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ДВОПАЛАТНИЙ ПАРЛАМЕНТ: ПОРІВНЯЛЬНИЙ АНАЛІЗ І ДОСВІД КОНСТИТУЦІЙНОГО РЕФОРМУВАННЯ В УКРАЇНІ

Анотація. *У процесі становлення і розвитку інституту парламенту виникає необхідність своєчасного вдосконалення організаційно-функціональної основи, конституційного та іншого законодавства, що сприяє ефективному функціонуванню цієї інституції. На переконання багатьох фахівців, бікамералізм є серйозним фактором зменшення політичної напруженості в країні, оскільки в двопалатному парламенті, як правило, менше конфліктів між партіями, що призводить до стабілізації парламентської діяльності, заснованої на системі стримувань і противаг. З урахуванням актуалізації обраної тематики статті її мета полягає у компаративному дослідженні досвіду конституційного реформування країн у сфері запровадження двопалатного парламенту, узагальненні позитивної практики та знаходженні можливостей її апробації на теренах України. Особливістю статті стало поєднання науково-теоретичного та емпіричного рівнів вивчення проблем конституційно-правового закріплення інституту парламенту, його структури та діяльності, взаємодії з іншими гілками єдиної державної влади в рамках конституційного принципу поділу влади. Автором, з урахуванням вказаної мети, були вирішені наступні завдання: розглянуто поліваріантність науково-практичних підходів до досліджуваної проблематики; проведено порівняльно-правовий аналіз досвіду формування палат у парламентах держав; сформовано обґрунтовані висновки та пропозиції щодо можливості запровадження двопалатного парламенту в Україні. Аналіз ролі парламентів дозволив скласти більш ґрунтовне уявлення про систему поділу влади в тій чи іншій країні, про існуючі в ній стримування й противаги з метою подальшої адаптації позитивного досвіду на теренах нашої держави та обґрунтування відповідних реформ. Крім того, проведений аналіз надав змогу констатувати, що така реформа є нагальною та необхідною, однак має бути проведена за умови дотримання запропонованих авторських концептів, які повністю корелюються із обраним нашою державою вектором європейської інтеграції.*

Ключові слова: бікамералізм, європейська інтеграція, реформування законодавства України, Палата депутатів.

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TWO-CHAMBER PARLIAMENT: COMPARATIVE ANALYSIS AND EXPERIENCE OF CONSTITUTIONAL REFORMING IN UKRAINE

Abstract. *In the process of formation and development of the institute of parliament, there is a need for timely improvement of the organisational and functional basis, constitutional and other legislation, which contributes to the effective functioning of this institution. The existing legal non-regulation, both at the level of the Constitution and at the level of current legislation, do not allow the parliament to fully exercise its functions. According to many experts, bicameralism is a serious factor in reducing political tensions in the country, as there is usually less conflict between parties in a bicameral parliament, which leads to stabilisation of parliamentary activity based on a system of checks and balances. Taking into account the actualisation of the chosen topic of the article, its purpose is to comparatively study the experience of constitutional reforming of the countries in the field of bicameral parliament introduction, generalisation of positive practice and finding opportunities for its testing in Ukraine. The peculiarity of the article has been the combination of scientific-theoretical and empirical levels of studying the issues of constitutional-legal fixing of the institute of parliament, its structure and activity, interaction with other branches of a single state power within the framework of the constitutional principle of separation of powers. The author, in view of the stated purpose, has solved the following issues: the multivariate scientific and practical approaches to the studied problems have been considered; a comparative legal analysis of the experience of forming chambers in the parliaments of the states has been conducted; conclusions and proposals on the possibility of establishing a bicameral parliament in Ukraine have been substantiated. An analysis of the role of parliaments has made it possible to come to a more thorough picture of the system of separation of powers in a particular country, about the existing restraints and counterbalances in order to further adapt the positive experience in the territory of our country and justify the relevant reforms. In addition, the analysis made it possible to state that such a reform is urgent and necessary, but it must be carried out, provided that the proposed copyright concepts are fully correlated with the vector of European integration chosen by our country.*

Keywords: bicameralism, European integration, reform of Ukrainian legislation, Chamber of Deputies.

INTRODUCTION

One of the most pressing issues of constitutional reform is the change in the institutional structure of state power, in particular through the possibility of establishing a bicameral parliament [1]. According to many experts, bicameralism is a serious factor in reducing political tensions in the country, as there is usually less conflict

between parties in a bicameral parliament, which leads to stabilisation of parliamentary activity based on a system of checks and balances. This is especially true for the current realities of Ukrainian politicum, when the confrontational style of behaviour of political parties leads to the destabilisation of many state institutions, first of all, the Verkhovna Rada of Ukraine.

Indeed, if to look at the constitutionally mandated powers of the upper chambers of parliament and the practice of their activity in the countries of Europe and North America, it can be concluded that this chamber is intended to block the questionable enough in terms of the benefits for the state and public development decisions of the lower chamber that is by its nature more prone to politicisation of approved decisions [2–4]. That is, the upper chamber is an institutional element that is able to subdue political passions and add stability to public policy processes.

The introduction of a bicameral parliament in Ukraine would reduce the level of conflict in the mechanism of exercising state power, strengthen the representative function of the parliament, increase the authority of local self-government, promote the better development of regions, and ensure the stability of Ukraine's political course. In general, bicameral parliaments provide a more sophisticated system of national representation than unicameral parliaments. They are better at overcoming law-making mistakes and making more balanced decisions.

In addition, the point of view is very spread that the upper chambers are carriers of a particular type of knowledge, depth of political thought and sound conservatism [5]. Thus, joining the upper chamber in Italy is associated with outstanding services in the social, scientific or artistic fields. Thus, during the construction of the building of the Brazilian Parliament, architect O. Niemeyer chose a quiet dome for the meeting room of the upper chamber, the Senate, while the dynamic "bowl" crowns the hall of the lower chamber, the Chamber of Deputies [6].

In the context of public debate, it should be emphasised that a bicameral parliament is not a mandatory affiliation of a federal state. Given the number of unitary countries with bicameralism on the European continent, a bicameral parliament can function harmoniously in states with a simple administrative and territorial structure. Thus, at least 10 such countries can be found on the map of Europe, namely: Belarus, Ireland, Spain, Italy, Netherlands, Poland, Romania, France, Croatia and the Czech Republic (although in some cases the ambiguity of the "simplicity" of the territorial structure of these countries should be taken into account, such as Italy and its autonomous regions).

At the same time, it should be noted that not all representatives of science, practice and experts support the idea of establishing a bicameral parliament in the territory of our country. In particular, constitutional law expert B. Bondarenko argues that the implementation of the bicameral parliament concept can take ten years, and such a reform will not lead to a projected positive impact on the effectiveness of the Verkhovna Rada of Ukraine. In addition, the presence of paramilitary conflict and partial occupation on the territory of Ukraine will facilitate, in the context of delineated reform,

the creation of regional parties that will produce a negative impact on the constitutional reform of the state as a whole [7].

The alternative outlined approaches substantiate the chosen purpose of the article, which consists in a comparative study of the experience of constitutional reform of countries in the field of bicameral parliament introduction, generalisation of positive practice and finding opportunities for its testing in Ukraine. With this purpose in mind, the following tasks were set: 1) to consider the multivariate scientific and practical approaches to the studied issues and to substantiate the feasibility of establishing a bicameral parliament in Ukraine; 2) to conduct a comparative legal analysis of the experience of forming chambers in the parliaments of the states; 3) to summarise the positive foreign experience of the existence of a bicameral parliament, to formulate sound conclusions and proposals regarding the possibility of establishing a bicameral parliament in Ukraine.

1. MATERIALS AND METHODS

The article uses general scientific and special scientific methods of research, in particular. General methods that define philosophical and worldview approaches that express the most universal principles of thinking. Among them are dialectical and phenomenological methods that have made it possible to analyse the nature, concepts and meanings of constitutional reform and the introduction of a bicameral parliament.

General scientific methods have also come in handy, where empirical research has played an important role: observation, comparison, description. Widely used theoretical and logical methods: deduction, induction, systematic approach, methods of analysis, synthesis, statistical method, the use of which allowed to obtain reliable knowledge about the processes and features of the formation of the parliamentary institution in Ukraine and its reforming.

Special scientific methods have been used in the study of the evolution of the Institute of Parliament in Ukraine and in other countries of the world. Chronological and comparative methods were also used. The latter, divided into synchronous and diachronic methods, contributed to the development of a number of proposals based on foreign experience in optimising the functioning of the Parliament of Ukraine and the introduction of the bicameral Parliament. The article also used the historical method of enquiry, which allowed analysing the institute of parliament from the position of the past, present and future.

The peculiarity of the article was the combination of scientific-theoretical and empirical levels of studying the problems of constitutional legal fixing of the institute of parliament, its structure and activity, interaction with other branches of a single state power within the framework of the constitutional principle of separation of powers.

