. Thus, Book I of the Special Part in the new Criminal Code of Ukraine – "Crimes"[6], and Book II – "Misdemeanours" should be introduced.

The necessity of criminal law protection of life, health, property, the environment, the service sector, or justice is undoubted [10]. Crimes against humanity and war crimes are in particular need of criminal justice, as Ukraine (since 2014) has been the victim of aggression by Russia and the occupation of its parts in Luhanska and Donetska Oblasts, as

[1] The Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text.

[2] Law of Ukraine No. 2341-III "On Criminal Liability". (2001, April). Retrieved from http://code.leschishin.org/crc/crc02.php.

[3] Law of Ukraine No. 2617-VIII "On modification of some legislative acts of Ukraine concerning simplification of prejudicial investigation of separate categories of criminal offences". (2018, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2617-19#Text.

[4] The Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text.

[5] The Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text.

[6] *Ibidem*, 2001.

well as in Crimea. To this end, the implementation of the Rome Statute of the International Criminal Court and the harmonisation of current legislation in this field are being addressed. Meanwhile, Ukraine has already recognised the jurisdiction of the International Criminal Court to commit crimes against humanity by senior government officials, which led to particularly serious consequences and mass killings of Ukrainian citizens during peaceful protests between November 21, 2013 and February 22, 2014[1]. The International Criminal Court has subsequently commenced proceedings for aggression against Ukraine (Reports of the International Criminal Court on the actions of the preliminary investigation of 14 November 2016[2], 4 December 2017[3], 5 December 2018[4], 5 December 2019[5]).

2.2 Historical preconditions for the development of criminal legislation in Ukraine on crimes against justice

It is necessary not only to preserve the historical ties that are preserved in the current version of the Criminal Code of Ukraine[6], but also to restore the already lost ties through the development of a new version of the Criminal Code of Ukraine with changes based on research of previous versions of various codes that were valid with the state formations on Ukrainian territory. Studies of these regulations allow to form *a historical map of crimes, misdemeanors, and offences against justice*, which were inherent in the criminal legislation of Ukraine in the 11th-20th centuries (*based on the stage and initial possibility of their commission*):

1. Stage before the registration of a crime, related to the registration of a crime or instead of pre-trial or court proceedings: 1) abscondence of a criminal, concealment of a crime or traces of a crime; 2) obstruction of the search for a criminal or a fugitive; 3) acceptance of the criminal on the ship by the skipper for the purpose of its transportation; 4) failure to report on an impending crime or on a committed crime; 5) false report of a crime, false denunciation, slander, self-incrimination; 6) denial of justice; 7) failure to initiate an investigation in a criminal case; 8) reprimanding a person for committing a crime before the court passes a sentence; 9) self-judgment; 10) exercising judicial functions without authority (by another person), pretending to be a judicial official.

2. Stage of pre-trial investigation: 1) obstruction of investigative actions by violence or other means; 2) illegal conduct of investigative actions, including search and seizure; 3) unlawful arrest, detention, or restriction of liberty; 4) failure to take security measures against persons taken under protection and disclosure of information about such measures; 5) non-appearance of a witness, expert, translator, juror in court (pre-trial investigation),

[1] Application of Verkhovna Rada No. 790-VII of Ukraine. (2014, February). Retrieved from https://zakon.rada.gov.ua/laws/show/790-18#Text.
[2] International Criminal Court Report on Preliminary Examination Activities (2016, November). Retrieved from https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.
[3] International Criminal Court Report on Preliminary Examination Activities (2017, December). Retrieved from https://www.icc-cpi.int/Pages/item.aspx?name=171204-rep-otp-PE.
[4] International Criminal Court Report on Preliminary Examination Activities (2018, December). Retrieved from https://www.icc-cpi.int/Pages/item.aspx?name=181205-rep-otp-PE.
[5] International Criminal Court Report on Preliminary Examination Activities (2019, December). Retrieved from https://www.icc-cpi.int/Pages/item.aspx?name=191205-rep-otp-PE.
[6] The Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text.

their refusal to perform duties; 6) resistance to the appearance of a witness, victim, expert, forcing them to refuse to testify or give an opinion, including through bribery or revenge; 7) incitement of a witness or expert to give false testimony, including by threats or violence; 8) perjury, intentional, or negligent false testimony of a witness or expert in a civil or criminal case, defamation, self-incrimination; 9) insulting witnesses; 10) insult of the prosecutor or investigator; 11) coercion to testify, torture; 12) failure of the investigator to interrogate after taking the person into custody for three days; 13) destruction, theft, or falsification of evidence or case; 14) violation (disclosure) of secrecy by a lawyer, prosecutor, or other person; 15) obstruction of the advocate's defence of a client, including through bribery; 16) misappropriation of a document written to the court for prosecution; 17) slowness of the investigation; 18) failure of an investigator to perform duties; 19) acquisition of property that is the subject of the case by the official conducting the investigation, as well as concealment of property subject to confiscation; 20) bringing a knowingly innocent person to criminal responsibility, sending them to court without charges, false accusation [11].

3. Stage of judicial review: 1) obstruction of judicial activity, interference in the activity of the court, interference in the performance of their duties by a court official; 2) contempt of court or court decision, insult of the court, including judge, magistrate, gendarme, other employee in a judicial institution; 3) bodily injuries, murder of a participant in legal proceedings (or in court) or threat of their commission; 4) disrespect committed by the judge to the participants in the proceedings, including bodily injury and murder; 5) false oath in a civil or criminal case; 6) bribery of a judge, prosecutor, or other judicial official, including through extortion; 7) abuse of justice by a judge or court official; 8) abuse of power by a court official; 9) excess of authority by a judge, prosecutor, judicial police officer; 10) incitement to abuse of power by a judge or prosecutor; 11) delay in justice; 12) unjust decision, injustice.

4. Stage of execution of judgement: 1) repeated appeal to the court on the same grounds; 2) claim what was lost after the court; 3) non-execution of judgement; 4) non-execution of punishment; 5) illegal imprisonment; 6) execution of a sentence not imposed by a court, increase or decrease of a sentence imposed by a court; 7) evasion from serving a sentence in the form of imprisonment; 8) violation of deportation abroad, escape from the place of exile, unauthorised return of the person who was deported or non-departure of the convict for deportation; 9) malicious disobedience to the requirements of the administration of the penitentiary institution; 10) illegal transfer of prohibited items to persons held in correctional facilities, pre-trial detention centres, medical-labour and medical-educational prophylactics; 11) escape of a prisoner, mass escape of prisoners, breakage of a prison, escape from a specialised medical institution; 12) aiding or abetting the escape of a prisoner; 13) negligence of the warden in prison [12].

2.3 Current trends in the development of criminal legislation of Ukraine on crimes against justice

Crimes and misdemeanours in justice will become important chapters of both books of the Special Part of the new version of the Criminal Code of Ukraine[1]. At present, there are

[1] The Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text.

certain trends in the world concerning the establishment of criminal liability for criminal offences in the field of justice: 1) implementation of international regulations; 2) ensuring the protection of the activities of international courts whose jurisdiction is recognised by Ukraine; 3) establishment of a system of criminal offences against justice through their division into groups in the structure of the relevant section (division of the section into chapters). Such groups may be: 1) criminal offences in administration of justice; 2) criminal offences in enforcement of justice; 3) criminal offences in support of enforcement of justice [13].

The names of criminal offences against justice in the world differ, which, however, allows to distinguish the following groups of names that protect the following generic objects: 1) the administration of justice; 2) justice; 3) related objects: a) the judiciary; b) judicial authorities; c) public authority; d) true statements, testimony, conclusions, accusations, and decisions in court proceedings; 4) justice and related objects. In this part, the legislator will need to decide on the object to be protected [14]. Therewith, it is important to maintain a broad interpretation of justice, which protects it at various stages and forms of proceedings from the filing of an application or operational and investigative activities to the execution of a court decision or sentence [15; 16]. That is why the provision of criminal law protection before the administration of justice will lead to a significant narrowing of protection to ensure the implementation of procedures in the issuance of court decisions.

The most typical criminal offences in justice in the world are: 1) false reporting of a crime, simulation of a crime, failure to report a (serious) crime and falsification of evidence; 2) false accusation, false testimony, false oath, and other false statements; 3) criminal offences related to the adoption of illegal decisions (illegal detention or arrest, coercion to testify, refusal to administer justice, making a false court decision); 4) corruption criminal offences of persons administering justice; 5) threat or violence against the participants in the proceedings, as well as encroachment on their property; 6) obstruction of justice, non-appearance, and defamation; 7) escape from the place of imprisonment, release of a person serving a sentence and concealment of a crime; 8) other criminal offences at the stage of execution of judgement or sentence (non-execution of judgement, evasion of execution of a court decision, riot of convicts) [17].

2.4 Prospects for the development of criminal legislation on crimes and misdemeanours in the new Criminal Code of Ukraine

Crimes and misdemeanours against justice in the new Criminal Code of Ukraine should include the corresponding sections in the books that establish criminal liability for committing socially dangerous acts [18]. This inclusion should be based on Ukraine's international legal obligations, the historical preconditions for the development of the institution of crimes and misdemeanours against justice in Ukraine, as well as the current state of justice, which requires protection at the appropriate level [19]. Considering such an approach, it is necessary to include the following acts as *crimes against justice* in the new Criminal Code of Ukraine: 1) concealment of a crime; 2) false denunciation; 3) knowingly illegal house arrest or detention; 4) coercion to testify; 5) perjury; 6) false oath; 7) false conclusion of a forensic expert or appraiser's report on property valuation; 8) false translation; 9) bribery of a witness, victim, forensic expert, appraiser, or translator; 10)

disclosure of investigative or lawyer's secrecy; 11) falsification of evidence; 12) ruling by a judge (judges) of a knowingly unjust decision, sentence, ruling, or resolution; 13) destruction or damage of evidence; 14) false accusations; 15) obstruction of the activity of a judge, prosecutor, or investigator; 16) interference in the activities of statesmen of the judiciary; 17) illegal interference in the work of the automated document management system of the court; 18) failure to take security measures against persons taken under protection; 19) disclosure of information on security measures in respect of a person taken under protection; 20) resistance to public or private performers; 21) non-execution of a court decision; 22) non-compliance with the decision of the International Criminal Court, the European Court of Human Rights, or the Constitutional Court of Ukraine; 23) illegal actions with respect to property subject to confiscation; 24) evasion of serving a sentence in the form of restraint of liberty; 25) evasion from serving a sentence in the form of restriction or imprisonment by a person who was allowed a short-term departure; 26) actions that disrupt the work of penitentiary institutions; 27) escape from the place of imprisonment or from custody [20].

The following acts can be considered as *misdemeanours against justice* in the new Criminal Code of Ukraine: 1) self-judgment; 2) violation of the right of access to court or the right to initiate a pre-trial investigation; 3) knowingly illegal detention or attachment; 4) non-compliance with house arrest; 5) violation of the right to protection; 6) misleading the High Council of Justice; 7) refusal of a witness to testify or refusal of a forensic expert or translator to perform the duties assigned to them; 8) obstruction of the appearance of a witness, victim, forensic expert, forcing them to refuse to testify or give an opinion; 9) interference in the activities of a judge, prosecutor, investigator, lawyer, representative of a person, forensic expert, employee of the state executive service, or private executor; 10) obstruction of the activity of the High Council of Justice, the High Qualification Commission of Judges of Ukraine; 11) disclosure of information on security measures in respect of a person taken under protection; 12) illegal actions with respect to the seized property, the pledged property, or the property distrained; 13) evasion from payment of a fine or from serving a sentence in the form of deprivation of the right to hold certain positions or engage in certain activities; 14) evasion of serving a sentence in the form of community service or correctional labour; 15) intentional non-performance of a conciliation agreement or a guilty plea; 16) non-compliance with restrictive measures, restrictive instructions or failure to pass the programme for offenders; 17) violation of the rules of administrative supervision.

CONCLUSIONS

Criminal offences against justice are such acts that significantly differ in the gravity of the offence, their social danger. Therefore, the division of these criminal offences into crimes and misdemeanours is timely and will affect the procedural features of bringing those responsible for their commission to criminal responsibility. This, in turn, will reduce the burden on pre-trial investigation bodies for these categories of cases. Analysis of global trends in the development of criminal law and Criminal (Penal) Codes in general, indicated that the period under criminal legislation should be referred to as globalisational, and codification should be referred to as unified. This is conditioned by the rapprochement of countries in the world through the implementation of conventions and other international

regulations and, as a consequence, the harmonisation of criminal legislation. It was established that in the process of modification of criminal legislation it is necessary to retain not only historical ties preserved in the current version of the Criminal Code of Ukraine, but also to restore the already lost ties through the development of a new wording of the Criminal Code of Ukraine with changes to previous versions of the regulations. Based on a study of previous versions of certain laws and various codes that operated within the state formations in Ukraine at different times, the author constructed a historical map of crimes, misdemeanours, and offences against justice inherent in the criminal legislation of Ukraine in the 11th-20th centuries (based on the stage and initial possibility of their commission).