The method of analysis allowed us to determine that the fatal event in the development and formation of the idea of bicameralism was the holding of an all-Ukrai-

nian referendum on April 16, 2000, in which 26 million citizens of Ukraine (or 89.91%) who voted in favour of forming a bicameral parliament in Ukraine. At the same time, it is worth paying attention to the direct formulation of the question that was put to the referendum, "Do you support the necessity of forming a bicameral parliament in Ukraine, *one of the chambers of which would represent the interests of the regions of Ukraine and promote their implementation,* and make appropriate amendments to the Constitution of Ukraine and electoral law?" Thus, the people of Ukraine unanimously supported the establishment of a top-level regional representation body. The reasoning behind the stated people's decision as the basis for reforming the system of representative institutions during the further implementation of the planned vectors of transformation of the national parliament, while simultaneously amending the Constitution of Ukraine, is considered to be sufficiently substantiated. At the same time, it should be emphasised that the attempts to implement the results of the all-Ukrainian referendum have not been implemented. The most significant reason for this phenomenon was the presence of a multivariate viewpoint on the feasibility of such a reform. Unfortunately, these positions are still preserved. The Constitutional Court of Ukraine in the case of amending the Constitution of Ukraine on the initiative of the People's Deputies of Ukraine No. 2-in / 2000 of July 11, 2000, expressed quite negatively about this. In particular, the court found in its opinion that the draft proposal was not compliant with the requirements of Articles 157 and 158 of the Constitution of Ukraine regarding the establishment of a bicameral parliament. The following argument was put forward in the argumentation of the mentioned position, "*An analysis of the current constitutional practice of foreign states shows that the creation of a bicameral parliament in a unitary state is a matter of expediency. The content and scope of the rights and freedoms of a person and a citizen by itself is not directly influenced by the structure of parliament (single or double chamber). However, they may be influenced by the procedure for the formation of chambers and the distribution of powers between them*" (paragraph 3.1 of the reasoning part of the Opinion). As a consequence, given the fragmentation and inconsistency of changes in the field of implementation of the bicameral parliament in Ukraine, the Constitutional Court found it impossible to pursue constitutional reform in this part. At the same time, the contents of the institution of the upper chamber, which was proposed in the draft, did not raise any objections and objections from the body of constitutional jurisdiction.

The theoretical basis of the study is the work of foreign and domestic authors on issues of statehood, institutions of state power, constitutional reform, including parliament.

2. RESULTS AND DISCUSSION

2.1 Features of creation of a bicameral parliament in Ukraine

In the modern period of development of national statehood, a bicameral parliament building system is observed by many countries with a prosperous economy, a stable

political system and high standards of civil and social rights. More than 70 states have opted for bicameralism [8]. It seems quite reasonable that the parliamentary structure of any country is distinctive and unique, but most of the other chambers of the parliaments of the world have one thing in common – they are the specialised representations of the regions (entities) that make up the territorial units of the country (state). This is typical not only for all federal states, but also for many unitary states (France, Italy, Spain, Poland, Romania, Japan, etc.).

Turning to the practice of introducing bicameralism on the territory of our country, it should be noted that after independence, Ukraine faced the problem of defining the path of its further state development and the creation of new institutions of government, including the parliament. Even in the process of drafting the current Constitution of Ukraine, the creation of a bicameral parliament was repeatedly considered as a way of arranging a higher representative institution.

In particular, the draft Basic Law submitted for national discussion in 1992 envisaged the creation of a bicameral parliament (the National Assembly) in Ukraine, which was to consist of a Council of Deputies (lower chamber) and a Council of ambassadors (upper chamber). The developers of this project sought to bring to life the idea of a "strong" upper chamber, "The Council of Deputies and the Council of Ambassadors exercise the powers of the National Assembly on the basis of equality and division of functions" (Article 139 of the project). In view of the proposed principle of equality of chambers, it was assumed that they would be endowed with identical powers in the legislative process, in particular, that both chambers would have to approve it for the adoption of the law. In order to remedy the differences, it was proposed that a conciliation committee of chambers be set up, which was responsible for developing a universal bill capable of meeting the requirements and observations of both chambers. The procedure for further "newly developed" draft law was also regulated in detail (Part 4 of Article 161 of the draft).

The idea of a bicameral parliament also found its place in the draft Constitution of Ukraine, developed by the Constitutional Commission and submitted to the Verkhovna Rada on March 11, 1996. In particular, it was anticipated that the upper chamber, the Senate, would consist of 80 members representing regions in following proportion – 3 each from the oblasts, the Autonomous Republic of Crimea and the city of Kyiv, and 2 representatives from the city of Sevastopol. The Senate's competence in the draft was to include the appointment on the submission of the President of the Supreme Court, the members of the Central Election Commission, the Prosecutor General, as well as the issue of administrative and territorial organisation.

It is worth pointing out that the idea of bicameralism has also been supported by certain political forces that have promulgated their own constitutional projects. Thus, in particular, the draft of the Ukrainian Republican Party proposed the creation of a bicameral parliament, whose term of office would be 6 years. Nominal (personnel) powers were assigned to the upper chamber, including the appointment of diplomatic

representatives and judges of the Constitutional Court. In the draft of the Christian Democratic Party of Ukraine, the Senate consisted of 150 members who were to be elected for 6 years in single-member constituencies, 3 from regions (including the capital) and 3 from the Crimean Tatar people.

Another significant event on the way to the endorsement of bicameralism in our country was the submission by the Head of State to the Parliament on March 31, 2009 of the draft Law of Ukraine "On Amendments to the Constitution of Ukraine", which provided for the creation of an upper chamber – the Senate in the structure of Parliament. The draft of this regulatory act regulated in detail the composition and powers of the newly created Senate, the election procedure and the mechanism for exercising the assigned competence. However, this bill has not been implemented and has been criticised by various representatives of theory, practice and law-making [9].

Subsequently, the idea of introducing a bicameral parliament has repeatedly emerged in the drafting activity. Thus, a particular issue was highlighted at the beginning of the Constitutional Assembly, approved by the Decree of the President of Ukraine of May 17, 2012 [10]. In its turn, the introduction of the bicameral parliament was not a priority for reform and had a rather substantial temporal framework, but was not finally rejected.

Today, after a long process of ratification of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand (dated March 21, 2014 and June 27, 2014)[1], our state is at the stage of intensification of reformation and transformation processes. In addition, the election of the new President of Ukraine has led to a special actualisation of the introduction of a bicameral parliament in Ukraine. At present, it is possible to speak about the active preparation of the relevant bill and lively public discussion.

Thus, it can be stated that bicameralism remains a subject of close attention and a subject of debate in the theory and practice of national state formation. At the same time, the process of implementation of the proposed idea in the practical plane requires a comprehensive analysis of foreign experience, its unification and finding of good practice in order to further test it in Ukraine.

2.2 Analysis of foreign practice in the sphere of formation of parliament chambers

In the context of debating the issue of complication of the structure of the Ukrainian Parliament, it is quite reasonable to carry out a comparative analysis of foreign experience in the field of similar constitutional and legal reforms. Thus, L.T. Kryvenko stresses that the bicameral parliament is a fairly widespread structure of the highest legislative body of the state. Moreover, for a long time, most parliaments of the

[1] A plea for an association between Ukraine, from one side, that of the European Union, the European Union from the atomic energy and member states, from the other side: the Law of Ukraine. (2014, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1678-18

countries of the world had a bicameral (two-chamber) structure [11]. In particular, the basis for comparison is the formation of the upper chamber and its competence.

Let us first turn to the formation order, which envisages two main ways – direct election of senators and the formation of the upper chamber by regional (regional) structures. According to experts, direct election of members of the upper chambers is used in 27 out of 66 cases, in 21 cases the chambers are formed with the help of regional and municipal representative bodies, and in 16 countries other ways of appointing members of such chambers are used. An example of the latter is the order of formation of the upper chamber of the National Parliament of Ireland, the Senate. It is made up of 60 members, 11 of whom are appointed Prime Ministers, and 49 are elected (43 by professional groups, 6 by universities) through a proportional representation system and secret ballot by mail. In turn, the lower chamber is also elected on a proportional basis. The cadence of both wards is 5 years [12].

Among the forms of direct elections, it is advisable to note the use of a mixed system of elections to both chambers of parliament. Thus, after the constitutional reform of 1993 in Italy, instead of a purely proportional one, a mixed electoral system was launched: from then, 75% of deputies are elected by majority, 25% by proportional system. At the same time, the outlined approach is identical for both the lower chamber and the upper chamber of parliament.

Another approach to direct elections is demonstrated by Czech and Polish parliamentarians. For example, the Chamber of Deputies of the Czech Parliament is elected on the principle of proportional representation, whereas the upper chamber, the Senate, on a majority basis, is updated with a third of the composition every two years. The Polish Parliament has a more "regional" colour. Of the 460 members of the lower chamber, the Sejm, 391 are elected by district lists of candidates in multi-member constituencies using preferences, and 60 deputies by the All-Polish list of candidates. As for the upper chamber, the Senate, the elections to it are held on a majority basis. At the same time, the majority district coincides with the territory of the voivodship, the largest territorial unit of the state. Thus, 100 senators are elected to the Senate by two from 47 voivodships and by three from the two largest voivodships – Warsaw and Katowice [13]. It is advisable to emphasise that at the level of the Polish Constitution, the term "parliament" is not used in the sense of a single legislative body. Instead, under Article 95 (1) of the Basic Law, it is stipulated that the legislature is exercised simultaneously by two institutions, the Sejm and the Senate [14–16].

Turning to the side forms of formation of the upper chamber, it is worth noting the procedure of formation of the upper chamber of the German Parliament – the Bundesrat, which consists of representatives of the governments of the lands that appoint and withdraw them. The number of members of the Bundesrat that may be delegated by a particular country depends on the population of the land: each land has the right to delegate three representatives; land with a population of more than 2 million has four votes, land with a population of more than 6 million – five votes, land with

a population of more than 7 million – six votes. It should be emphasised that the position of the land must be fully agreed on a particular issue. More complex, but more effective in terms of regional representation, the method of forming the upper chamber (Senate) was introduced in France. For example, the Senate is elected by departments (regions) of colleges consisting of elected in the department of lower chamber deputies, regional advisers, general advisers of this department, delegates of municipal councils and their deputies. The number of delegates from municipalities depends on the size of the population.

Also, the study should take into account the classification of bicameral parliaments developed by the science of constitutional law. In particular, there are parliaments with a weak upper chamber and parliaments with a strong upper chamber [17–19]. It is advisable to expose their differences and problem speculations. The tendency for the upper chamber to be strong is quite widespread; the competence of both chambers is completely or overwhelmingly equal, and under such conditions the special powers of the upper chamber are generally less significant than those of the lower chamber; vice versa. Otherwise, in the presence of a weak upper chamber, the powers are divorced and subject to jurisdiction, moreover, the lower chamber usually has advantages [3]. In most cases, chambers have the same rights to review and adopt laws. Perhaps that is why in the US the bill is allowed to enter any of the chambers of congress. The lower chambers, as a rule, have special powers in the field of finance (budget adoption), while the upper chambers are more likely to ratify international treaties. In the US and Ecuador, the upper chamber is vested with the power to approve government members and other officials appointed by the president [20].

Here are some examples. Thus, a strong upper chamber in a unitary country is the upper chamber of the Italian parliament – the Senate of the Republic. The "power" of the Senate lies, first of all, in the fact that at the level of the Constitution it is recognised as equivalent to the lower chamber by the legislature: Article 70 of the Italian Constitution provides that "the legislative function is exercised jointly by both chambers". This, in turn, means that the bill can be submitted to any of the chambers and is considered approved when deputies of both chambers vote for its adoption. It is also significant that the budget must also be approved by both chambers of the Italian Parliament (Article 81 of the Constitution) [21]. An example of a weak upper chamber is the Polish Senate. At the level of the Constitution of Poland (Part 1 of Article 95), it is stipulated that the Sejm and the Senate shall exercise legislative power. In view of the above, it is advisable to express doubts about the possibility of 100% characterisation of the two designated institutions as chambers of parliament. In particular, the content of Article 95 and other norms of the Polish Constitution shows that both the Sejm and the Senate act as separate bodies of the legislature. Moreover, as a single body called the National Assembly, the Sejm and the Senate act only in cases clearly defined by the Constitution (Part 114, Article 114 of the Constitution of Poland). It

should be noted that the powers of the Senate are not equivalent to the powers of the Sejm, especially as regards the adoption of laws.

In some cases, there are situations where it is not possible to clearly attribute Parliament to a particular group. The "mixed" nature of the competence of the upper chamber of parliament is manifested in the fact that the law can be adopted only after approval by both chambers. In this, unlike the procedure of passing a bill in parliaments with a strong upper chamber, in the event of a dispute between the fees on the bill, the Government is allowed to interfere with the law-making process by requesting the final approval of the bill by one of the chambers, as a rule, by the lower chamber. A striking example of such an intervention is France. Pursuant to Article 45 of the French Constitution, any draft law or legislative initiative is being progressively considered in both Chambers of Parliament for the adoption of an identical text. If, as a result of disagreements between the two chambers, a bill or legislative proposal has not been adopted after two readings by each chamber, or if, after one reading in each of them, the Government declares the need for urgent consideration, the Prime Minister has the right to convene a meeting of the mixed commission that is obliged to propose new text on controversial issues. The text prepared by such a committee may be submitted by the Government for approval to both Chambers. Moreover, none of the amendments can be adopted without the consent of the Government. If the mixed commission fails to adopt the agreed text or if the text is not adopted on the terms provided earlier, the Government may, after a new reading in the National Assembly (lower chamber) and the Senate (upper chamber), require the National Assembly to take a final decision.

The outlined procedure in science is called the "legislative shuttle", which means the transfer of a bill from one chamber to another in a bicameral parliament to overcome differences between them before adopting a mutually agreed legislative text [22]. In some cases, a very detailed "legislative shuttle" procedure is envisaged at the Constitution level. In this regard, we will note the constitutional regulation of this issue in the Basic Law of Belgium (which in many respects is similar to French rules). First of all, it should be noted that the Belgian Constitution sets out the specific joint legislative competence of the lower chamber of Parliament and the King, as well as the joint legislative competence of both chambers. As a general rule, a bill passed by the lower chamber of parliament is referred to the Senate, which may consider it if at least 15 of its members so request. Over the next 60 days, the upper chamber may either decide that the bill does not need to be amended or adopt the bill after it has been amended. In the first case (as well as in a situation where the Senate did not consider the bill within the specified period), the passed bill is passed to the lower chamber of the King for signature. The Constitution also provides for the possibility of creating a mechanism for overcoming conflicts between the chambers. This is a typical institution such as the parliamentary conciliation committee, which is com-

posed on a parity basis of members of the Chamber of Representatives and the Senate, which is empowered by its decisions to resolve conflicts between the chambers in the sphere of their legislative competence, including to extend the terms of consideration of the bills. In this context, the approach of the Romanian legislators to resolving conflicts arising when the conciliation commission mentioned by us does not unanimously in its decision is quite interesting. In such a case, the variant texts are presented for discussion by the Chamber of Deputies and the Senate at a joint sitting, which will adopt the final text by a majority vote (Part 2 of Article 76 of the Romanian Constitution).

On the whole, it can be concluded that in the vast majority of cases at the present stage of state-building, the Chambers of Parliaments are endowed with almost equal powers in the field of law-making. Only in some cases it is possible to find that there is a certain advantage of the lower chamber, especially in the fiscal area. For example, the Senate of the Irish Parliament has no right to change the financial laws passed by the lower chamber. The exclusive competence of the lower chamber of the Austrian Parliament is the adoption of budgetary and financial laws.

The powers of the chambers in other spheres show some unevenness. For example, in the area of scrutiny, when considering parliaments with a strong upper chamber – the Government is accountable and controlled by two chambers at once. In Romania, the Chamber of Deputies and the Senate may withdraw the confidence of the Government expressed in a joint meeting by passing a resolution of no confidence by a majority of the votes of the deputies and senators. A similar norm is enshrined in the Italian Constitution (Article 94). An example of the variability of the competences of the chambers is the provision of Article 30 (1) of the Czech Constitution, according to which only the lower chamber of parliament is empowered to set up commissions of enquiry to investigate matters of public interest.

The presented and analysed variation approaches of different countries to the formation of the parliament and its competence show that the adaptation of the tried and tested foreign models should be carried out with due consideration of the realities of a particular state, its territorial structure, and the peculiarities of the legal system. In addition, the experience of countries with "strong" and "weak" chambers of parliament must be taken into account and agreed. At the same time, the readiness of the state for such reforms should be a special factor on the way to introducing a bicameral parliament.

CONCLUSIONS

An analysis of the role of parliaments, including the upper and lower chambers, gives a more thorough picture of the system of separation of powers in a particular country, of the existing constraints and counterbalances in it, in order to further adapt the positive experience in our country and substantiate the relevant reforms. The very task of preventing the usurpation of power by a majority that ignores the

interests of the minority, and of ensuring the stability of the government, was put before politicians by the authors of the theory of separation of powers, S. Montesquieu and J. Madison, as well as their followers, who pointed out the need for a bicameral parliament. The problem of separation of powers, the formation and consolidation of checks and balances, and securing a stable government remain quite pressing issues for modern Ukraine. Studying the role of the chambers of parliament in the decision-making and implementation of political decisions (including in the sphere of foreign policy) has allowed broadening of understanding of the specifics of the political system and political regime of Ukraine, the prospects of its democratic development, taking into account the introduction of the bicameral parliament.

In addition, the analysis made it possible to state that such reform is urgent and necessary, but should be carried out with the following concepts:

1) it is desirable that upper chamber to be a true expression of regional interests, and therefore, the most optimal way of forming the upper chamber – the Senate, is to elect its members at general meetings (colleges) of deputies (or their delegates) of local councils of one or another region, cities of Kiev and Sevastopol, as well as the Autonomous Republic of Crimea. A similar method is used in France, and it has proven effective in taking into account the regional sentiments of parliament when making important decisions. The lower chamber, as an expression of the interests of the Ukrainian people, in this case, should be elected on the basis of universal, equal and direct elections in a proportional election system with open lists, although openness of the lists is no longer critical.

2) it is necessary to take into account the successful American experience of the transformation of the order of formation of the upper chamber, the Senate, equal number of representatives from the state at the beginning, with the transition to the number of representatives depending on the population, – allows to consider with optimism the modernisation of the national model of bicameralism in the future. It is also advisable to involve in the electoral process through the direct participation of representatives of the doctrine, providing representation from the National Academy of Sciences of Ukraine and branch academies of science of Ukraine, other reputable institutes of civil society (one representative each).