The study of regulations that operated in Ukraine in different historical intervals, allowed to point to the rich experience and extensive path of the legislator, who singled out such acts that encroach on justice (approximately 55 crimes against justice). Consideration of these historical preconditions, the modern development of criminal law in Ukraine, as well as current trends, has led to the development of crimes (27) and criminal misdemeanours (17), which may be included in the new Criminal Code of Ukraine.

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КРИМІНОЛОГІЧНА ПОЛІТИКА В УМОВАХ ПОШИРЕННЯ ГОСТРОЇ РЕСПІРАТОРНОЇ ХВОРОБИ COVID-19

Анотація. *Актуальність дослідження обумовлена необхідністю розробки підходів і алгоритмів в питаннях протидії загрозам розповсюдженням світових пандемій з метою запобігання катастрофічним наслідкам в галузях громадського здоров'я та економіки. Мета даного дослідження полягає у визначенні пріоритетних напрямів кримінологічної політики під час карантинних заходів пов'язаних з COVID-19, а також у розробці комплексу стратегічних підходів з питань віктимологічного забезпечення безпеки під час карантинних заходів. У дослідженні був використаний діалектичний метод, а також методи моделювання та системного аналізу даних, які дозволили проаналізувати сучасні виклики, що постають перед українською правовою системою в питаннях визначення комплексу законодавчих вимог і урядових рішень, спрямованих на виявлення та усунення причин і умов вчинення злочинів, забезпечення безпеки суспільства під час карантинних заходів пов'язаних з COVID-19. Результати дослідження дозволяють зробити припущення, що наявність стратегічного документа могла б зробити його дієвим політико-правовим інструментом в питаннях протидії та подолання наслідків поширення існуючих і майбутніх вірусних хвороб. Такий документ має передбачати чіткий алгоритм дій і заходів для забезпечення безпеки громадян при настанні кризових ситуацій та запобігання вчинення злочинів зумовлених загрозами поширення пандемій. У зв'язку з цим, запропоновано комплекс політико-правових рішень стратегічного значення для протидії поширенню світової пандемії на національному рівні та напрями формування кримінологічної політики в умовах реалізації протиепідемічних заходів. У практичному аспекті результати дослідження можуть застосовуватися з метою розробки суб'єктами законодавчої ініціативи різних країн, комплексних документів і стратегій для регулювання суспільних відносин в умовах правових обмежень пов'язаних з епідеміологічними загрозами.*

Ключові слова: Covid-19, SARS-CoV-2, коронавірус, пандемія, кримінологічна політика, віктимологічне забезпечення, стратегія боротьби.

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CRIMINOLOGICAL POLICY IN THE CONDITIONS OF SPREAD OF ACUTE RESPIRATORY DISEASE COVID-19

Abstract. *The relevance of the study is due to the necessity to develop approaches and algorithms to combat the threat of global pandemics in order to prevent catastrophic consequences in the fields of public health and the economy. The purpose of this study is to identify priority areas of the criminological policy during quarantine activities related to COVID-19, as well as to develop a set of strategic approaches to victimological security during quarantine activities. The study used a dialectical method, as well as methods of modelling and systematic analysis of data, which allowed analysing the current challenges facing the Ukrainian legal system in defining a set of legal requirements and government decisions aimed at identifying and eliminating the causes and conditions of crime, ensuring public safety during quarantine activities related to COVID-19. The results of the study suggest that a strategic document could be an effective political and legal tool in combating and overcoming the consequences of the spread of existing and future viral diseases. Such a document should provide a clear algorithm of actions and measures to ensure the safety of citizens in crises and prevent the commission of crimes caused by the threat of pandemics. In this regard, a set of political and legal decisions of strategic importance to counter the spread of the global pandemic at the national level and the direction of the formation of criminological policy in the implementation of anti-epidemic measures. In practical terms, the results of the study can be used to develop the legislative initiative of Ukraine and other countries, comprehensive documents and strategies to regulate public relations in the face of legal restrictions related to epidemiological threats.*

Keywords: Covid-19, SARS-CoV-2, coronavirus, pandemic, criminological policy, victimology, control strategy.

INTRODUCTION

The coronavirus pandemic of 2019 caused profound changes in the daily life of the world community. The countries have begun to experience economic downturns, with an

unprecedented burden on social, economic support and public health systems, which many people rely on in difficult times. The updated strategy of the World Health Organisation to combat COVID-19 of April 14, 2020[1] states that in a short time the local outbreak of COVID-19 has developed into a global pandemic with three defining features that can be described as: a) speed and scale b) severity c) social and economic destabilisation. Controlling people's freedom of movement has become a top priority for governments seeking to slow the spread of the virus. In a pandemic, growing demand and limited resources create ideal conditions for the intensification of corruption, financial and other crimes. Underfunding of health facilities due to various fraudulent and corrupt factors weakens the potential of the health sector. At the same time, the complexity of the work of doctors is growing proportionally, and the role of the medical sector is becoming even more significant. The use of substandard and ineffective drugs, which have become available due to illegal actions, can worsen the condition of patients, complicate the accurate diagnosis or even lead to death, as noted in the analytical report of Europol Crime and Contagion [1].

The lack of comprehensive unified approaches at the national and international levels in the field of victimological security of the population during the spread of pandemics necessitates the filling of such political and legal gaps. In the current context, the implementation of comprehensive measures to study, assess and prevent criminal threats, as well as the introduction of scientific developments in the practice of social control over crime combined into a single strategic document are considered a priority in terms of public safety. Current studies examining the victimisation factors caused by the spread of quarantine measures caused by epidemics and pandemics, in particular COVID-19, address the criteria for quarantine measures [2], the balance between the effectiveness of quarantine measures and the preservation of civil rights and freedoms [3; 4], the impact of quarantine measures on the constitutional rights of citizens [5], criticism of restrictive measures imposed by states in connection with the COVID-19 pandemic in the context of compliance with WHO International Health Regulations [6], the legal liability of health workers in conditions of the spread of coronavirus infection [7; 8] etc. The criminological policy should be carried out according to clearly defined scientifically based criteria, specially defined by law subjects, as well as with the use of modern methods and technologies that will establish the influence of external factors on this process. This approach should be a priority in the development of measures to improve this process and in general the content of the criminological policy, taking into account the existing legal risks associated with possible: miscalculations and inconsistencies in law-making, unprofessional application of legislation in the fight against crime, lack of knowledge about the interpretation of the law and other shortcomings at the level of law enforcement, including on issues of preventive activities, which made up the content of this study.

The main requirement for the effective formation and implementation of criminological policy in the context of the spread of acute respiratory disease COVID-19, should be the coherence of international norms and practices in combating global biological threats and national legislation in matters of security during the quarantine. In

[1] Updated World Health Organization COVID-19 Strategy. (2020, April). Retrieved from https://www.who.int/ru/emergencies/diseases/novel-coronavirus-2019/strategies-plans-and-operations.

today's environment, the main and primary threat is the spread of the COVID-19 pandemic, which necessitates an analysis of current domestic and foreign regulations in the field of public relations during the restrictive measures to prevent the spread of coronavirus and anti-epidemic measures.

1. MATERIALS AND METHODS

The study is based on the analysis of the Updated Strategy for Combating COVID-19 of the World Health Organisation (WHO)[1], the analytical report of Europol Crime and Contagion (2020) [1], the International Health Regulations (IHR) approved by the WHO in 2005[2], legislation Of Ukraine, in particular the Law of Ukraine "On protection of the population from infectious diseases"[3], the Law of Ukraine "On prevention of the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 on the territory of Ukraine"[4], the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine aimed at preventing the occurrence and spread of coronavirus disease (COVID-19)"[5] and others. The above laws list and substantiate the basic principles, rules and recommendations that were used and systematised during the study of information on coronavirus infection and in the writing of this paper. The methodological basis of the article was a dialectical method of scientific knowledge of socio-legal phenomena, as well as general science (empirical – observation and comparison; empirical-theoretical – abstraction and modelling, analysis and synthesis, induction and deduction; theoretical – analogy, historical, systematisation and classification) and separate scientific (special) methods – sociological, statistical and others. The dialectical method of scientific knowledge was used during the specific review of Ukrainian legal documents, as well as foreign ones, for example, the Updated Strategy for Combating COVID-19 of the World Health Organization (WHO) was considered. Using the dialectical method, the information of the analytical report of Europol Crime and Contagion (2020) [1] was objectively considered, and also from the objective point of view the recommendations and rules specified in the above-stated laws of Ukraine concerning prevention of spread of the respiratory disease COVID-19on the territory of Ukraine were analysed.

The method of system data analysis was used. Using the methods of analysis and synthesis, the author consistently analysed the available information on the research topic. With the help of analysis, structural elements, properties and signs of coronavirus disease (COVID-19) were analysed. The synthesis method combined information on coronavirus

[1] Updated World Health Organization COVID-19 Strategy. (2020, April). Retrieved from https://www.who.int/ru/emergencies/diseases/novel-coronavirus-2019/strategies-plans-and-operations.

[2] International Health Regulations. (2005, June). Retrieved from https://zakon.rada.gov.ua/laws/show/897_007#Text.

[3] Law of Ukraine No. 1645-III "On protection of the population from infectious diseases". (2000, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1645-14#Text.

[4] Resolution No. 211 "On prevention of the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 on the territory of Ukraine". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/211-2020-п#Text.

[5] Law of Ukraine No. 530-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/530-20#Text.

disease into a single system. Using this method, all available information from the literature and legal sources on the prevention and control of the spread of coronavirus was systematised and grouped into a single system. The modelling method was used to develop possible options for the formation and implementation of criminological policy in the context of the spread of acute respiratory disease COVID-19. Conclusions were made on the necessity for further technical and software equipment of coronavirus prevention centres "Covid-19", sanitary-epidemiological stations with computer equipment and telecommunications. Using the method of classification, the laws aimed at combating coronavirus infection were sequentially organised and distributed, and they were divided into groups according to certain characteristics. The sociological method of scientific research was used in the study of legal regulation in foreign countries, in particular, the experience of the United States and European countries was analysed. Using the methods of system analysis and scientific design, the paper considers the current challenges facing the Ukrainian legal system in the formation of criminological policy during the implementation of quarantine measures related to COVID-19 in the international context, as well as developed a set of policy measures importance for counteracting the spread of the global pandemic at the national level. Using the method of systematisation of information, the Ukrainian legislation was analysed, as well as the base of the existing legislative acts on the research topic was systematised. In particular, the Law of Ukraine "On Prevention of the Spread of Acute Respiratory Disease COVID-19 Caused by SARS-CoV-2 Coronavirus on the territory of Ukraine" was analysed. Provisions of this law inform the population about administrative liability in case of non-compliance with the rules of prevention of the spread of coronavirus infection. Also, the method of analogy was used to study the issue of preventing the spread of coronavirus infection. The study of foreign sources of information on the control and prevention of coronavirus infection, provided an opportunity to study practical experience and develop recommendations in case of similar situations in Ukraine.

2. RESULTS AND DISCUSSION

COVID-19 is a new type of infectious disease that differs from other diseases caused by coronaviruses, severe acute respiratory syndrome and Middle Eastern respiratory syndrome. According to world statistics, about 40% of cases are mild, 40% have moderate disease, including pneumonia, 15% have severe disease, and 5% have critical illness [9]. In Ukraine, Covid-19 coronavirus infection (a new type of pneumonia) was first diagnosed on March 3, 2020 in Chernivtsi. On March 13, the first fatal case of coronavirus infection was recorded. The results of the study show that the lack of strategic approaches to the issues of integrated response to the spread of biological threats is currently characteristic not only for Ukraine. In particular, the experience of the United States speaks of the selective and unsystematic application of legal instruments to combat the COVID-19 pandemic in this country, which, however, is due to the complexity of its legal system, the state system. At the same time, it is obvious that the presence of a comprehensive strategic document, which would provide a clear algorithm of actions and measures to ensure the safety of citizens in crisis situations caused by the threat of pandemics could be a guarantee of human life. Therefore, one of the main priorities in ensuring the security of the country should be state criminological policy as a coordinated activity of all branches of

government and civil society institutions, aimed at identifying and eliminating the causes and conditions (determinants) of crimes, forecasting possible changes in criminogenic situation, adjusting strategic management criminal justice system for the formation and implementation of anti-epidemic measures. Against the background of the development of the global pandemic in many countries of the world there is a sharp outbreak of crimes, which are directly or indirectly related to the introduction of anti-epidemic and quarantine measures. According to the European Police Office (Europol), during operation "Pandea", which recently took place around the world, police discovered 2000 websites offering counterfeit anti-coronavirus drugs, sprays and ointments (Riegert, 2020) [10].