3) in Ukrainian realities, it is advisable to introduce a mechanism for recalling the representatives of the upper chamber by the colleges of deputies who have delegated them. This will allow the senators to liaise with their own regions and strengthen their accountability for their responsibilities.

4) to ensure the quality of law-making, it is permissible to introduce a model of "equivalent chambers", following the example of Italy. Ability of the upper chamber to participate actively in law-making, the use of a kind of veto on the acts adopted by the lower chamber, as a consequence, the need for conciliation procedures that can significantly improve the quality of laws and other decisions by a single legislative body in Ukraine.

The above proposals are completely correlated with the vector of European integration chosen by our country and the intensification of the comprehensive reform of the legal system as a whole and the practice of law-making in the realities of today.

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ТЕОРЕТИКО-ПРАВОВІ ЗАСАДИ РОЗВИТКУ СИСТЕМИ СТРАТЕГІЧНИХ КОМУНІКАЦІЙ СЕКТОРУ БЕЗПЕКИ І ОБОРОНИ

Анотація. *Дослідження проблеми правового регулювання суспільних відносин у сфері стратегічних комунікацій в умовах розвитку інформаційних технологій та поширення негативних інформаційних впливів на людину і суспільство є вкрай актуальною темою та потребує комплексного наукового опрацювання. Автор поставив за мету проаналізувати теоретичні, історичні та правові засади становлення системи стратегічних комунікацій сектору безпеки і оборони України та відповідного досвіду США, Великої Британії та інших країн-членів ЄС і НАТО. У роботі із застосуванням загальнонаукових і спеціальних методів наукового пізнання (діалектичного, історичного, системного аналізу та ін.) розглянуто правові засади формування та пріоритетні напрями розвитку системи стратегічних комунікацій сектору безпеки і оборони в умовах гібридної війни та євроатлантичної інтеграції України. Зроблено висновок, що правове регулювання суспільних відносин у цій сфері в Україні перебуває на етапі формування, а спеціальне законодавство з питань розбудови національної системи стратегічних комунікацій, організації управління і контролю та діяльності суб'єктів цієї системи потребує належного опрацювання з урахуванням досвіду країн-членів НАТО. За результатами дослідження: 1) сформульовано ключові загрози національної та міжнародної безпеки в інформаційній сфері; 2) визначено основні чинники, які впливають на розбудову системи стратегічних комунікацій, та складові вказаної системи (публічна дипломатія і заходи, спрямовані на просування цілей держави; зв'язки з громадськістю та військові зв'язки; інформаційні та психологічні операції); 3) уточнено складові системи управління та координації діяльності у сфері стратегічних комунікацій; 4) запропоновано модель побудови національної системи стратегічних комунікацій, наведено юридичне визначення суб'єктів цієї системи, їхніх завдань і функцій, організації взаємодії та міжнародного співробітництва.*

Ключові слова: національна оборона, персональні дані, конфіденційність, євроатлантична інтеграція, міжнародні відносини.

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THEORETICAL AND LEGAL BASIS FOR THE SECURITY AND DEFENSE STRATEGIC COMMUNICATIONS SYSTEM DEVELOPMENT

Abstract. *Research of the problem of legal regulation of public relations in the field of strategic communications in the conditions of development of information technologies and dissemination of negative information influences on the person and the society is extremely relevant and de-*

mands a complex scientific study. The author aims to analyse the theoretical, historical and legal foundations of the becoming of the strategic communications system of the security and defense sector of Ukraine and the relevant practices of the United States, Great Britain and other EU and NATO Member Sstates. The paper considers the legal grounds of formation and priority directions security and defence strategic communications system development in the conditions of hybrid war and Euro-Atlantic integration of Ukraine, with application of general and special scientific research methods (dialectical, historical, system analysis, etc.). It is concluded that the legal regulation of public relations in this field in Ukraine is in the formation stage, and the special legislation on the development of the national system of strategic communications, organization of management and control and activity of the subjects of this system needs proper elaboration with consideration of practices of NATO Member Countries. According to the results of the research: 1) the key threats to national and international security in the information sphere are worded; 2) the main factors influencing the development of the strategic communications system and the components of the said system (public diplomacy and measures aimed at promoting the state goals; public relations and military relations; information and psychological operations) are identified; 3) the components of the system of management and coordination of activities in the field of strategic communications are specified; 4) the model of construction of the national strategic communications system is proposed, the legal definition of the subjects of this system, their tasks and functions, organization of interaction and international cooperation are provided.

Keywords: national defence, personal data, confidentiality, Euro-Atlantic integration, international relations.

INTRODUCTION

The problem of legal regulation of public relations in the field of strategic communications is quite new for Ukraine and demands systematic consideration. Therefore, let us first consider how the concepts of "communication" and "strategic communication" are applied in the modern context. Currently, communication touches practically all facets of human being, society and state – political, financial, economic, social, cultural, educational, security, etc. Even a peek into the ongoing social transformations reveals the rapid development of communication processes. Changes in communication transform the world and its integrity. The term "communication" (from Latin *communicare*) means information, transmission, conversation, exchange of thoughts, data, ideas, that is – a specific form of interaction of people in the process of their life.

There is a number of different approaches to defining the concept of "communication", in particular: a mechanism by which the existence and development of human relationships, including all thinking symbols, the means of transmitting them in space, and the preservation of time, are ensured; exchange of information between complex dynamic systems and their parts that are able to receive information, to accumulate it, to transform; social integration of individuals through language or signs, establishment of meaningful sets of rules for different purposeful activities; information connection of the subject with a certain object – human, animal, machine.

According to our opinion, communication should be understood as a form of information exchange between the social structure subjects to reach their potential, and the totality of means intended for this purpose – as systems (means) of communication [1–4].

The issue of strategic communications has become popular in recent decades. Until recently, it has been considered mainly in the political, military, scientific and commercial circles of the United States and several other countries. Since the beginning of the 21st century, the concept of *"strategic communications"* has been increasingly used in legal documents in Ukraine.

Scientists have started to draw more attention to the term of "strategic communications" since 2001, following the "*Report of the Defense Science Board Task Force on Managed Information Dissemination*" by Vincent Vitto, chairman of the Defense Scientific Council (Federal Advisory Committee for Independent Advice to the US Secretary of Defense). This report suggested that *sophisticated strategic communications* could define the agenda and create a context conducive to political, economic and military goals. Despite the repeated reference to the specified term, it's definition was not mentioned in the report. However, it was noted that the requirements for government communications during natural disasters, pre-crisis states, and hostilities differ significantly from the requirements for *long-term strategic communications* [5].

Thus, as S.G. Solovyov points out, the important difference between strategic communications and other similar activities and processes is outlined here – *long-termness*, i.e. focus on the long-term result. Accordingly, strategic tools and means must be put in place to achieve the specified goals, which facilitate the gradual and systematic influence on the receipients' beliefs [6].

In the socio-humanistic science, as the analysis displays, there is a number of attempts to conceptualize the phenomenon of strategic communications. At the same time, there are practically no scientific developments that would provide a holistic vision of this phenomenon at the level of theoretical and legal generalization.

Modern domestic science assumes that *strategic communication* is the process that underpins national security efforts and the realization of national interests, including in the information sphere. Subjects of strategic communications and other activities are involved in this process. Another interesting opinion belongs to Daniel Gage, who understands strategic communication as a process of synchronizing actions, images and words in order to achieve the desired effect [7]. In general, it should be noted that modern information technologies, systems and networks penetrate into all activities of people, society, state and international community. Information is increasingly affecting people and society, and the use of information and information technology is becoming increasingly important upon resolving internal, interstate and international conflicts [8–12].

The development of information and communication technologies has fundamentally changed the principles and methods of governance, leading to revolutionary

changes in the field of international relations, in military affairs and modes of warfare. Concequentially, it is now possible to achieve the victory in a military conflict through purposeful informational influences on the population of another state or to seize its territory without the use of military force, including by application of the components of the strategic communications system.

1. MATERIALS AND METHODS

The research is based on materials regarding scientific achievements of foreign and domestic scientists, the results of the analysis of historical patterns and tendencies in the formation of strategic communication systems in Ukraine and NATO Member States. In the context of the above, the scientific advances that highlight the political and legal vision and practices of the becoming of strategic communications in the USA and the United Kingdom are of particular interest. To analyse the processes and problematics associated with the formation of strategic communications in Ukraine, the scientific achievements of a number of national scientists were studied, as well as relevant legislative acts concerning the field of information and security and defence sector of the Ukraine.

The methodological basis of the study is a set of methods and techniques of scientific research – general and special: dialectical, historical, system analysis, systematic and structural, comparative law. The leading is the general scientific dialectical method of research of the processes of formation and development of strategic communications of the security and defence sector in the EU and NATO Member States and in Ukraine. The historical method facilitated coverage of the prerequisites and processes for the formation of the conceptual apparatus and components of the strategic communication system in the late 20th – early 21st century.

The system analysis method allowed to systemize the major challenges and threats to national and international security in the information field and to identify key factors that influenced the development of the strategic communications system. The application of the system-structural method contributed to the development of a model for building a strategic communications system in Ukraine, defining its structural elements, as well as the objectives of the relevant state authorities and subjects of the security and defence sector.

Application of the comparative law method resulted in identification of systemic issues and priorities for the development of legislation on information and security and defence issues in the context of development of a national strategic communications system in accordance with standards of the EU and NATO Member States.

2. RESULTS AND DISCUSSION

Due to the rapid development of the information sphere and total informatization of the society in the development of international relations between the countries, significant changes are also taking place in connection with the latest developments in the field of information and communication technologies.

It is no accident that at the beginning of the 21st century, first in the USA, and then in a number of other countries of the world, new approaches to addressing the role of mass communications in national policy started emerging, which were specifically embodied in the concept of "strategic communications". As a number of researchers rightly points out, in particula [13–16], factors of extremely rapid development of strategic communications are the following: rapid development of informatization; increasing role of information warfare to achieve politico-military and economic goals; increasing number of forceful (armed) conflicts in the world; spreading of terrorist activity; formation of new national strategies of modern states; adjusting and changing the image of countries in the international arena; emergence and development of new forms of diplomacy (public diplomacy, cyber diplomacy, etc.).

As previously noted, the term "strategic communications" in its modern sense first appeared in US military community in 2001 [17; 18]. However, it has been used in official US documents since 2006. According to K. Vynohradova, the term "strategic communications" was interpreted as focused US efforts, directed at understanding the specifics of target audiences and cooperation with them for the US government to create, strengthen and preserve favourable conditions for the promotion of national interests and goals through coordinated information, integrated plans, comprehensive plans, action programs and synchronization with other elements of national power [19]. At the beginning of the 21st century, strategic communications have also become widespread in the United Kingdom, where military structures of the country are being actively developed and implemented. The United Kingdom is convinced that strategic communications must work to advance national interests by using all types of defence to influence the behaviour of target audiences [20; 21].

In general, strategic communications, according to British experts' opinions, should provide a decisive contribution to the development and implementation of a national strategy that is understood to be the set of ideas, preferences and methods explaining the activity (diplomatic, economic or military) and leading it to the goal. At present, strategic communication is also being actively studied and developed in the EU and NATO Member States, the PRC and the Russian Federation.

2.1 Legal bases of formation of strategic communications system in Ukraine

For the first time in Ukraine, the term strategic communication was used in the preamble to the Agreement between the Government of Ukraine and the North Atlantic Treaty Organization on the Status of NATO Delegation to Ukraine, signed on 22.09.2015 and ratified by Law No. 989-VIII dated 04.02.2016[1]. In general, it is a programmatic document on the development of international legal relations between Ukraine and NATO, which does not directly address the issue of forming and developing a strategic communications system.

[1] Decree of the President of Ukraine "On the Doctrine of Information Security of Ukraine". (2017, February). Retrieved from https://zakon.rada.gov.ua/laws/show/47/2017

Understanding of the concept of "strategic communication" in the NATO system is considered as a determined effort to identify and develop target audiences for the establishment, development and preservation of national (government) interests, policies and goals through the use of coordinated programs, plans, topics, messages and products, synchronized with all the actions and tools implemented by the authorities [22].

In Ukraine, the concept of "strategic communications" was first defined in paragraph 4 of Presidential Decree No. 555/2015 dated September 24, 2015[1] on the new version of the Military Doctrine of Ukraine as a coordinated and appropriate use of the state's communication capabilities – public diplomacy, public relations, military communications, information and psychological operations, activities aimed at promoting the goals of the state. According to this act, strategic communications are considered as the basis of crisis response to military threats and the prevention of escalation of military conflicts.

In general, the Military Doctrine of Ukraine for the first time legally defines: a) the definition of the term "strategic communications"; b) the scope of strategic communications in the activities of state authorities and subjects of the security and defence sector; c) the need for an effective strategic communications system in the security and defence sector; d) the need to develop a unified communications strategy in the security and defence sector and to identify a state authority responsible for coordination and control in this area.

The term "strategic communications", cited in the Military Doctrine, was also introduced in the Doctrine of Information Security of Ukraine, approved by Presidential Decree No. 47/2017 dated 25.02.2017[2]. At the same time, this Doctrine defines the term "strategic narrative" as a specially prepared text intended to be verbally narrated in the strategic communications process for informational influence on the target audience.

That is, "strategic communications" in this case can also be understood as a certain process, namely: the process of presenting the "strategic narrative", which is performed for informational influence on the target audience.

In accordance with Section 3 of the said Doctrine, the development of the strategic communications system of Ukraine is classified as vital interests of society and the state as a component of national interests in the information field.

Furthermore, "building an effective and efficient strategic communications system" in accordance with para. 1 Section 5 refers to national policy priorities in the information field regarding the assurance of information security.

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[1] Decree of the President of Ukraine "On the new version of the Military Doctrine of Ukraine". (2015, September). Retrieved from https://zakon.rada.gov.ua/laws/show/555/2015

[2] Decree of the President of Ukraine "On the Doctrine of Information Security of Ukraine ". (2017, February). Retrieved from https://zakon.rada.gov.ua/laws/show/47/2017

The basic legislative acts in the field of strategic communications should also include the Annual National Programs under the auspices of the NATO – Ukraine Commission for 2017 and 2018, approved in accordance with the Decrees of the President of Ukraine No. 103/2017 dated 08.04.2017 and No. 89/2018 dated 28.03.2018 [18]. According to these documents, a number of measures were envisaged to develop the strategic communications system of the security and defense sector of Ukraine, namely:

– development of public diplomacy;

– development and implementation of the national strategy of Ukraine in the field of strategic communications;

– building strategic communications capabilities in national security and defence;

– creation of coordination interagency mechanism of information operations;

– development of a system of professional training of specialists in the field of strategic communications;

– intensifying interaction with partner countries in the information field and developing partnerships in strategic communications;

– providing the subjects of security and defence sector, in cooperation with NATO, with scientific, expert and practical materials on strategic communications;

– preparation of proposals regarding normalization of the strategic communications system, etc.

Comprehensive analysis of the legal bases for the formation and development of the strategic communications system of the security and defence sector in Ukraine enables such opinions and proposals to be made:

1) legal regulation of public relations in the field of strategic communications in Ukraine is currently at the stage of formation. Special legislation governing the key aspects of developing a national strategic communications system, the management and control organization and the activities of the subjects of this system needs to be elaborated, adopted and implemented with consideration of the experience of NATO Member States;

2) the conceptual and categorical apparatus in the field of strategic communications, implemented by current regulations, broadly complies with NATO documents, but requires systemization, clarification and proper legal definition. In particular, the use of various terms, such as "government strategic communications", "state strategic communications", "national strategic communications", etc., is debatable. Strategic communications, as an integral part of the national security and defence system, as well as government communications or communications of other public authorities, should be clearly distinguished. They differ significantly in their goals, tasks, forms and methods of their implementation;

3) the definition of strategic communications as a coordinated and appropriate use of the state's communicative capabilities – public diplomacy, public relations, military relations, information and psychological operations, measures aimed at promoting the

goals of the state allows to distinguish the following basic components of strategic communications: a) public diplomacy and measures aimed at promoting the goals of the state; b) public relations and military relations (civil-military cooperation); c) information and psychological operations;

4) in seeking the role and place of strategic communications in the domestic law and legislation system, it is advisable to refer to national security and military law [23], especially since the field of "strategic communication" is directly identified (in NATO Member States) with the security and defence sector. The subject of regulation of public relations in terms of "national security and military law" may be: the legal basis and issues of national security and defence as one of the main functions of the state; the legal basis for the protection of state sovereignty, the constitutional order, the territorial integrity and inviolability of Ukraine's borders, the legal protection of state and military security and the state border security; issues of legislation and law in the field of national, collective and international security; system and state-legal mechanisms for ensuring national security and defence of Ukraine; statutory regulation of the activities of the subjects of the security and defence sector, military law enforcement and military justice bodies; legal issues of the implementation of the standards of the European Union Member States and the North Atlantic Treaty Organization into the legislation of Ukraine.

2.2 Priorities for the development of the strategic communications system of the security and defence sector in the context of hybrid war and Euro-Atlantic integration of Ukraine

In recent years, the concept of "hybrid war" has become widespread and transcended the Russian-Ukrainian conflict, and a number of countries in the world have actually become parties to this confrontation using information, economic, energy, military and other components. In these circumstances, the problem of forming and developing a modern and effective strategic communications system for the security and defence sector, with consideration of the experience of NATO Member States, becomes extremely urgent for Ukraine.

It is noteworthy that in recent years (in the context of a hybrid war), EU and NATO Member States have paid particular attention to counteracting the use of information weapons and developing strategic communications in the security and defence sector, as evidenced by the chronology of a number of events and decisions adopted, namely [24]:

– in October 2007, the Enhancing NATO's Strategic Communications Directive was adopted, and in 2008 the strategic communications issue was included in the Alliance's policy document – the NATO Summit Declaration;

– in January 2014, the NATO Strategic Communications Centre of Excellence, or NATO StratCom COE was created. Its main objectives include coordination of NATO's strategic communications activities, exploring ways to emerge and disseminate infor-

mation threats, developing information counteraction techniques, and providing training for information and psychological operations;

– in March 2015, the Council of Europe established the East StratCom Task Force, or East StratCom, and decided to entrust the High Representative of the Council of Europe, together with the relevant European Union institutions and EU Member States, with the preparation of a Strategic Communications Action Plan;

– in March 2016, the Executive Office of the President of the United States and the US Department of State reformed and expanded units that handle strategic communications;

– in November 2016, the European Parliament adopted a resolution to counteract the propaganda of third countries, including the Russian Federation. In the resolution, in particular, the European Parliament acknowledged that the Russian government was aggressively using a range of means and tools to attack democratic values, to split Europe, to ensure support within the country and to create the impression of differences between the EU's Eastern Neighbourhood countries.