Restrictions on free movement and closure of borders have had a direct impact on some criminal activities, the growth of which has slowed or stopped. But at the same time, criminal gangs are emerging that use public confusion to create new demand for illegal goods and services. It can be expected that as the crisis develops, the opportunities for criminal activity will expand. In particular, in countries where organised crime groups have links to health systems, life-saving resources are used for criminal gain, weakening the response of states to health emergencies [1]. Quarantine restrictions have no less of an impact on international cooperation. Thus, for many countries, the security of their citizens seems to be a higher priority than the provisions of international instruments guaranteeing free movement. However, in the scientific community, not everyone shares the views on the benefits of severe restrictive measures. It is argued that, in the short term, travel restrictions prevent goods from entering pandemic-affected regions, slow down international public health initiatives, stigmatise society and disproportionately harm the most vulnerable. In the longer term, countries that choose which international instruments to comply with may encourage other countries to do the same, which in turn undermines the basic tenets of international relations [6]. In accordance with Part 1 of Art. 33 of the Constitution of Ukraine[1], everyone who is legally on the territory of Ukraine is guaranteed freedom of movement, except for restrictions prescribed by law. Thus, the constitutional right to free movement of a country is not absolute and may be limited by the relevant law.

In this case, and given the current situation in Ukraine and the state's measures to prevent the spread of COVID-19 in Ukraine, such a law is the Law of Ukraine "On Protection of the Population from Infectious Diseases"[2], which defines, in particular, principles of activity of executive bodies, local self-government bodies, aimed at preventing the occurrence and spread of infectious human diseases, localisation and elimination of their outbreaks and epidemics. This Law establishes the rights, duties and responsibilities of individuals in the field of protection of the population from infectious diseases [11]. Articles 20 and 22 of this Law provide for the responsibilities of persons who are potential carriers and the measures to be taken against such persons. Such persons – if they pose a real risk of infecting others – are subject to treatment, medical supervision and examination in appropriate health care facilities.

Article 29 of the Law regulates the issue of establishing quarantine, during which the necessary preventive, anti-epidemic and other measures, their executors and terms of

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

[2] Law of Ukraine No. 165-III "On protection of the population from infectious diseases". (2000, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1645-14#Text.

implementation are approved, temporary restrictions of the rights of individuals and additional responsibilities imposed on them are determined. Article 31 of this Law defines institutions (special hospitals, isolators, observers) based on which the necessary examinations of persons who have had reliable contacts with a patient with a particularly dangerous infectious disease, as well as persons with symptoms of such diseases must be located and passed. The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)" of March 17, 2020[1] provides administrative liability for violating the rules on quarantine of people, sanitary and hygienic, sanitary and anti-epidemic rules and norms outlined by the Law of Ukraine "On Protection of the Population from Infectious Diseases", other acts of legislation, as well as decisions of local governments on the fight against infectious diseases. The law provides for the creation of a legal basis for the prompt implementation by the state of a set of urgent measures to prevent and treat COVID-19, including procurement of goods, works and services necessary for this purpose, without applying the procedures provided by the Law "On Public Procurement"[2]; 100% prepayment for such goods, works and services; control by the Cabinet of Ministers over the prices of medicines, medical supplies and socially significant goods [12].

The law introduces a set of legal norms aimed at protecting the rights of individuals and legal entities during quarantine, and restrictive measures related to the spread of COVID-19, namely: the possibility of working at home for employees, civil servants and local government officials and providing with their consent leave; granting the right to owners to change the modes of operation of bodies, institutions, enterprises, institutions, organisations, in particular, regarding the reception and service of individuals and legal entities with mandatory informing the public about it through websites and other means of communication; prohibition on revocation of the certificate of registration of an internally displaced person (for the period of quarantine and within 30 days after its revocation), etc. The law instructs the Government to set additional surcharges for medical and other workers directly involved in the eradication of human disease at COVID-19 for the period of implementation of measures to prevent the occurrence and spread of coronavirus disease, until the completion of these measures, and additional payments to certain categories of workers, which ensure the main areas of life. The law establishes administrative liability for leaving a place of observation (quarantine) by a person who may be infected with COVID-19. In particular, violation of the rules on human quarantine, sanitary and hygienic, sanitary and anti-epidemic rules and norms provided by the Law "On protection of the population from infectious diseases", other legislation, as well as decisions of local governments on infectious diseases entails penalties in the form of fines for citizens, including officials. Such changes have been made to the Code of Ukraine on Administrative Offences (to supplement Article 44-3)[3]. In addition, the law provides for

[1] Law of Ukraine No. 530-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/530-20#Text.

[2] Law of Ukraine No. 922-VIII "On Public Procurement". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/922-19#Text.

[3] Code of Ukraine on Administrative Offenses. (1984, December). Retrieved from https://zakon.rada.gov.ua/laws/show/80731-10#Text.

criminal liability for violating the rules and regulations established to prevent and control epidemic and other infectious diseases, if such actions have caused or are known to cause the spread of these diseases or death or other serious consequences. According to the Criminal Code of Ukraine[1], liability for such offences includes sanctions in the form of fines, arrest, restraint or imprisonment. According to regulations, quarantine is an administrative and health measure used to prevent the spread of particularly dangerous infectious diseases, i.e. diseases characterised by severe and (or) persistent health disorders in a significant number of patients, high mortality and rapid spread of diseases among the population. Government Resolution of March 11, 2020, No. 211 "On prevention of spread of acute respiratory disease COVID-19 caused by Coronavirus SARS-CoV-2 on the territory of Ukraine" (as amended by Resolution of April 2, 2020, No. 255)[2] defines the categories of persons which are subject to obligatory hospitalisation to observers (isolators), and the procedure for such hospitalisation. Thus, since in accordance with Art. 33 of the Constitution of Ukraine[3], citizens of Ukraine may not be deprived of the right to return to Ukraine at any time, they are obliged to comply with all rules and established security measures, in particular, related to mandatory isolation (observation) in view of the quarantine emergency regime and implementation of measures aimed at preventing the spread of coronavirus.

At the same time, there is opposition from some citizens to compulsory observation, which is associated with self-confidence and irresponsibility for possible irreversible consequences and threats to other citizens within the state. These citizens are insufficiently informed about the places and conditions of mandatory isolation (observation), its legal requirements. The experience of the United States in the introduction of quarantine measures shows that the powers of the authorities for the period of implementation of such measures, although quite broad, but subject to significant constitutional restrictions. Although the powers of health authorities should be based primarily on scientific expediency, at the same time they should not violate the fundamental universal values of personal freedom and non-interference in private life [13]. The balance of personal rights and freedoms and legal restrictions in connection with quarantine measures is one of the main issues in the development of quarantine measures, regardless of the jurisdiction of a country. Quarantine measures should be applied only when necessary for public health purposes (or are the least restrictive alternative) and only when they are accompanied by guarantees of adequate legal protection [5]. The US Department of Health and Human Services' (HHS) emergency declaration at the time of the coronavirus pandemic in the United States allows the use of additional financial resources, expands the powers of federal agencies, interagency coordination and temporarily repeals some legislation. The introduction of emergency regimes in the states and in the field is also allowed [3]. A separate problem in the application of certain measures to combat the pandemic may be

[1] Criminal codex of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.

[2] Resolution No. 211 "On prevention of the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 on the territory of Ukraine". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/211-2020-п#Text.

[3] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.

their incompatibility with the International Health Regulations (IHR) approved by the WHO in 2005[1]. For example, paragraph 2 of Article 43 of the IHR implies that states should not apply additional health measures only as a precautionary measure, and must justify their decisions by "scientific principles", "scientific data" and "WHO recommendations". Many of the restrictions on movement imposed during the COVID-19 outbreak are not supported by health or WHO studies. Thus, the WHO has recommended not restricting free movement, arguing that restrictions do more harm than good [6].

In connection with the above, it is possible to formulate several basic special requirements for the effectiveness of the formation and implementation of criminological policy in the context of the spread of acute respiratory disease COVID-19:

– the coherence of international norms and practices in combating global biological threats and national legislation in matters of security during quarantine measures;

– the normative definition of the term "examination for coronavirus "Covid-19" (in most cases, this term means the examination performed to detect antibodies to coronavirus "Covid-19");

– prohibition of refusal of admission to a medical institution and the provision of emergency medical care or restriction of other rights of persons on the grounds that they are carriers or patients with COVID-19, as well as restriction of the rights of relatives and friends of the infected. Illegal actions of officials, violations of the rights of infected or sick people with coronavirus, their relatives and friends can be appealed in accordance with the legislation of Ukraine;

– establishment of criminal liability for knowingly not informing about the infection or infection of another person (persons) with coronavirus by a person who knew about the presence of coronavirus infection. A perpetrator must also compensate for the damage caused by the failure to provide medical and social assistance to an infected person. However, the responsibility of healthcare professionals for human coronavirus infection should be approached with extreme caution, deeply analysing the responsibility of each person, as well as the situation in which a healthy person was infected with a coronavirus infection by a sick person. Therefore, Art. 325 of the Criminal Code of Ukraine "Violation of sanitary rules and regulations for the prevention of infectious diseases and mass poisoning" should, in the authors' opinion, add Part 2 as follows: "Infection of another person with infectious diseases by a person who knew he had the disease";

– it is necessary to envisage the development of a better anti-epidemic surveillance system for COVID-19, which would provide the organisation of monitoring of infected and persons from "high-risk groups".

Thus, modern achievements of scientific and technological progress necessitate further technical and software equipment of coronavirus "Covid-19" prevention centres, sanitary epidemiological stations with computer equipment, telecommunications, which will create a single integrated automated information and analytical system at the regional level on this problem based on basic computer programs. The issue of cybersecurity in ensuring the effective functioning of such systems deserves special attention, as the shortcomings of software applications can make them objects of criminal encroachment,

[1] International Health Regulations. (2005, June). Retrieved from https://zakon.rada.gov.ua/laws/show/897_007#Text.

create threats to the security and privacy of patients, etc. [14]. Based on this, the system of medical examination of the population is subject to revision and improvement, which provides for both mass epidemic and sample surveys of certain categories of the population to preserve the volume of research on persons from "high-risk" groups and other contingents [15]. The social significance of the problem of coronavirus "Covid-19", legal regulation of examination of "high-risk groups", the issue of liability of medical staff and others for human coronavirus infection requires high training for organisational, legal, treatment and prevention and anti-epidemiological measures and their information software. Thus, the experience of the United States shows that in the United States there is no common approach to ensuring the legal immunity of physicians related to the performance of their professional duties in situations that require immediate decision on how to save the patient's life (e.g. use of ventilators) [16]. Existing federal and state laws provide limited immunity to physicians and nurses in situations that require urgent decisions. The scientific community notes that health workers' concerns about liability should be kept to a minimum, as even a small likelihood of prosecution can affect the ethics of doctors' decisions about their responsibilities, which may, for example, be reflected in appointment of ventilators by the principle of "first come – first served", and not based on the conditions of objective necessity [17].

In this regard, the strategic general social directions of the formation of criminological policy during the implementation of quarantine measures should include:

– appropriate professional training of doctors, lawyers, teachers in the institutes of improvement and advanced training courses for specialists of various specialties and especially virologists-infectious diseases;

– development and publication of relevant scientific, legal and educational literature (monographs, thematic reviews, methods, abstracts, collections, reference books, textbooks, etc.) on preventing the spread of infectious diseases, including the use of positive experience abroad on issues of coronavirus "Covid-19";

– inclusion of human coronavirus prevention issues in the curricula of all educational institutions;

– training of leaders of youth organisations, persons from "high-risk groups" in territorial centres of human coronavirus prevention;

– training of practical health care specialists, law enforcement officers and scientists in the leading specialised research institutions of Ukraine and abroad.

– strict adherence to self-isolation and observation.

The measures will allow for the training of highly qualified personnel for the provision of legal and specialised medical care and significantly increase the efficiency of the entire system of health care, education and legal information support of this problem [18]. In connection with the above, it can be stated that it is necessary to adopt at the legislative level the State Response Strategy for Covid-19 (Prevention Strategy), the main task of which should be to control the pandemic and its cessation by slowing down virus transmission and reducing mortality. COVID-19, as well as the elimination of negative social, economic, political and other consequences caused by the introduction of quarantine restrictions that may lead to illegal actions in this area. Achieving such a strategic goal is possible by:

a) coordination of state and regional response measures to eliminate the causes and

conditions of crimes;

b) involvement and mobilisation of affected by the virus and local communities and individuals at risk to identify and provide information on illegal actions in the context of quarantine measures;

c) application of situationally necessary medical and sanitary measures to slow down the transmission of the virus and control of concomitant cases that may lead to the commission of offenses;

d) preparation of the health care system in order to reduce COVID-19-related mortality, preserve priority health care services and protect health workers from and against wrongdoing;

e) planning of emergency measures to ensure uninterrupted vital public functions and elimination of circumstances that may lead to the commission of offenses in the field of medical services.

The defining goals of the Strategy are:

– mobilisation of all social institutions and citizens of the country to fight the pandemic, in order to ensure the acceptance of responsibility by all state and public sectors and participation in the prevention of diseases and illegal behaviour that may contribute to the spread of coronavirus;

– control of cases and foci of the disease, and prevention of virus transmission among the population by rapid detection and isolation of all cases, provision of appropriate medical care, tracking, quarantine and support for all those who came into contact with patients;

– prevention of spread of the virus among the population by taking appropriate situation measures to prevent and control infection, general measures of physical distancing, as well as appropriate and proportionate restrictions on domestic and foreign travel, in which there is no urgent need;

– reduction of mortality through the provision of appropriate clinical care to patients with COVID-19, ensuring the continuity of priority health and social care services and the protection of health workers and vulnerable groups;

– development of safe and effective vaccines and therapeutic agents that can be distributed in the required quantity and available depending on the needs of the health care system and the population.

The necessity for formal platforms for interagency coordination of efforts to counter the spread of pandemics is confirmed by a study of Singapore, which since the outbreak of SARS in 2003 has systematically strengthened its ability to combat new infectious diseases and as of today, it has one of the lowest mortality rates among Asian countries in terms of the number of patients (23 deaths in 32,800 patients) [19]. In addition, the need for comprehensive strategic approaches to criminological and victimological support of global and national security during quarantine measures stems from the essence of the studies considered in this paper on the EU and the US, which give an idea of clearly developed approaches to the above issues in these countries do not yet exist. Quarantine measures and bans on free movement are often the first response against new infectious diseases. However, these traditional remedies tend to have limited utility for rapidly spreading infectious diseases, and if used exclusively as a tool of harsh influence, selectively and unsystematically, they can be counterproductive [20].

Ukraine should implement a set of measures appropriate to its capabilities and situation in order to slow down the transmission of the virus and reduce the mortality associated with COVID-19, with the ultimate goal of achieving and (or) maintaining a stable level of virus transmission or the absence of new infections and the elimination of circumstances that lead or may lead to the commission of crimes in the context of anti-epidemic measures.

CONCLUSIONS

The outbreak of the COVID-19 pandemic has revealed the unwillingness of many nations to effectively counter the new global threat in terms of effective legal and enforcement mechanisms. In this sense, Ukraine is no exception. At the same time, the analysis of Ukrainian legislation suggests that since the spread of the pandemic in Europe, it has been able to adapt relatively quickly to new realities. At the same time, the issues facing the Ukrainian legal system in terms of the formation and implementation of criminological policy in the field of public safety during quarantine measures related to the spread of the coronavirus pandemic revealed the need to develop a national strategy document that includes a set of measures to combat viral threats and regulation of public relations during their spread. Such a complex should include the achievements of international practices, be flexible and adaptable to new challenges, given the close contact of criminological, economic, political, social and other areas of security of the individual and society.

The proposed set of measures reflected as a State Response Strategy for Covid-19 could create the preconditions for the formation of an effective mechanism in criminological and victimological support of global and national security, given the existing and future epidemiological threats. It is assumed that being adapted to the relevant legal realities of other states, the proposed strategy has the right to exist in any legal system. The results of the study suggest that future challenges in the formation and implementation of criminological policy to ensure the safety of citizens during quarantine and restrictive measures will be due to the adaptation of criminal activity to such conditions, and therefore it is assumed that further research should focus on the development of criminological approaches to combating crimes in the field of public health and violation of norms for the prevention of infectious diseases.

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Відділ дослідження проблем кримінального процесу та судоустрою
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імені академіка В.В. Сташиса
Національної академії правових наук України
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ПРАВОВІ ЗАСОБИ ЗАБЕЗПЕЧЕННЯ ЄДНОСТІ ЗАСТОСУВАННЯ КРИМІНАЛЬНОГО ПРОЦЕСУАЛЬНОГО ЗАКОНУ

Анотація. *Забезпечення єдності судової практики є реалізацією принципу правової визначеності, який, будучи складовою принципу верховенства права, забезпечує розумну прогнозованість судових рішень. На теоретичному рівні питання єдності судової практики здебільшого стають предметом досліджень у контексті судової реформи та судоустрою, проте комплексні дослідження з цієї проблематики у царині сучасного кримінального судочинства майже відсутні. Метою дослідження є встановлення системи правових засобів забезпечення єдності судової практики. Методологічну основу дослідження склали загальнонаукові та спеціальні методи, а саме: діалектичний, системний, формально-юридичний та логічний методи. Авторами надано короткий огляд теоретичних положень, що визначають соціально-правову цінність єдності правозастосовної практики. Проаналізовано поняття «єдності судової практики» у царині кримінального провадження та наголошено на використанні у власному дослідженні підходу до розуміння єдності судової практики як синоніму однакового (усталеного) застосування процесуальних та матеріальних норм в однорідних категоріях судових рішень, що ухвалюються в перебігу кримінального провадження. Розглянуто питання реалізації дискреції при прийнятті судового рішення та її співвідношення із стандартом «узгодженості судового рішення». Встановлено, що межа дозволеної різності у застосуванні закону є досить гнучкою та неформалізованою. Установлено, що якість закону не може оцінюватися у відриві від практики його застосування. Авторами наголошено й на інструментальній ролі судової практики у загальному механізмі забезпечення однаковості правозастосування. Висловлена позиція щодо ролі роз'яснень Пленуму Верховного Суду в загальному механізмі забезпечення єдності судової практики. Встановлено, що система правових засобів забезпечення єдності застосування закону у царині кримінального провадження складається з сукупності взаємопов'язаних між собою елементів. Результати дослідження можуть бути використані при подальшій науковій розробці проблеми забезпечення єдності судової практики, науковому обґрунтуванні пропозицій, спрямованих на удосконалення чинного законодавства України, що регулює питання, які стали предметом даного наукового дослідження.*

Ключові слова: судова практика, єдність судової практики, якість кримінального процесуального закону, система правових засобів, розбіжність судових рішень, суддівська дискреція.

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LEGAL MEANS OF PROCURING THE UNITY APPLICATION OF THE CRIMINAL PROCEDURE LAW

Abstract. *Ensuring the unity of judicial practice is the implementation of the legal certainty principle, which is considered as the part of the rule of law, ensures the predictability of court decisions. At the theoretical level, the issues of the unity of judicial practice are mostly the subject of research in the context of judicial reform and the judiciary, but comprehensive research on this issue in the field of modern criminal justice is almost absent. The purpose of the study is to establish a system of legal means to ensure the unity of judicial practice. The methodological basis of the study was based on general and special methods, namely: dialectical, systematic, formal-legal and logical methods. The authors provide a brief overview of the theoretical provisions that determine the socio-legal value of the unity of law enforcement practice. The concept of "unity of judicial practice" in the field of criminal proceedings is analyzed and it was emphasized the usage of the approach of understanding the unity of judicial practice as a synonym of equal (adjustment) application of procedural and material norms in homogeneous categories of court decisions, which are adopted in the course of criminal proceedings. It is established that the limit of permitted differences in the application of the law is quite flexible and informal. It is established that the quality of the law cannot be assessed in isolation from the practice of its application. The authors also emphasize the instrumental role of judicial practice in the general mechanism of ensuring uniformity of law enforcement. A position was expressed on the role of explanations of the Plenum of the Supreme Court in the general mechanism of ensuring the unity of judicial practice. It is established that the system of legal means to ensure the unity of application of the law in the field of criminal proceedings consists of a set of interrelated elements. The results of the study can be used in further scientific development of the problem of ensuring the unity of judicial practice, scientific substantiation of proposals aimed to improve the current legislation of Ukraine, which regulates the issues that have become the subject of this research.*

Keywords*: judicial practice, uniformity of judicial practice, quality of criminal procedural law, system of legal remedies, discrepancy or court decisions, judicial discretion.*

INTRODUCTION

The unity (or coherence) of judicial practise is one of the fundamental values of modern justice. One of the key principles of legal certainty in the concept of the rule of law is manifested, among other things, in ensuring the *unity of judicial practise* in understanding the relevant legal rules by courts taking into account the specific situation and in accordance with general guidelines in its interpretation contained in judicial practise. A single approach to the application of the law best meets the requirements of predictability, the rule of law and the effective protection of human rights [1]. Conversely, according to the case-law of the European Court of Human Rights (ECtHR), inconsistencies in judicial decisions destroy public confidence in judges, which is an integral part of the rule of law and constitutes the ground to implement the right to a fair trial (Article 6 § 1 of the

Convention for the Protection of Human Rights)[1]. Thus, in the context of modern legal understanding, which does not reduce the right to law, the court decision as a result of law enforcement activities in a state governed by the rule of law is actually required to comply with judicial practise or "established case law" [2]. In view of this, the legislator, scientific experts of leading democracies and international organisations pay great attention to finding and approving effective mechanisms to ensure the unity of judicial practise. Among the international legal acts, a valuable guideline in the field of ensuring the unity of judicial practise is the CCJE Opinion No. 20 "On the role of courts in ensuring the uniform application of the law" (Strasbourg, November 10, 2017) (hereinafter – the Opinion of the CCJE). The CCJE Opinion states, in particular, that in a state governed by the rule of law, citizens have a legitimate expectation that they will be treated like everyone else and that they can rely on previous judgments in similar cases, and thus citizens may provide for the legal consequences of their actions or omissions (paragraph 5) [3]. In other words, for a judgment in a state governed by the rule of law to meet the requirements of the rule of law, it must be reasonably foreseeable. It is no coincidence that the ECtHR also links the right to a fair trial enshrined in Article 6 of the CPC to the requirements of uniform application of the law. Many states seek to ensure the uniformity of their case law, arguing that the judiciary is independent in its proceedings, but that its decisions should be predictable rather than chaotic. That is why the courts of lower instances in most cases rely on the decisions of the courts of higher instances [4].

In Ukraine, the issues of ensuring the unity of judicial practise have long been in the focus of priority attention of both state institutions, practitioners and the scientific community. Back in 2015, the official political document recognised the insufficient level of unity and consistency of judicial practise as one of the main factors of low efficiency of the justice system, which necessitated the development of a system of coordinated mechanisms to promote unity of practise[2]. In this context, a number of legislative and organisational measures have been taken, in particular, reforming the judicial system, improving the legislation governing the procedural powers of the court of cassation, and others. However, despite the constant attention paid to the issue of coherence of judicial practise, the problem of diametrically opposed judicial positions on similar legal issues today, unfortunately, is not resolved. Although the unity of judicial practise is an indicator of the professionalism of judges, most of its achievement depends on legal factors – the existence of a coherent system of remedies that allow ensuring unity in the application of the law, and thus unify judicial practise. This necessitates the study by scholars of issues related to the means of ensuring the unity of judicial practise at the systemic level.

1. MATERIALS AND METHODS

The methodological basis of the study was a set of modern general scientific and special methods used in legal science. At the same time, first of all, the authors proceeded from the fact that the system of methods should be associated with the recognition of the

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, No 995_004. (1990, January). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004/ed20131002#Text

[2] Decree of the President of Ukraine No 276/2015 "On the strategy of reforming the judiciary, the judiciary and related legal institutions for 2015-2020. (2015, May 20). Retrieved from https://zakon2.rada.gov.ua/laws/show/276/2015

existence objectivity and the need for development of legal phenomena – unity of judicial practice, legal means to ensure unity of judicial practice, socio-legal expectations at the present stage of development of society, etc. The general level of methodology is represented by the method of materialist dialectics, which has not lost its relevance so far, as it requires comprehensiveness and objectivity to the knowledge of real phenomena, as well as their links with practical activities in criminal proceedings. The choice and use of specific methods of the research process depended on the stage of cognition and the goal, which was set at a certain stage of cognitive activity.

Thus, the dialectical method as a universal method of studying social and legal phenomena allowed stating that the quality of legislation and the practice of its implementation are in objective unity, interconnection and interdependence. The dialectical method is based on such methods of information cognition as data synthesis and analysis, as well as abstraction and the principle of convergence from abstract to specific concepts. To generalise and develop a holistic vision of the concept of unity of judicial practice, a set of methods of theoretical cognition was used, which together with dialectical method form a system of research methodology. The system method allowed to consider a set of legal means to ensure the unity of judicial practice as a system, the elements of which, being interconnected and interdependent, are used to solve a specific problem – ensuring the unity of judicial practice in criminal proceedings, which, in fact, is the integrative quality that characterises the very system of these tools. The method of abstraction was used to set out the legal positions of the ECtHR relevant to the issue of ensuring the unity of judicial practice, to highlight their essence. Formal-legal method is used to clarify the conceptual and categorical apparatus of research (in particular, the concept of "unity of judicial practice"), the establishment of structural elements of the unity of judicial practice, formed by law enforcement practice (acts of law enforcement by higher courts): 1) court decisions – procedural decisions of courts of appeal and cassation, which are valuable guidelines in the interpretation and application of the law; 2) decisions (rulings) of the Supreme Court that resolve existing differences in judicial practice (disputed issues of law enforcement). The logical method (methods of analysis, synthesis and induction) allowed analysing the problematic issues of uniform application of the law in similar legal relations and to identify legal means of ensuring the unity of judicial practice, which is a necessary condition for overcoming the problem of diametrically opposed judicial positions on similar legal issues. The comparative legal method was used in the study of approaches to the vision of the phenomenon of divergence of court decisions, formalised in some international legal acts. The method of idealisation and modelling allowed developing a theoretical model of legal means to ensure the unity of judicial practice and others. At the same time, all scientific research methods were used in interconnection and interdependence, which contributed to the comprehensiveness, completeness, objectivity of the study and laid the foundation for further scientific research of the analysed issues and professional scientific discussion aimed at finding and approving effective mechanisms for unity of national case-law.