The specified Resolution also recommended that the EU combat propaganda more vigorously, without forgetting the principle of freedom of speech. She also recommended that the East StratCom Task Force be strengthened, transforming it into a full-fledged EU External Relations Service. In the context of the above, it should be noted that one of the key factors of the modern hybrid war, global and regional (sub-regional) confrontation is the field of information. Therefore, to effectively ensure the information security (as well as the development of a strategic communication system), the issues of combating information wars, cyberattacks and negative information and psychological impact on the individual, society and the state are extremely urgent. According to research performed [25–30], the following *key threats to national and international security in the information field* are now of utmost priority: global changes and transformations in the information field are creating the latest challenges that pose a real threat to human security and international law; along with the development of information and communication technologies there is a problem of unauthorized collection of personal data and violation of privacy of human life; there is a tendency in the information space to spread information aggression and violence, manipulation of consciousness of the person and the society, informational and psychological operations are being periodically performed; most countries in the world have encountered cyberespionage, cyberterrorism, cybercrime and cyberattacks on critical infrastructure; the consequences of using modern information weapons can lead to a real loss of state sovereignty and territorial integrity of the countries of the world. (The 2014 events of aggression against Ukraine clearly confirm this).

The level of modern challenges and threats in the information field confirms the validity and exceptional importance of the provisions of Art. 17 of the Constitution

of Ukraine[1] that information security is one of the main functions of the state and the matter of the entire Ukrainian nation (in the context of the said constitutional provision, cybersecurity should be considered as one of the components of information security). In general, according to our opinions, the national information policy and the information security system should be aimed at the effective protection of national security objects: human and citizen – their constitutional rights and freedoms; society – its spiritual, moral, ethical, cultural, historical, intellectual and other values; the state – its constitutional order, sovereignty, territorial integrity and inviolability. In the context of the emergence of an information society, national and global information space, an extremely important objective in the field of information and national security is also to create a *strategic communications system for the security and defence sector* and to improve it with consideration of the practices of NATO Member States, as discussed in the Ukraine Security and Defence Sector Development Concept (2016).

It appears to be appropriate to relate the following to the key factors in the formation of the national strategic communications system of the security and defence sector of Ukraine: principles of the national policy in the field of strategic communications as a component of the state information policy and the policy of information security assurance; principles of functioning of the strategic communications system; subjects of the security and defence sector as defined by legislation; basic directions of functioning of the strategic communications system of the security and defence sector. Let us consider these and other aspects more substantially.

First. National policy in general, including national information and information security policy, in accordance with the Constitution of Ukraine, is determined by the Verkhovna Rada of Ukraine. The central executive authorities and other state authorities, in cooperation with civil society, take part in its formation. Accordingly, the national policy in the field of strategic communications should be developed with the participation of the NSDC of Ukraine, the Ministry of Information Policy and the State Committee for Television and Radio-Broadcasting of Ukraine, the Ministry of Foreign Affairs of Ukraine, the Ministry of Defence of Ukraine, the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine and other subjects of the security and defence sector. According to our estimations, the national policy in this sphere should be considered as a component of the national information policy of Ukraine, and implemented by the legislatively defined subjects of the security and defence sector.

Second. The basic principles of functioning of the strategic communications system of the security and defence sector should include the following:

a) general principles: legitimacy, democracy, non-partisanship, integrity, decency, accountability and responsibility;

[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

b) special principles: focus on the protection of national interests and national security objects – human, society and state; balance of human rights and freedoms and legitimate interests of society and the state; unity of approaches in the formation and implementation of measures in the field of strategic communications; scientific rigour, systematic approach to the formation and development of strategic communications of the subjects of the security and defence sector.

Third. In accordance with Part 1 of Art. 12 of the Law of Ukraine "On National Security of Ukraine", the security and defence sector of Ukraine consists of four interconnected components: security forces; defence forces; military industrial complex; citizens and civil groups voluntarily involved in national security assurance.

In accordance with Part 2 of Art. 12 of this Law, the subjects of the security and defence sector include the following: Ministry of Defence of Ukraine, Armed Forces of Ukraine, State Special Transport Service, Ministry of Internal Affairs of Ukraine, National Guard of Ukraine, National Police of Ukraine, State Border Service of Ukraine, State Migration Service of Ukraine, State Emergency Service of Ukraine, Security Service of Ukraine, State Security Department of Ukraine, State Service for Special Communication and Information Protection of Ukraine, Office of the National Security Council Ukraine and Defence, intelligence agencies of Ukraine, central executive authority facilitating the formation and implementation of the national military-industrial policy. In accordance with Articles 106, 107 of the Constitution of Ukraine[1], management in the fields of national security and defence of Ukraine is exercised by the President of Ukraine, and coordination – by the National Security and Defence Council of Ukraine. In consideration of the foregoing, the following list of subjects of the security and defence sector should be taken as the basis for the formation of the national strategic communications system.

Fourth. A meaningful analysis of the definition of "strategic communication" concept, provided by the statutory acts of Ukraine[2], as well as the statements of the Strasbourg-Cologne meeting of the North Atlantic Council and the Heads of State and Governments of NATO Member States[3] make it possible to classify the functions of the strategic communications system by such major directions: public diplomacy and measures aimed at promoting the goals of the state; public relations and military relations (civil-military cooperation); information and psychological operations.

Under these conditions, the organizational design (model) of the strategic communications system of the security and defence sector may appear to take the following form:

[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[2] The Military Doctrine of Ukraine, approved by the Decree of the President of Ukraine. (2015, September). Retrieved from https://www.president.gov.ua/documents/5552015-19443

[3] The Strasbourg I Kehl Summit declaration. Retrieved from https://www.nato.int/cps/en/natohq/news_52837.htm?mode=pressrelease

1. *General coordination and guidance* on matters of strategic communications in national security and defence, with consideration of the provisions of Art. 106 of the Constitution of Ukraine, which shall be implemented by the President of Ukraine and the NSDC. The implementation of this function may be entrusted to the Office of the NSDC of Ukraine or a specially created authority under the NSDC (for example, the National Coordination Centre on Strategic Communications). Accordingly, the role of National Coordinator on matters of NATO-Ukraine cooperation in the field of strategic communications may be assigned to one of the Deputy Secretaries of the NSDC;

2. Coordination and enforcement of the *function of public diplomacy and measures aimed at promoting the goals of the state* may be performed within the competence of the Ministry of Foreign Affairs of Ukraine and the Ministry of Information Policy of Ukraine, with the participation of other state bodies, non-governmental structures and public organizations. Organizational and other assurance of the implementation of the above may be performed by the corresponding units of the apparatus of the said ministries, as well as by the international liaison units of the central executive authorities and subjects of the security and defence sector;

3. *Public relations and military communications* should be performed by all actors in the security and defence sectors identified by law. With that, the Ministry of Defence of Ukraine may be responsible for coordinating military communications (military-civilian cooperation). The implementation of these objectives should be performed through the subjects of the security and defence sector, media and public relations units or through other units;

4. *Coordination, planning and conducting of information and psychological operations,* as the most "sensitive" sphere of strategic communications, requires complex involvement of organizational and legal, telecommunication, information, sociological, psychological, operational and other forces and means of the subjects of the security and defence sector and other state authorities and non-governmental organizations.

With regard to this matter, in the context of the provisions of the Law "On National Security of Ukraine", proposals concerning the pooling of relevant forces and resources of state and non-state subjects in the security sector for their coordinated practical engagement on these issues and possible creation of an appropriate interagency unit within the Security Service of Ukraine appear to be reasonable. At the same time, it would be worth considering the experience of legal regulation and functioning of another similar interagency association – the Anti-Terrorist Centre at the Security Service of Ukraine.

CONCLUSIONS

Analysis of the current issues of the development of the situation in the political, legal, military and information fields, as well as tendencies of international events around Ukraine, allows to single out a range of theoretical and legal issues of the

formation and development of the strategic communications system of the security and defence sector of Ukraine, namely:

1. The system of national administration and coordination in the field of strategic communications is now being developed quite fragmentarily, without due consideration of the objectives, nature and content of this activity. The key issues in organizing strategic communications in the security and defence sector of Ukraine include: lack of a unified national policy, proper legal framework and a comprehensive system of strategic communications for the security and defence sector; scattered activities of the subjects of strategic communications, the necessity to introduce effective mechanisms for coordination of civil-military cooperation, information and psychological operations; inadequate level of professional training of persons involved in strategic communication functions, as well as lack of prepared personnel reserve for the deployment and development of the strategic communications system; the need to organize the development of legislative acts, analytical, methodological and scientific support in the strategic communications of the security and defence sector.

2. Priority directions for the formation and development of the strategic communications system of the security and defence sector of Ukraine should include: development of a modern model of the national system of strategic communications, legal definition of the subjects of this system, their main objectives, functions, powers, interaction and organization of international cooperation; clarification of the system of governance, coordination of activities and democratic control in the field of strategic communications; addressing issues related to the development of public relations of the subjects of the security and defence sector in the context of a hybrid war, the emergence of an information society and the introduction of the latest information and communication technologies; ensuring effective counteraction to informational and information and psychological operations to the detriment of the individual, society and the state; organization of training, retraining and advanced training of the personnel of the subjects of the security and defence sector, as well as adequate scientific and technical support in the field of strategic communications.

3. At the stage of development of the strategic communications system, a duly protection of rights, freedoms and security of the individual and citizen in the information field shall be provided, first of all, in order to reform the national system of personal data protection in accordance with the EU Data Protection Package, which came into force in May 2018 and implements the following basic principles of personal data management: legality, fairness, transparency, target limitation, minimization of data, accuracy, retention, integrity , privacy. The case law of the USA and other EU and NATO Member States on the definition of privacy torts should also be considered: intrusion upon seclusion – invasion of the "personal space" of the individual; publication of private facts; representation of and individual in a false light; use of someone else's name or image for lucrative purposes (appropriation).

In general, developing an effective strategic communications system can become a significant component of the security and defence sector and the protection of vital national interests of Ukraine.

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ІНСТИТУЦІЙНА СПРОМОЖНІСТЬ ДЕРЖАВИ ТА ПРАВА ЛЮДИНИ

Анотація. *У статті розкриваються основні параметри інституційної спроможності держави. Верховенство права як критерій легітимності діяльності держави передбачає методичне втілення владних рішень в життя, які мають ґрунтуватися на фундаментальних цінностях гідності людини, свободи, рівності, поділу влади та демократії. В якості основного методологічного підходу розглядається синтетичний, який побудований на основі міждисциплінарних досліджень, що поєднують розуміння права як природних законів та результатів людської діяльності, що зумовлює певну структуру суспільства та його організацію в державу. Набуває нового значення приватноправовий механізм формулювання та визнання правил і процедур. Зокрема, це проявляється у доктрині прямої дії права наднаціональних об'єднань у сфері прав людини, які накладають негативні і позитивні обов'язки на державу. Обумовленість організації держави правами і свободами людини визначається через інституції, процедури і правила щодо обмеження влади. У силу цього держава покликана гарантувати економічні свободи, здійснювати справедливий розподіл благ та рівний доступ до них громадян. Трансформація національного суверенітету передбачає його політичну та юридичну складову, а також передачу частини суверенних повноважень на наднаціональний рівень. Критерієм демократичної легітимності такої передачі повноважень служить якість захисту прав людини та забезпечення національних інтересів. У світлі цього необхідно досягти належного рівня симбіозу людства із природою і воно є питанням глобального рівня та потребує кардинальної зміни у підходах щодо ухвалення владних рішень на всіх рівнях організації влади. Це надає особливого характеру сучасному процесу глобалізації як руху в сторону посилення охорони довкілля, забезпечення прав людини та втілення демократичної конституційної держави. Тому набуває значення конкурентоспроможність національної економіки, незважаючи на циклічність економічних процесів та наявні конфлікти між державами. Виходячи з цього, розкрито різні варіанти втілення європейського та євроатлантичного векторів інтеграції Україні за допомогою адекватних конституційних засобів.*

Ключові слова: верховенство права, демократія, захист конституції, інституційна спроможність держави, конституціоналізм, національний суверенітет, права людини.

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INSTITUTIONAL CAPACITY OF THE STATE AND HUMAN RIGHTS

Abstract. *The article reveals the main parameters of the institutional capacity of the state. The rule of law, as a criterion for the legitimacy of state activity, provides for the methodological implementation of authority decisions in life, which should be based on the fundamental values of human dignity, freedom, equality, separation of powers and democracy. The main methodological approach is synthetic, which is based on interdisciplinary research that combines understanding of law as natural laws and the results of human activity, which determines a certain structure of society and its organization in the state. The private-law mechanism of formulating and recognizing rules and procedures is taking on new significance. In particular, this is manifested in the doctrine of the direct effect of the right of supranational human rights associations that impose negative and positive obligations on the state. The conditionality of the organization of the state by human rights and freedoms is determined through institutions, procedures and rules for restriction of power. For this reason, the state is meant to guarantee economic freedoms, to ensure fair distribution of goods and equal access to them for citizens. Transformation of national sovereignty implies its political and legal component, as well as the transfer of part of the sovereign powers to the supranational level. The criterion for the democratic legitimacy of such a devolution is the quality of human rights protection and the safeguarding of national interests. In light of this, it is necessary to achieve the proper level of symbiosis of humanity with nature, and it is a global issue and requires a fundamental change in the approaches to making authority decisions at all levels of government. This is of particular importance to the current process of globalization as a move towards greater environmental protection, human rights and the realization of a democratic constitutional state. Therefore, the competitiveness of the national economy becomes more important, despite the cyclical nature of economic processes and the existing conflicts between the states. Proceeding from this, various options of embodiment of the European and Euro-Atlantic vectors of integration of Ukraine with the help of adequate constitutional means are revealed.*

Keywords: rule of law, democracy, protection of the constitution, institutional capacity of the state, constitutionalism, national sovereignty, human rights.

INTRODUCTION

This paper considers a constitutional state capable of making decisions, which are formulated as a result of social interaction and are based on social consensus on fundamental social values, enabling them to be implemented methodologically. The criterion for the verification of authority decisions and the ability to introduce them is their recognition and ability to implement them on the basis of respect for human dignity. In particular, it will consider (1) the transformation of sovereignty on the basis of the network-centricity of building public authority, which (2) is conditioned by human rights and (3) determines the parameters of the institutional capacity of

the state. (4) Provision of secure national identity in the context of globalization becomes particularly important, through (5) the constitutional means of becoming of a global law. The author considers the institutional capacity of the state through the lens of ensuring the dignity of its democratic legitimation as a fundamental constituent decision. Such a fundamental decision defines the character of modern statehood as legal, determines the content of its basic functions and is implemented in its specific authorities. The methodological basis for this is the separation of powers, subsidiarity and the ability to defend constitutional democracy (the doctrine of *militant democracy*).

The purpose of this research is to identify mechanisms for securing national sovereignty through the lens of the institutional capacity of the state. For this purpose, the achievements of liberal, liberal-democratic and social constitutionalism will be analyzed against the background of globalization processes. The main methodological approach will be a synthetic one, built on the basis of interdisciplinary research that combines the understanding of law as natural laws and the results of human activity, which determines a certain structure of society and its organization in the state. The scientific novelty and practical importance of this paper is the development of criteria for the institutional capacity of the state to effectively implement its own decisions on the basis of constitutional values.

The question of the institutional capacity of the state in the Ukrainian constitutional doctrine was stated in the works of Bohdan Kistyakivskyi [1] and Oksana Shcherbanyuk [2]. In fact, this doctrine came to us from Western literature. In particular, Kistyakovskyi's views were influenced by the works of Immanuel Kant [3], and Shcherbanyuk's – by Nicholas Spykman [4] and Zbigniew Brzezinski [5]. In the domestic doctrine of constitutionalism, apart from the works of Oksana Shcherbanyuk, which focus on the capacity of power, this issue is only indirectly considered through the lens of human rights and civil society institutions. In view of the deepening of integration processes, these issues should be considered through the lens of globalization and the competitiveness of the national economy in global and regional markets in terms of securing national interests and economic freedoms.

The article will reveal the mechanism of interaction between civil society institutions and the state in the context of ensuring national sovereignty through the lens of parameters of the institutional capacity of the state. The first part of the paper highlights the tendencies towards a network-centric construction of public power and adapt the content of the principle of subsidiarity to the peculiarities of the constitutional structure of Ukraine. The second part reveals the conditionality of the constitutional structure of human rights in terms of the duty to protect as a fundamental constitutional principle, and its substantive content through institutions, procedures and rules. The third part defines the basic parameters of institutional capacity, with consideration of the constitutional dynamics and values. The fourth part reveals the peculiarities of the emergence of global civil society and global law and their impact on national sover-

eignty. The fifth block of issues is devoted to the constitutional means of implementing the globalization of law, including particular aspects of European and Euro-Atlantic integration.

1. MATERIALS AND METHODS

The core of this research is a comparative constitutional law toolkit based on the complementarity of comparative legal research and the functional method. According to the principles of legal pluralism, Ran Hirschl's approach will be taken as the basis for the exchange of ideas and doctrines in constitutional law on the basis of complementarity [6]. Such an exchange of ideas is important for understanding the nature of institutions and procedures for the effective implementation of authority decisions based on fundamental values – human dignity, freedom, equality and the rule of law. In accordance with the multidisciplinary approach, the achievements of philosophy will also be used to determine the nature of constitutional values as the basis for understanding the state in the system of constitutional values, and the achievements of political science – to determine the role of the doctrine of militant democracy [7] as institutions for the protection of constitutional values, sociology and game theory, to determine the basis of certain provisions, procedures and the rules that make up the institutional capacity of the state. The main achievements of the doctrines of liberal, liberal-democratic and social constitutionalism [8–10], as well as the doctrines of communicative and procedural democracy are also used in the paper [11].