During the study it was stated that theoretical and applied issues of the unity of judicial practise were considered in the works of many experts of different times, who studied the legal status of the Supreme Court (Ukraine) and covered issues related to ensuring the unity of judicial practise, including: N. Bobechko [5], M. Demenchuk [6].

2. RESULTS AND DISCUSSION

2.1 On the value of the unity of judicial practise

Consistency of case law is one of the key provisions in the context of ensuring the rule of law at the legislative level, in particular, its integral components, such as legal certainty and predictability and the principle of equality before the law (paragraphs 50, 51, The Report on the Rule of Law of 2011) (The Report on the Rule of Law of 2011) [7]. Even in pre-revolutionary times, the famous Russian jurist M.M. Korkunov stressed that one of the main conditions of justice is the application of laws to all equally, and this is impossible without the same, established judicial practises [8]. The mentioned CCJE Opinion states that in a state governed by the rule of law, citizens have a legitimate expectation that they will be treated like everyone else, and that they can rely on previous judgments in similar cases, and thus citizens can provide legal consequences of their actions or inaction (item 5). In other words, for a judgment in a state governed by the rule of law must be reasonably foreseeable to meet the requirements of the rule of law. It is no coincidence that the ECtHR also links the right to a fair trial enshrined in Article 6 of the Convention[1] to the requirements of uniform application of the law. Many states seek to ensure the uniformity of their case law, arguing that the judiciary is independent in its proceedings, but that its decisions should be *predictable* rather than chaotic. That is why the courts of lower instances in most cases rely on the decisions of the courts of higher instances.

The socio-legal value of a single application of the same substantive or procedural rule in such legal relations is both in the predictability of the legal consequences of certain actions or omissions, and manifested in the minimisation of corruption risks in criminal proceedings (equality in the exercise of discretion on certain legal issues limits "unfair" law enforcement in its "manoeuvring" within the law receiving illegal benefits); ensuring compliance with a reasonable time frame of trial (the existence of sustainable case law as a guide in complex law enforcement issues can significantly reduce the court decision-making process), preventing unjustified loading of the judicial system ("single case law reduces the likelihood of appeals due to predictability of the court's position in the case; .. helps to reduce the burden on the courts, because people, knowing how such cases were resolved in the courts, will be able to understand the futility of court proceedings and refrain from going to court in certain cases" [4]). The vector of the public importance of the uniform application of the law is aimed at increasing the level of public confidence in the court. Conversely, as stated in the CCJE Opinion, the repeated adoption of conflicting judgments (the French version of the Opinion translates the term "conflicting" as "contradictoire" (contradicting, conflicting)) may create a situation of legal uncertainty that reducing trust in the judiciary, while this trust is an important element of the rule of law. The only application of the law determines public confidence (paragraph 6 of the CCJE Opinion) [9]. At the same time, the nature of the discrepancy between court decisions is by no means anomalous, but quite objective. After all, as the ECtHR noted in its judgment in Tudor v. Romania (2009) [10], differences in judicial decisions are by their nature an integral consequence of any judicial system based on a network of courts of first instance and appellate courts built on the principle of territorial jurisdiction. This is how

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, No 995_004. (1990, January). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004/ed20131002#Text

the judicial system in Ukraine works and, of course, may allow different application of the same rule of law by different courts, and therefore there is a need to ensure the unity of judicial practise – precisely in order to bring it, so to speak, to a common denominator [11]. However, the same decision of the ECtHR states: "The Court considers that although the Convention does not oblige the State to return confiscated property and even more so to dispose of it in accordance with its prerogatives of property rights, once the State has taken a decision, it must be carried out with clarity and coherence, with reasonable consistency, in order to avoid, as far as possible, uncertainty and ambiguity among the persons whose powers include measures to implement it. In this context, it should be emphasised that uncertainty – whether legislative, administrative or resulting from government practises – is an important factor to consider when assessing the conduct of the State (paragraph 26). … The Court considers that, in the absence of a mechanism to ensure consistency in the practise of national courts, such profound and long-standing differences in approaches to case law concerning matters of importance to society are such as to create a state of permanent uncertainty (para. 30)" [12].

2.2 Methodological remarks on the "unity of judicial practise"

Before proceeding to the definition and consideration of the system of legal measures, the authors consider it necessary to make a number of methodological remarks on the very subject of security – "unity of judicial practise". In the literature there are different approaches to defining the very concept of *unity* of judicial practise. Without aiming at their careful analysis, only note that the dominant is consideration of unity as the same approach to the application of legal norms to similar in nature factual circumstances [2]. There is also an understanding of the unity of judicial practise as predictability, consistency in the order of consideration of homogeneous categories of court cases and its results, which consists in similarity (likeness) of interpretation, specification of legal norms, overcoming gaps in legal regulation by analogy, and based on substantive and procedural rights, in particular, the rule of law [4]. In the mentioned Conclusion, the CCJE uses as identical concepts "uniform application of the law", "uniform application of the law", "unified application of the law", "uniform (or unity) judicial practise". In this study, the authors believe it possible to consider the unity of judicial practise in the field of criminal proceedings in its substantive sense as a synonym for equal (established) application of procedural and substantive rules in homogeneous categories of court decisions made in criminal proceedings. Moreover, the Law of Ukraine "On the Judiciary and the Status of Judges"[1] refers to the same application, namely – the Supreme Court ensures the uniform application of law by courts of different specialisations in the manner and order prescribed by procedural law (Part 2 of Article 36). The demand for this quality of practise is extremely important in view of the above. The key conditions for assessing the similarity or difference of court decisions are: the application of the same rule; similarity of the factual circumstances established in the course of the proceedings (selection of those circumstances of a particular proceeding that are significant in determining whether it falls under the disposition of the procedural rule, the unequal application of which is questioned). Such an established similarity of factual circumstances is a condition of the

[1] Law of Ukraine "On the Judiciary and the Status of Judges". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19#Text.

relevance of the judicial precedent with which another court decision is compared. As stated in paragraph 38 of the CCJE Opinion, the relevance of the case-law presupposes that the previous case was in fact based on fundamentally similar facts. In cases of recourse to case law, due regard must be paid to the context and circumstances of the case at the time the decision was taken. Appropriate attention should be paid to the analysis of relevant case law, including the development of appropriate case differentiation techniques. There may be cases where a case is involved in a category of cases that are likely to fall under a previous court decision, but a more detailed and critical analysis shows that such a previous court decision is not really a relevant court precedent. The application to two different disputes of different ways of resolving them cannot be considered a conflict within the case law, if it is justified by differences in the relevant factual situation.

In modern legal conditions, when axiomatic is not even the admissibility of discretion in criminal proceedings, but its mandatory presence as a means of ensuring justice in the administration of justice, the subject of discussion of scholars and practitioners has shifted to the problem of specific procedural mechanisms for optimising its boundaries. Given that in the states of continental law, to which Ukraine belongs, in the conditions of rapid development of law and the need for its "correct" application, the importance of judicial practise as a determining guideline for interpreting the law and eliminating legislative gaps, it seems possible to talk about law enforcement discretion within not only the law but also judicial practise. In this sense, *the standard of consistency of a court decision* in resolving issues of law with other existing decisions made in similar legal and factual circumstances, as one of the regulators of law enforcement, is in great demand. When making different criminal procedural decisions, the nature and degree of the implemented discretionary component are different, which depends on a number of factors: the degree of certainty of the hypothesis of the legal norm and alternative legal behaviour options laid down by the legislator in its disposition; the nature of the factual grounds to which the law links the possibility of a decision; in general, the settlement of these factual circumstances by positive law.

"Discretion" or "discretion marked with zero" is inherent only in a few legal situations. This applies to cases where the law contains an imperative indication of the necessary course of legal conduct in the presence of any legal facts that are not subject to assessment in the event of their reliable establishment. At the same time, the hypothesis of a legal norm, which formulates the grounds for making criminal procedural decisions, is absolutely definite and does not require an assessment of the established circumstances in terms of, for example, their sufficiency for a particular legal conclusion. Such situations may include, in particular, the closure of criminal proceedings in the event that an investigator or prosecutor establishes the entry into force of the law abolishing criminal liability for an act committed by a person; the existence of a sentence on the same charge that has entered into force, or a court decision to close criminal proceedings on the same charge; refusal of a victim, his representative from the accusation in criminal proceedings in the form of a private accusation, etc. (paragraphs 4, 6, 7, part 1 of Article 284 of the CPC[1]). In other cases, as a rule, the legal regulation of the grounds and conditions of criminal procedural decisions causes a certain state of factual or legal uncertainty,

[1] Code of Criminal Procedure of Ukraine. (2010, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text

overcoming which requires the decision-maker to apply some degree of discretion to ensure the effective conduct of criminal proceedings. Given the different types of discretion that can be exercised during the adoption of a procedural decision, and the limited requirement of uniformity purely in matters of law, it is necessary to identify the following situations where a single approach to resolving the case is in demand:

1) realisation by the law enforcer of discretion in a situation of "bringing" of the established facts in compliance with the corresponding legal norms formulated with use of estimation concepts, open lists of cases or exceptions;

2) the exercise of discretion regarding the choice of the appropriate legal norm to be applied in establishing specific facts. It is both a matter of applying a legal analogy to overcome a certain legal uncertainty (gaps in criminal procedural law (in particular, in the absence of a procedure for implementing legal law – Part 6 of Article 9 of the CPC[1]), and choosing a legal norm based on a critical analysis of regulations. designed to resolve the established factual circumstances (within the principle of legality formulated in parts 3, 4 of Article 9 of the CPC), the application of a broad interpretation of the law on a particular case, taking into account the general principles of criminal proceedings and ECtHR practise, etc.;

3) the exercise of discretion as to the expediency of making a specific procedural decision or committing a procedural action in the event of the establishment of certain facts. The discretionary component here is manifested not only in the possibility of interpreting the facts as falling under the regulations with which the law associates the possibility of a particular type of procedural decision, but also in determining the appropriateness (need) to take certain legal measures in this case. Dispositions of those norms that contain the words "may", "exercise", "if deemed necessary", "if necessary", etc. are given a similar variant. Moreover, the choice in such cases is limited to only one option, enshrined in law. As an example, there is the question of: obtaining samples for examination (Article 245 of the CPC[2]); court decision on a shortened procedure for trial (Part 4 of Article 349 of the CPC); appointment of an examination in court (Part 2 of Article 332 of the CPC); conducting certain investigative actions, etc.;

4) the exercise of discretion to choose one of the legally permissible options for legal conduct in the event of the establishment of certain facts. Moreover, this variability concerns both the choice of a certain value (size) of one of the parameters (characteristics) of a generally sufficiently defined action (restriction) [12] (for example, determining the amount of collateral within the limits specified in Part 5 of Article 182 of the CPC, etc.) and its overall quality characteristics (for example, the choice of one of the precautionary measures listed in Article 176 of the CPC, additional obligations listed in Part 5 of Article 194 of the CPC) [13-14]. In such procedural decisions, the discretionary component is most pronounced. It seems that the conclusions in which this type of discretion is implemented can be the least unified in judicial practise. After all, it is the set of specific circumstances of a case (ad hoc) that determines the nature of the decision. Analysing the problem of the allowed limit of differences in law enforcement, and finding out whether the existence of two court decisions in which the same legal norm is applied differently in similar factual legal relations is permissible, the CCJE in the Opinion noted the following

[1] Code of Criminal Procedure of Ukraine. (2010, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text

[2] *Ibidem*, 2010

two aspects. First, differences in interpretations can be perceived as an integral feature of the judicial system, consisting of a certain network of courts [15; 16]. That is, different courts may come to different, but nevertheless rational and reasonable conclusions regarding a similar legal issue with similar factual circumstances (paragraph 8). And this is understandable given the individual uniqueness of the actual composition of each case, and accordingly only the relative ability to typify the legal relationship according to their actual composition. Secondly, in certain circumstances, contradictory decisions of national courts, especially courts of the highest instances, may constitute a violation of the requirement of a fair trial, as set out in Article 6 § 1 of the ECHR (paragraph 9 of the CCJE Opinion).

As a limit beyond which the discrepancy is unacceptable, the CJEU names two criteria: quantitative – "longevity" and qualitative – "depth". As for the qualitative criterion, in the authors' opinion, the search for depth should take place through the prism of the nature of the impact of the decision on the restriction of human rights and freedoms or the realisation of its legitimate interests. From the perspective of modern postulates of the criminal process, permeated by the principle of proportionality, the existence of two similar in fact court decisions, in which to different persons in the same circumstances legal norm was applied differently (with different aggravating consequences for human rights and freedoms) is a clear manifestation of injustice, non-compliance with equality before the law. In other words, if there is already a judgment in which, under such factual circumstances, the balance between personal and public interests has been ensured by choosing the least detrimental restriction on human rights and freedoms, a subsequent judgment with greater burdens (or more aggravating) will not be compatible with the requirements of the proportionality of the application of restrictions, and therefore with the requirements of fairness in the sense in which this concept is provided by Article 6 of the ECHR [17]. And the more common is such a different approach in practise to the application of a particular rule, the greater the scale of the danger. It seems that the Grand Chamber of the Supreme Court proceeded from these positions when formulating the criteria of exclusivity of a legal problem (which is essentially a consequence of the same difference of practise, lack of a single correct approach to law enforcement due to certain defects of law). The legal opinion set out in the ruling of the Grand Chamber of the Supreme Court of June 4, 2018 (case No. 638/11484/17)[1] states that the exclusive legal problem must be assessed in the light of quantitative and qualitative dimensions. *The quantitative* illustrates the fact that it is present not in a particular case, but in an indefinite number of disputes that either already exists or may arise in the light of a legal issue on which the problem of uncertainty arises. In terms of *qualitative criteria*, the exclusivity of the legal problem is evidenced by the following circumstances: 1) the cassation appeal is motivated by the fact that the courts committed significant violations of procedural law, which made it impossible to consider the case in accordance with the requirements of fair trial; 2) the rules of substantive law were applied by the courts of lower instances so that there is a question of *compliance with the principle of proportionality*, i.e. ensuring a proper balance between the interests of the parties in the case.

Thus, the limit of permissible differences in the application of the law is quite flexible

[1] Grand Chamber of the Supreme Court No. 638/11484/17. (2018, June). Retrieved from http://reyestr.court.gov.ua/Review/74506027.

and informal. However, in any state governed by the rule of law, there must be a system of necessary measures to ensure a unified approach to the application of the law in such factual circumstances (preventive and restorative).

2.3 Regarding the definition of the system of means of ensuring the unity of application of the law in the field of criminal proceedings

Now turn to the subject of the study, namely – legal means of ensuring the unity of application of the law in the field of criminal proceedings. It is well known that the factors that affect the law enforcement process, and hence its outcome, are quite diverse: legal, organisational, economic, political, and others. Most of them, given their complexity and versatility, can be the subject of a separate study. As the role of the legal factor cannot be overestimated, within the limits of this work the authors will be limited to consideration of system of legal mechanisms of maintenance of uniform application of the law in judicial practise. In this context, first of all, turn to the above Conclusion of the CCJE, which states the diversity of means of ensuring the unity of judicial practise, their different nature and role in the overall mechanism of provision (formal, semi-formal and informal). Formal proceedings in appellate courts and, in particular, in supreme courts or courts of cassation have the most direct impact on the uniform interpretation and application of the law. Such proceedings in the supreme courts, for example, include: 1) consideration of an individual complaint of one of the parties to the proceedings; 2) consideration of a special complaint filed by a public prosecutor (or similar state body) to the Supreme Court (in civil cases) regarding an important legal issue in order to ensure uniform application of the law or development of law through judicial practise, and in most legal systems such appeal adoption of a declarative court decision that does not affect the rights of the parties; 3) providing an official interpretation of a purely abstract nature, without reference to complaints filed in a particular case; 4) adoption of a preliminary ruling on cases pending in relation to a narrowly defined legal issue, at the request of a lower court.

Semi-formal arrangements, as stated in the CCJE Opinion, include, for example, regularly scheduled meetings of judges of a particular court or judges of different courts of the same level with judges of a higher court. These meetings can be either purely informal or they can be institutionalised to some extent. Finally, there are exclusively informal mechanisms, such as informal consultations of judges, in order to establish consensus on various issues of procedural and substantive law, where case law contains differences. The level of consistency of law enforcement is primarily determined by the quality of the law. The interdependence of the quality of the rule of law and the practise of its application is quite obvious from the standpoint of the phenomenological approach to the study of the quality of the rule of law, to which the famous scientists L.B. Alekeeva, O.M. Larin and M.S. Strogovych (the latter provides for the separation and study of the relationship between the results of law enforcement and the construction of norms [18]) even in Soviet times in the study of quality and effectiveness of criminal procedure law. In essence, the vision of the phenomenon of the quality of law in a modern legal democratic society in the light of the concept of the rule of law is similar. Thus, in particular, in the already mentioned Report on the Rule of Law of 2011, the Venice Commission recognised the coherence of case law as one of the key elements in the context of ensuring at the legislative level all components of the Rule of Law (paragraph 50). Paragraph 51 also states that the core elements of the rule of law, such as legal certainty and supremacy of the law,

presuppose that the law has been applied in practise. It also means that it is suitable for use. Therefore, it is extremely important before the adoption of the law to assess its suitability for its application in practise, as well as to check a posteriori whether its application will be effective. In other words, the quality of the law cannot be assessed in isolation from the practise of its application. In the decision of "Oleksandr Volkov v. Ukraine", the ECtHR noted that the existence of a specific and consistent practise of interpreting the relevant provision of the law was a factor that led to the conclusion that the provision was predictable (it is about "Goodwin v. The United Kingdom" [19]). Although this conclusion was made in the context of the common law system, the interpretation made by the judiciary cannot be underestimated in the systems of continental law while ensuring the predictability of legislative provisions. It is these bodies that must consistently interpret the exact meaning of the general provisions of the law and dispel any doubts as to its interpretation (paragraph 179) [20]. In view of the above, the unity of practise is one of the indicators of high-quality law in light of its compliance with modern legal standards of its legal certainty – the law should be as clear, predictable and consistent as possible. As aptly noted in the CCJE Opinion, courts will be better able to ensure uniform application of the law if the laws are logical, coherent, properly written, have clear wording, avoid unnecessary ambiguity and do not have internal contradictions. (p. 44). While contradictions in judicial practise are sometimes the result of ambiguous laws, which does not allow courts to reach a single and generally accepted interpretation (paragraph 46). However, as stated in paragraph 175 of the ECtHR decision in "Oleksandr Volkov v. Ukraine", it may be difficult to formulate high-definition laws in certain areas, and a degree of flexibility may even be desirable to allow national courts to apply the law in the light of its assessment of what action is necessary in the particular circumstances of each case (see "Goodwin v. the United Kingdom", decision of 27 May 1996, § 33, Reports 1996-II [19]). The logical consequence of the principle of general application of laws is that legislative acts are not always clearly formulated. The need to avoid excessive rigidity in wording and to respond to changing circumstances means that many laws inevitably have more or less vague wording. The interpretation and application of such acts depend on practise (see "Gorzelik and Others v. Poland" [GC], application No. 44158/98, § 64, ECHR 2004-I) [21]. Thus, certain qualitative characteristics of the law and the mechanisms established by it are a desirable and necessary condition (and therefore means) to ensure a unified approach to its application in practise. On the other hand, the instrumental role of judicial practise in the general mechanism for ensuring uniformity of law enforcement cannot be underestimated. Considering the issue of means of ensuring the unity of judicial practise, it seems necessary to comment separately on the explanations of the Plenum of the Supreme Court, which for many years served as a kind of guide in judicial practise. According to the current wording of paragraphs 10-1, 10-2 of Art. 46 of the Law "On the Judiciary and the Status of Judges"[1] the Plenum of the Supreme Court in order to ensure uniform application of law in certain categories of cases summarises the practise of substantive and procedural laws, systematises and ensures the publication of legal positions of the Supreme Court with reference to court decisions formulated, as well as the results of the analysis of judicial statistics and generalisation of judicial practise provides

[1] Law of Ukraine "On the Judiciary and the Status of Judges". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19#Text.

an explanation of the recommendatory nature of the application of legislation in resolving court cases. Meanwhile, the above-mentioned CCJE Opinion states in this regard that the public role of the Supreme Court, which is to provide guidelines for the future, ensuring the unity of judicial practise and the development of law, should be achieved through an appropriate system of filtering appeals. This approach is more acceptable than the development of law by developing binding explanations or general conclusions adopted in plenary sessions of the Supreme Court. Such instruments, which (still exist) in some countries, are adopted (unlike the instrument of previous decisions), without taking into account any real cases or cases under consideration, and without the participation of the parties to the case or their lawyers who could would justify their positions. Assuming the possibility of such instruments to have a positive impact on the unity of judicial practise and legal certainty, the CCJE considers that these instruments are a matter of concern in terms of the proper role of the judiciary in the system of distribution of state power (paragraph 28).

In the authors' opinion, the system of legal means to ensure the unity of application of the law in the field of criminal proceedings consists of a set of interrelated elements:

1. Criminal procedural law that meets the standards of its quality.

2. Judicial decisions – procedural decisions of courts of appeal and cassation, which are valuable guidelines in the interpretation and application of the law.

3. Decisions (rulings) of the Supreme Court that resolve existing differences in judicial practise (controversial issues of law enforcement).

4. Legal regulation of the necessary degree of binding decisions of the Supreme Court and the possibility of derogation from its legal positions by lower courts, as well as the Supreme Court itself.

According to their functional purpose, these tools can be both preventive and restorative. However, most of them perform both functions. Thus, in particular, the decision of the Grand Chamber of the Supreme Court of an exclusive legal problem, although directly aimed at restoring the violated legal regime of legality, nevertheless warns in the future of incorrect application of certain legal norms by judges. Although certain elements are by their nature a variety of others, their separate consideration is methodologically justified given their special functional load in the general process of ensuring the unity of judicial practise.

CONCLUSIONS

The socio-legal value of a single application of the same substantive or procedural rule in such legal relations, first of all, is to exercise the right of everyone to a fair trial, guaranteed by Article 6 of the CPC, and also manifests itself in ensuring a reasonable trial judicial system, minimising corruption risks in the field of criminal proceedings, increasing the level of public confidence in the court and its authority in the state, guided by the rule of law. The system of legal means to ensure the unity of application of the law in the field of criminal proceedings consists of a set of interconnected elements, which are proposed to include the criminal procedure law that meets the standards of its quality; court decisions – procedural decisions of courts of appeal and cassation, which are valuable guidelines in the interpretation and application of the law; decisions (rulings) of the Supreme Court that resolve existing differences in judicial practise (disputed issues of law enforcement); legal

regulation of the necessary degree of binding nature of the decisions of the Supreme Court and the possibility of deviation from its legal positions by lower courts, as well as the Supreme Court itself. The allocated legal means of ensuring the unity of application of the law are the direction of their further substantive research in order to formulate scientifically sound proposals for improving the criminal procedure law and the practise of its application.

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МЕТОДОЛОГІЧНІ ПРОБЛЕМИ ФОРМУВАННЯ ПОНЯТІЙНОГО АПАРАТУ КРИМІНАЛІСТИЧНОЇ ІННОВАТИКИ

Анотація. *Стаття присвячена проблемі формування понятійного апарату криміналістичної інноватики як нового наукового напрямку у криміналістиці. Досліджуються методологічні проблеми розроблення та формування категорій та понять розглядуваної наукової концепції. Обґрунтовується, що рівень сформованості та обґрунтованості будь-якої наукової теорії, у тому числі і криміналістичної інноватики, визначається ступенем і рівнем розробленості її теоретико-методологічних засад та категоріально-понятійного апарату цієї теорії, зокрема, таких понять, як криміналістична інновація, інноваційний криміналістичний продукт, їх функції, класифікації, стадії інноваційного процесу та ін. Проведенно аналіз наукових підходів до розуміння основних категорій розглядуваної наукової концепції, якими є інноваційний криміналістичний продукт та криміналістична інновація. Запропоновано їх визначення, виокремлено суттєві ознаки та властивості, проаналізовано співвідношення цих понять. Аналізується загальний і універсальний діалектичний метод сходження від абстрактного до конкретного і від конкретного до абстрактного, розглядається їх роль у формуванні понятійного апарату криміналістичної інноватики. Зазначається, що методологічним підґрунтям розроблення і впровадження інноваційних криміналістичних продуктів та застосування криміналістичних інновацій у правозастосовній діяльності виступають також діяльнісний, системно-структурний і технологічний підходи, використання яких є перспективним у дослідженні як основних понять криміналістичної інноватики, так і для розроблення цієї криміналістичної теорії. Сформульовано пропозиції та авторське бачення щодо вирішення окремих дискусійних питань, пов'язаних із інноваціями у криміналістиці та правозастосовній практиці. Обґрунтовується, що комплексний підхід у розроблені та формуванні основних понять та категорій криміналістичної інноватики є методологічним фундаментом для подальших досліджень цієї проблематики, який визначає перспективні напрямки розвитку криміналістичної науки.*

Ключові слова: новітні тенденції, всесвітній науково-технічний прогрес, правозастосовна діяльність, протидія злочинності, технологізація.

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METHODOLOGICAL PROBLEMS OF THE CONCEPTUAL FRAMEWORK DEVELOPMENT FOR INNOVATION STUDIES IN FORENSIC SCIENCE

Abstract. *The paper investigates the development issues associated with the conceptual framework of the innovation studies in forensic science as a new research area in forensic science. The author studies the methodological problems of developing and grouping categories and concepts of the subject matter. It is substantiated that the level of development and validity of any scientific theory, including the innovation studies in forensic science, is determined according to the degree and level of development of its theoretical and methodological principles and the framework of categories and concepts of this theory. In particular, this refers to such concepts as forensic innovation, innovative forensic product, their functions, classifications, stages of the innovation process, etc. The study analyses the scientific approaches to understanding the basic categories of the matter under consideration, which are innovative forensic product and forensic innovation. The author offers their definitions, describes essential features and properties, and analyses the correlation of these concepts. Furthermore, the author analyses the general and universal dialectical method of rising from the abstract to the concrete and from the concrete to the abstract, including their role in the development of the conceptual framework of innovation studies in forensic science. The study notes that the methodological framework for the development and implementation of innovative forensic products and the application of forensic innovations in law enforcement also includes activity-based, system-structural, and technological approaches, the use of which is promising both in the study of basic concepts of innovation studies in forensic science and in the development of this forensic theory. The author articulates proposals and individual insights in the solution of particular debating points associated with innovations in forensic science and law enforcement practice. The study substantiates that a comprehensive approach to the development of basic concepts and categories of innovation studies in forensic science constitutes a methodological foundation for further research on this subject, which determines the promising areas for the development of forensic science.*

Keywords: emerging tendencies, global scientific and technological progress, law enforcement, crime prevention, technologisation.

INTRODUCTION

In modern reality, the aggravation of socio-economic and political problems in society, along with the tendencies emerging in global scientific and technological progress, have led to changes in quantitative and qualitative indicators of crime, as well as to new negative manifestations in its dynamics and structure. Such circumstances have posed new challenges to forensic science, which are related to the so-called social procurement of practice, aimed at actively seeking effective means, techniques, and methods to combat modern challenges of crime. In this regard, the creation and introduction of innovative forensic products in law enforcement, as noted in the literature [1; 2], currently constitutes one of the priority tasks of forensic science and urgent necessity for practice.

To successfully solve this and other issues, forensic science integrates and synthesises modern advances in science and technology [3; 4]. As V.Yu. Shepitko notes, in modern conditions of development of forensic science, this process depends on scientific and technical progress of the human society. The development of forensic science and its tendencies are conditioned by the influence of global information flows, the integration of knowledge about the possibilities of combating crime by means of the scientific and technological achievements of modern society. The computerisation of the social environment has led to the "technologisation" of forensic science, the development and implementation of information, digital, telecommunication, and other technologies. in this regard, radical changes are currently underway and innovative approaches are being introduced in the forensic support of law enforcement agencies [5].

In such modern realities, forensic science should intensify its prognostic function and methodologically ensure the process of criminal proceedings with forensic recommendations for the effective use of modern innovative technologies in pre-trial investigation and legal proceedings. Admittedly, the planning and implementation of the innovation process, which involves the development, implementation, and application of innovations can be ensured to the fullest only with an integrated approach and in such unity and interrelation of the emerging and solved tasks. Furthermore, without innovative technologies and the latest tools to solve organisational, legal, scientific and technical issues of development and implementation of forensic methods, tools and recommendations, such support of law enforcement agencies will not meet the requirements of efficiency [6]. In this regard, a whole host of issues in forensic science requires a critical scientific reinterpretation, and in some cases a revision. This refers to the issues concerning the study of innovative principles of forensic science and the practice of development and implementation of forensic innovations in law enforcement to improve the efficiency of the latter.

In this regard, the study of methodological problems of developing the conceptual framework of innovation studies in forensic science as a new scientific concept becomes of particular importance. To solve this problem, the scientific approaches to understanding the main categories of the studied scientific concept must be analysed. This concerns such categories as innovative forensic product and forensic innovation. Being based on methodological principles, the solution of the said problem necessitates an in-depth study and development of these concepts, highlighting their essential features, properties, as well as their correlation. This comprehensive approach constitutes the methodological foundation for further research on this subject, which, in turn, identifies promising areas of research in forensic science.

1. MATERIALS AND METHODS

To study the methodological problems of developing the conceptual framework of innovation studies in forensic science and to outline the main categories of this scientific concept, a set of scientific methods and practices of their application was used. Thus, the study used philosophical approaches, general and special scientific methods of scientific knowledge, as well as scientific provisions of the general theory of forensic science, which analysed the different approaches to the interpretation of innovative product in forensic science, as well as of such phenomenon as forensic innovation, highlighted their

advantages and disadvantages. Therewith, the study and analysis of literature demonstrates that forensic science has a different understanding of innovative forensic products and forensic innovations, sometimes offering various pseudo-innovations that are questionable and do not meet the requirements of either innovative forensic products or forensic innovation. In this regard, an important task at hand is the problem of developing and unifying the framework of categories and concepts of forensic science in this subject area.

The author applies a dialectical method, which is used at all stages of this study to discover the essence of such forensic categories as innovative forensic product and forensic innovation, to outline their features and properties, determine their interrelations, interdependence, mutual influence, and correlation. The general and universal dialectical method of ascent from the abstract to the concrete and vice versa was used to develop and form the basic concepts of this scientific concept, their role in the development of such forensic categories and concepts is considered. The Aristotelian method was used to analyse the corresponding concepts and categories, formulate conclusions and recommendations on the methodological foundations of the development of concepts and categories of innovation studies in forensic science and their use in law enforcement practice. Categories and methods of formal logic have been widely used in the study: concepts, definitions, proofs and refutations, judgments, analysis, synthesis, comparisons, generalisations, etc. The study also employed other methods conventional for forensic and legal sciences.

The method of analysis and synthesis allowed to conclude that the development of basic concepts and categories of forensic innovation should involve application of a comprehensive approach that includes a system of general and special scientific methods of scientific knowledge, as well as scientific provisions of general forensic theory. Consideration of such provisions and various aspects in the development of scientific understanding of the basic concepts of forensic innovation should also be based on system-structural, technological, activity-based, and functional approaches, which comprise the methodological foundation for the creation of preconditions for a separate forensic theory development [7].

2. RESULTS AND DISCUSSION

2.1 Discussion problems of the methodology of development of the conceptual framework of innovation studies in forensic science

In the doctrine of forensic science and practice of combating crime, the problems of development, implementation, and application of innovations in practice have always been and remain one of the priorities of forensic science. Therewith, in modern realities there is a host of debatable problems in this subject area, especially with regard to research of innovative products in forensic science and issues of their introduction in practice of the investigative, judicial, and forensic activities. Methodological problems of the establishment, development, and unification of the framework of categories and concepts of forensic innovation as one of the emerging research areas in forensic science require a separate in-depth study, critical analysis, and further scientific developments.

Innovation studies in forensic science is a rather broad, complex concept, which, on the one hand, includes a set of innovative forensic tools and methods of their use for

collecting, researching, evaluating, and using evidence, and the activities of evidence to create appropriate conditions for effective use of these tools in law enforcement practice. On the other hand, it constitutes a system of scientific provisions that study the patterns of such innovation (including the impact of criminal activity), the results of which are aimed at solving practical tasks in the application of forensic innovations in law enforcement. As is evident, forensic innovation should be considered as *a research area*, as well as *a specific activity* of the subjects authorised by law. As a new research area in forensic science, innovation studies contain a system of theoretical and practical knowledge about forensic innovations, their features, types, role and purpose, stages of development, implementation and application, features of functioning, connections and relations between the subjects of such innovations (developers and consumers). This system is based on the study of patterns of development, introduction, implementation, and application of such innovations, their reflection in sources of information that form the basis of innovative tools, techniques, and methods of collecting, researching, evaluating, and using evidence to optimise, improve quality and the effectiveness of law enforcement practice and the solution of forensic problems [8].

As is known, any scientific theory can be recognised as such only when not only its theoretical foundations are conceptually formed and substantiated, but also its framework of concepts and categories is developed [9]. Therefore, to develop innovation studies in forensic science into a separate forensic theory, it is important to develop concepts and categories of this theory, in particular, such as forensic innovation, innovative forensic product, their functions, classification, stages of innovation process, factors determining the development and use of such innovations and innovative products, etc. As is evident, the main categories of the theory under study are the concepts of innovative forensic product and forensic innovation. In the theory of forensic science and law enforcement practice, the question of the concept of innovative forensic product and forensic innovation and their features remains debatable. Nevertheless, it is obvious that the vast majority of forensic scholars, who studied this problem, define the concept of innovation as the ultimate result of innovative activity, acquired and embodied in the form of *an innovative product* (new or improved) or a new approach to the technological process, decisions, organisation, provision of services, tools for solving problems that are used in practice and aimed at optimising and improving the efficiency of such activities. Typically, such innovations are associated with the creation of a new or improved innovation product in forensics and its implementation in law enforcement. Thus, such product is considered both in narrow, and in wide meaning.

In a narrow meaning, it is a material new product in criminology in the form of n*ew modern technical means, devices, equipment, tools, and technologies* developed and introduced in practice, which constitute the results of research and development, and the purpose of which is to optimise the investigation and prevention of criminal offenses, to improve the quality and efficiency of investigative activities, significantly reducing errors, effort, and costs. In this case, the innovative product is a *materialised result* of innovative activity in the form of developed and created a new materialised object (product), the future use of which will be aimed at solving certain forensic problems, improving law enforcement. The form of such a developed and proposed innovation is a materialised product, which can include *the latest forensic means, devices, equipment, tools*, etc., i.e.

materialised objects. As is evident, in this case there is a materialisation of the developed and proposed product, the result of which is embodied in a particular material carrier in the form of new materialised products or material substance that is embodied in products or technology

In a broad meaning, an innovative product in forensic science is a set of materialised and non-materialised new modern methods, techniques, tools, products, technologies, operations, solutions, services, etc., which are developed, proposed, and *implemented and applied in practice* by qualified special subjects, and are aimed at the effective solution of forensic problems, ensuring the improvement of the quality and effectiveness of law enforcement activities. Therewith, non-materialised innovative products in criminology should include new or improved *services*, *solutions* (technical, tactical, methodical, organisational), the newest approaches to the *organisation of work* of subjects of such activity (investigative, judicial, expert, etc.) which constitute the result of developed and implemented research and development, scientific, and forensic solutions. As is evident, along with materialised objects (means) there are also intangible, in particular such as services, solutions, etc. that can be new (newly created, or newly used, or improved). Practical application of such products is performed by special subjects (investigator, expert, judge, etc.), which ensures qualification and efficiency of their use

The formulation of the definition and essential features of the concept of innovative forensic product involves an analysis of the essence of such a concept, considering its interpretation in the theory of innovation, forensic science and its legislative definition in the Ukrainian legislation. In the explanatory dictionary of the modern Ukrainian language, a product is an object that is a material result of human labour and activity; consequence, product, result of something; a substance obtained or formed chemically or otherwise from another substance; a substance that serves as a material for the manufacture of something [10]. In the theory of innovation studies [11], an innovative product is a research or development of a new technology or product with the manufacture of an experimental sample or experimental batch. In this case, innovation is understood as an ultimate result of innovative activity, embodied in the form of new or improved products (services, equipment, technology, production engineering) of a new or improved technological process, intended for practical use in a particular field of activity to profit, meet needs, and achieve beneficial effect [12].

In accordance with the Law of Ukraine "On Innovative Activities"[1], an innovative product is the result of scientific and (or) research and development efforts, which meets the requirements set out in Art. 14 of this Law[2]. Notably, according to the legislative approach, only technology or products can be the object of an innovative product. Neither services nor organisational and technical solutions are included in this concept. As is evident, in the domestic legislation, along with innovation, there is another object of innovation – an innovative product which, *in fact, is an intermediate object between a new solution, idea, and the result of its implementation* – the innovation proper. An innovative product is created and exists at the stage of research and development, as it emerges as a result of a set of research and development work to clarify, create conditions, and provide

[1] Law of Ukraine No. 5460-VI "On Innovative Activities". (2012, December). Retrieved from https://zakon.rada.gov.ua/laws/show/40-15.
[2] *Inbidem*, 2012.

the necessary form for the implementation of the idea, bringing development to implementation [13]. As noted by Yu.Ye. Atamanova, the concept of "innovation" under Ukrainian law is not connected to intellectual property or to the results of research, which allows for a very broad interpretation of the concept of "innovation". Furthermore, unlike many scientific definitions of innovation, the legal definition does not directly link them to the introduction, use, and commercialisation of newly created intellectual objects, although it is built in such a way that innovation actually recognises the end result of the introduction or implementation of new developments, ideas (products, services, technology, organisational and technical solutions) [14]. Evidently, the imperfection in the defined concepts of "innovation" and "innovative product" significantly complicates the process of creating and implementing innovative forensic products in practice.

In our opinion, different approaches to understanding the “forensic product” among forensic scientists acquire special and methodological significance in the study of this concept. Thus, V.O. Obraztsov notes that the concept of forensic product is generic in relation to two types of objects: forensic scientific product and forensic practical product [15]. The first type is the result of research activities in forensic science, which is addressed to investigators, prosecutors, experts, as well as other researchers, persons who teach and study forensic science, based on its use by them in their scientific, educational, or practical criminal procedural activities. The second type is the direct application and implementation of recommendations, tools, and techniques by practitioners in investigative activities [15; 16]. Therefore, the forensic product is considered in two aspects: theoretical and practical. O.Yu. Drozd supports this position, stating that a forensic product constitutes a set of all developments, designs, programmes, technologies that are *products of forensic science, focused on achieving practical tasks* [17]. In turn, M.T. Koilybaiev and Z.R. Dilbarkhanov used the term “product of forensic science” [18].

In view of the above, it should be borne in mind that the forensic product can be considered as: 1) the result of scientific and (or) research and development efforts, which is a product of forensic science, the result of research activities in forensic science; 2) a set of new scientific recommendations, tools, technologies, techniques, methods that derive from forensic science (new tools); 3) the result of a comprehensive process of development, proposal, and implementation by developers (scientists, etc.) and the use of new products in forensic science and practice by consumer entities (investigators, detectives, judges, experts, etc.), i.e. as a result creation of an innovative forensic product.

The study and analysis of the approaches to understand the concept of innovative forensic product, proposed by scholars in forensic science, acquires a certain scientific interest and methodological significance. Thus, N.V. Zhyzhyna, exploring the essence of such innovative products, notes that their use in investigative and judicial practice must meet the following conditions: 1) the use of innovative products in practice must be permissible, while not violating the rights and legitimate interests of citizens, moral, ethical standards; 2) in application it is necessary to ensure the preservation of sources of evidentiary information and the prevention of distortion of fixed information; 3) scientificity and reliability of such products, i.e. the product itself must be based on scientific data, be tested, and if necessary – certified and recommended for practical use; 4) the qualification of the use of such products, which should be carried out by the relevant special entities (investigator, judge, expert, operatives); 4) safety and efficiency of

application of forensic innovative products; 5) it is necessary to reflect the conditions, procedure and results of the use of such products in procedural documents (protocols of actions), etc. [19].

In turn, M.I. Dolzhenko and D.K. Tarianyk, researching this forensic category, note that the result of innovative forensic activity is the creation of an innovative product. Furthermore, such innovation is closely linked to the innovation process of creating, implementing, and applying such a product in practice. According to the authors, an innovative product in forensic science must correspond to the following features: relevance, efficiency, practicality, significance, feasibility, legality [20]. Interesting opinions regarding the understanding of innovative forensic product and innovation were expressed by N.B. Niechaieva [21], according to whom, innovation in criminology should be understood as the *implementation* of such a *component* that differs from the previously used principles of action, intellectual and technological parameters, methods of organisation and management, in order to increase the overall potential of criminal investigation [22]. This refers to creation of innovative forensic products in a broad meaning, as the author notes, precisely "such component" at which such forensic innovation, according to the author, should have certain properties: to be significant and capable of serving the purposes of criminal prosecution; meet the requirements of the law; be timely and easy to use [22].

The analysis of scientific approaches to understanding the essence of the studied categories indicates that the development and formulation of such concepts must consider the methodological principles of this process, among which the main provisions are as follows:

1. Any science or scientific theory can be recognised as such only when not only its theoretical foundations are conceptually formed and substantiated, but also its framework of concepts and categories is developed, which reflects its subject matter. In their unity, concepts and categories form the framework of any science or individual theory. This fully applies to innovation studies in forensic science.

2. The formulation of concepts and categories of science or theory involves a certain procedure and system of methods of scientific knowledge. The essence of this procedure is expressed in the *formalisation of knowledge* about individual phenomena and objects, which lies in abstracting or distracting from insignificant, atypical features and properties of such phenomena, in identifying and fixing patterns of development and in establishing *the most important general (typical) features*, according to which they differ from others.

3. The general and universal method of forming concepts is *the dialectical method of scientific cognition*, which includes the necessary stages of rising *from the abstract to the concrete*, and then – *from the concrete to the abstract*. In this process, the role of logical and epistemological procedures, such as “abstraction-idealisation”, and “abstraction-identification” and the category “concrete” in the development of categories and concepts of the subject matter should be considered [23; 24]. This process also applies to the development of the conceptual framework of innovation studies in forensic science

4. The development of new concepts and categories in forensic science should consider the scientific developments of the studied problematic and requirements for forensic categories and concepts [25; 26], since they, as scientific abstractions, constitute the result of cognitive activity, should reflect the essential aspects and natural connections

of the studied phenomenon, its objects, facts, events in a generalised form, i.e. reflect the essential features of the studied concept. The above provisions form the methodological foundation of such research.

2.2 Problems of development of basic concepts of innovation studies in forensic science

After analysing scientific approaches to understanding the essence of the studied categories of innovation studies in forensic science and clarifying the basic methodological principles of their development, we the concepts of "innovative forensic product" and "forensic innovation" can be developed, with their features characterised. The variety of features of an innovative forensic product, their different interpretations necessitate their classification according to the degree of significance. Considering this criterion, it is appropriate to divide the features into significant and insignificant ones. *Significant* features are those that are reflected in the definition of an innovative forensic product. *Insignificant* features, albeit not included in the content of such a concept, constitute a priori knowledge about them, which determines the essence of this forensic category.

The essential features of an innovative forensic product include the following: 1) scientific and technical *novelty* of such a product, which can be newly created, or newly used, or improved, so this feature is primarily associated with the creation and emergence of new properties of innovative product, improving its parameters and capabilities; 2) such an innovative product is *developed and proposed for practical use*, but so far it *has not been introduced and applied* and it is embodied in the form of a new materialised product or technology; 3) it is developed, *created, and exists at the stage of scientific and research and development efforts*, as it emerges as a result of their implementation so as *to clarify, create conditions, and provide the necessary form for the implementation of the idea and bring the development to implementation*; 4) such an innovative product, in comparison with the already applied innovation, *occupies an intermediate place (is an intermediate object) between the new proposed idea, solution (innovation), and the result of its implementation*, i.e. already applied forensic innovation; 5) *demand in practice* and *the ability to meet the demands and needs of practice* and individual subjects of their application; 6) *the focus of such a product on the solution of forensic and other tasks* in a particular field of activity or tasks on certain issues or situations of investigation, trial and enforcement; 7) *development and proposal of forensic innovative products for the practical use* is calculated for their further use by special entities (investigator, detective, prosecutor, judge, expert, etc.), which must be qualified and aware of the prospects for their use; 8) a clear focus of such an innovative product on *a lasting positive effect* in the process of its further (possible) application, in particular, such an effect may be to improve the quality and effectiveness of law enforcement activities, its optimisation or solving certain forensic problems, etc. Thus, *an innovative forensic product* is a new product or technology developed and proposed for implementation, which is the result of scientific or research and development efforts, which is designed for their further use by qualified special entities and aimed at solving forensic problems and ensuring optimisation, improving the quality and effectiveness of law enforcement activities.

In this regard, literature notes that innovative forensic products should include developments in forensic techniques, tactics, and methods of crime investigation, namely: newly created or already existing and adapted to the needs of investigative practice forensic

tools, modern information technology, electronic knowledge bases, methods of recording, analysis, and evaluation of evidence, new tactics, their complexes, tactical combinations and operations, algorithms of priority investigative (search) actions and verification of typical investigative versions, methods of investigating new types of crimes, etc. [27; 28]. It is considered that such an approach is reasonable and can serve as a methodological foundation for further forensic research on this subject matter [29]. Clarifying the meaningful understanding of the concept of "innovative forensic product" allows to proceed to the study of such a phenomenon as "forensic innovation". Evidently, knowledge of the essence of this forensic category involves the study and research of the properties and features of this concept. In this case, the properties should be understood as a quality that is a distinctive feature of the object or phenomenon [30]. The properties of forensic innovation include the following: innovation (novelty), objectivity, subjectivity, purposefulness, demand, practical applicability, efficiency. All these properties fully apply to forensic innovative products, except for one – practical applicability – because only the practical orientation of such a product can be referred to. This means that it has been developed and proposed for practical use, but it has not yet been implemented and used in practice. Furthermore, it is important to factor in that innovative forensic products are embodied only in the form of new materialised products or technology; however, intangible objects (neither services, nor organisational and technical solutions, etc.) are not included in the concept of this product and its understanding [31; 32].

The main essential features of forensic innovation are as follows: 1) the *novelty* of products, technologies, services, and solutions developed, proposed, and implemented in practice, is manifested in the fact that they are associated with the creation and emergence of new properties improve its parameters and features, therefore they are newly created, or newly applied, or improved; 2) the latest technical, tactical, methodological, and forensic tools (innovative forensic tools) *developed, proposed and applied* are *in demand and are constantly used in practice*, they are embodied in the form of new products, technologies, solutions; 3) the latest technical, tactical, methodical, and forensic tools developed, proposed, and introduced into practice *are the result of scientific or research and development efforts*; new products, technologies, solutions are in demand and applied forms of implementation (application) of such innovative forensic tools; 4) the application of such innovations is *carried out by special subjects* (investigator, judge, etc.), which ensures the qualification and efficiency of the use of innovative tools developed and implemented in practice; 5) the *focus* of innovative tools on the effective solution of forensic problems, ensuring optimisation, improving the quality and effectiveness of law enforcement practice and further innovative development of forensic science. Thus, *forensic innovation* is the latest technical, tactical, methodological and forensic tools developed, implemented, and applied as the result of scientific or research and development efforts, embodied in the form of a new product, technology, service, solutions used by qualified special subjects in practice and aimed at effective solution of forensic problems, ensuring optimisation, improving the quality and effectiveness of law enforcement practice and further innovative development of forensic science.

In this regard, an important area of improvement of the conceptual framework of the studied theory is the clarification and unification of terms, since innovations in forensic science are denoted differently: "innovative tools", "innovations in forensic science",

"innovative technologies", "innovative forensic product", "innovations in the methodology of crime investigation", "innovations in forensic tactics". It is considered that such terminological discrepancy is associated with the stage of development of the concept of innovation, the development of this category of forensic science, but it negatively affects both their research and the practice of their application. The author believes that the well-established term "forensic innovation" should be recognised as the most successful and optimal for designating the process of development, implementation and application of innovations in law enforcement practice, which corresponds to the above criteria, thereby emphasising its focus on solving the problems of forensic science, obtaining the effect of their practical application and performing functional destination, i.e. ensuring optimisation, improving the quality and effectiveness of investigative, judicial, and expert activities.

CONCLUSIONS

Thus, one of the promising areas of scientific development in modern forensic science is the research of the problems of innovation study in forensic science as a fairly new scientific concept that is being developed. For its further study it is important to develop a framework of concepts and categories of this theory, in particular, such concepts and categories as forensic innovation, innovative forensic product, their functions, classifications, stages of the innovation process, etc.

The main categories of the studied theory are the concept of "innovative forensic product" and "forensic innovation". The analysis of the essence of these concepts gives grounds to assert that the innovative forensic product and forensic innovation are separate types of means of innovation studies in forensic science. Firstly, they constitute relatively new, specific activity categories, they reveal the functional side of innovative forensic tools that are used by qualified subjects (investigator, judge, expert, etc.) and are subjects-consumers of such innovations, and on the other hand, this is a development process, proposals and implementation of innovative products, which is carried out by the subjects-developers (scientists, innovators, etc.) in the form of the results of research, experimental, and design developments. Secondly, forensic innovation product and forensic innovation should not be considered as competing forensic categories, but rather as complementary ones, which together create a single, most effective mechanism for obtaining and collecting evidence, optimisation, quality and efficiency of law enforcement and solving forensic problems. However, each of these categories have their own properties, essential features, content, role and purpose and their own tasks in the process of their application in practice.

Successful solution of practical problems of innovation studies in forensic science involves the development of the framework of categories and concepts of this scientific concept and must consider the methodological principles of this process and prospects for development, implementation of innovative forensic products and application of forensic innovations in law enforcement. When developing the basic concepts and categories of this forensic theory should apply a comprehensive approach, which includes a system of general and special scientific methods of scientific knowledge, as well as the scientific provisions of the general theory of forensic science. Considering such provisions and various aspects in the development of scientific understanding of the basic concepts and categories of this scientific concept should be based on system-structural, technological,

activity-based, functional approaches, which constitute the methodological foundation for creating prerequisites for the development of a separate forensic theory – innovation studies in forensic science. Operating with such approaches in the development of the concept of forensic innovation can become a new paradigm of forensic science, capable of raising to a higher theoretical and methodological level of research in this subject area.

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