On the basis of an analysis of the formalistic, procedural and substantive doctrines of the rule of law, the positive duties of the state will be formulated in the light of human dignity and fundamental rights. Human dignity, as self-identity and the possibility of free self-determination of an individual, sets standards for the formulation of provisions of legislation and practice of its application. The basic quality requirements that meet them are the clarity and certainty of the laws and the reasonableness and clear motivation of court decisions that would be appropriate for the application and implementation. The matter of the content and quality of the state's performance of such duties will be addressed through the lens of the rule of law [12–14]. In particular, it emphasizes the need for process inclusivity (involving as many interested parties and opportunities as possible) and validity (reasonableness, prudence and balance) of decision making. The doctrine of state responsibilities at the supranational level is of particular importance [15], as it raises questions about the effective upholding and realization of national interests at the regional and global level.

2. RESULTS AND DISCUSSION

2.1 Subsidiarity and the network-centric structure of public authority

The transformation of national sovereignty stems from at least a two-way movement upon formulating and recognizing rules. Since sovereignty is the property of the public authority bearer to independently make certain decisions and enforce them

through legal means, they may either recognize a certain order of things or define the desirable rules for the future. As a result, the private legal mechanism for formulating and recognizing rules and procedures is gaining importance. In particular, this is reflected in the doctrine of direct effect of the right of supranational human rights associations, also called the horizontal effect doctrine. This is important for defining the goals and objectives that underpin the formulation of the powers of public authorities. Human rights, as the limits of the exercise of power, determine the main directions of their activity, which are also conditioned by access to resources and the state of the environment. The question arises as to the division of powers between the levels (tiers) of public authority: communities – regions/autonomies – subjects of federation – supranational associations [16].

It also imposes restrictions on the division of powers between levels of government, which is determined, in fact, by the criterion of the effectiveness and efficiency of human rights protection. For example, on July 16, 2015, the Verkhovna Rada adopted a resolution, in accordance with which was directed a bill amending the Constitution regarding the decentralization of power of the Constitutional Court (hereinafter referred to as "the Constitutional Court") in order to conclude on its compliance with Articles 157 and 158 of the Constitution[1]. On July 30, 2015, the Constitutional Court issued a positive opinion (Opinion No. 2-rp/2015) on compliance with the constitutional values and principles of the content of this draft law – the integrity of the substance of human rights and fundamental freedoms. The aforementioned Opinion of the Constitutional Court is the first display that only human rights are the permissible limits of public authority interference in the field of private autonomy, which, at first glance, resonates with the idea of protecting the three constitutional values set out in Article 157 of the Fundamental Law. Because of the predicate – the sovereignty and territorial integrity of the state – it is hardly possible to properly assess the democratic dimension of constitutional statehood. The limitation here is posed specifically by human rights. It is no coincidence that human rights served as an objective criterion for the admissibility of the transfer of a part of the sovereign powers of the state to the institutions of the European Union during the ratification of the Treaty of Lisbon, which was subsequently reflected in the decisions on the constitutionality of this Treaty of the Constitutional Tribunal of Poland, the Constitutional Council of France, the constitutional courts of Germany, the Czech Republic, etc.

Returning to the demonstrated approach of the Constitutional Court in its Opinion dated 30 July 2015, it should be noted that, in a substantive and material sense, the human rights criterion determines the review of constitutional draft laws:

– proper implementation of negative and positive obligations by the state to ensure access of individuals to certain material and spiritual goods, their legitimate interests in self-determination as an individual;

[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

– institutional components of the functioning of power institutions based, in particular, on respect for human dignity, non-discrimination and arbitrariness through separation of powers and principles of self-regulation, initiative, access to management services;

– procedural components of statehood, which include the principles of trust, due process and consideration of all material circumstances of the case, hearings of interested parties, competitiveness of the process, the right to appeal against decisions, the principle of res judicata.

Therefore, the review of the constitutional draft law on compliance with human rights and freedoms is sufficient, as human rights themselves determine certain requirements for the quality of organization and order of activity of governmental institutions, in particular for ensuring the sovereignty and territorial integrity of Ukraine. On this basis, nation-states are given the opportunity to exercise their sovereign powers at the supranational level. At the same time, it is important to involve the regions in the decision-making process at national and supranational levels. In addition, the values of supranational unification are of key importance for constitutional statehood, as they, according to the doctrine of modern constitutionalism, shall be based on respect for human dignity, freedom, equality, the rule of law, human rights, democracy, due process of law, etc. Proceeding form this, modern states should combine the traditional hierarchical structure of the organization of power with the extension of horizontal interaction between the institutions of power. The functioning of public authority should generally follow current trends in the formation and reproduction of rules, which increasingly enhance the role of horizontal relations [16].

2.2 Human rights predicament of the constitutional structure

The constitutional structure consists of the composition of authorities. Traditionally, it is associated with forms of state rule and state structure. The dynamics of implementation of the relevant principles of organization of power is expressed by the state regime. As previously noted, the question arises whether, at a satisfactory level, these components meet the criteria of effective provision and protection of human rights, which in itself is a fundamental constitutional decision. Preferably, it has a two-tier nature. The constitution is an act of constituent power of the people. The Constitution of Ukraine establishes a system of checks and balances. The functioning of such instruments is aimed at protecting constitutional values, above all the private autonomy of a freely evolving individual. The Federal Constitutional Court of Germany in the case of Lut said that the constitution "establishes an objective order of values, which substantially strengthens the effectiveness of the fundamental rights. This system of values, at the heart of which is the freely developing individual and their dignity, should be considered as a pivotal, fundamental constitutional decision that influences all branches of law and is a priority for the development of law, public administration and justice". The second level of the constitutional structure

consists of established institutions – legislative, executive and judicial authorities. The Constitution of Ukraine[1] identifies these three main functions in the state, which are aimed at preventing arbitrary decisions, as it threatens to excessively restrict human rights or deny their essence. Therefore, the division of authorities between the institutions of power expresses a national constitutional tradition. For young constitutional democracies, resolving the dilemma of parliament and judicial constitutional control is key. In this coordinate system, there is always a struggle between the majority and human rights.

Paul Gauder emphasizes the importance of providing a transition from an authoritarian interpretation of legal statehood, which comes down to the ideas of regulation and publicity, whereby the right serves to streamline relations between people and the use of public officials, "for officials to explain their behavior to whom they apply coercion" which is a requirement for the justification of power decisions [12]. A strong version of the rule of law is no longer formalized, but is rather based on publicity as a criterion of materiality. The concept of generality, in turn, is based on expression as the result of an agreement (convention) that has an egalitarian content, which denies the division of people into castes, the distribution of public goods and the consideration of the interests of different entities [12].

Earlier, the author of these lines, together with Mykola Onishchuk, had already outlined the basic parameters of constitutional reforms, which seemingly have not yet been resolved, despite the amendments to the Constitution of Ukraine[2] concerning justice and European and Euro-Atlantic integration. Let us outline them here: the definition of mechanisms of accountability and accountability of government before the people; the principles of people's sovereignty limited by constitutional values through provision of a balance between the rule of parliament and constitutional justice; free and democratic elections as the basis of parliamentary legitimacy; ensuring the democratic foundations of forming a government, in particular through a vote of confidence and a constructive vote; proper integrity and accountability of the government to parliament [17].

The recently raised issue of the constitutionality of illicit enrichment (Article 3682 of the Criminal Code) in the decision of the Constitutional Court No. 1-p/2019 in connection with the alleged violation of the principles of the legal definition of the crime as a component of the rule of law, the presumption of innocence and the constitutional guarantee regarding self-blame, is solved completely differently. It is quite rightly pointed out by Anna Peters, that corruption is targeted primarily at social rights, moreover, such corruption is of low intensity, not large, like it is at the highest level, but daily, as it is mainly concerned with ensuring a decent standard of living for the individual, in particular quality education, medical services [18]. According to a suc-

[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[2] *Ibidem*

cessful remark, “corruption, whether systemic, endemic or small, violates the enjoyment of all rights by citizens guaranteed by all international means” [19]. Of course, Peters translates the solution to the issue of corruption in the implementation of the state's own negative and positive obligations, in particular to protect, procedural and procedurally independent duties, the source of which was often a denial of causality between the quality of legislation (for instance, its gaps) and the denial of the substantive content of rights, including social rights [18]. Everything rests upon the allocation of resources on the basis of the overall scale and effectiveness of institutions, procedures and rules.

1) Institutions play a steady role in the allocation of resources, which are always scarce and, with regard to their equitable allocation, planning for the future must be in palce, albeit in view of the cyclical nature of economic processes. In particular, privatization carried out in the 1990s without the formation of market institutions, which were determined through acceptable procedures and price rules, led to an unfair distribution of national wealth and the enrichment of the former nomenklatura and criminal capital. All this quite substantially undermined the state's institutional capacity. Therefore, the elimination of state dirigism in the economy should be accompanied by the formation of adequate market institutions. It also undermines the judicial system's drastic reduction of the judiciary from over nine thousand to five thousand courts. Considering the post-colonial nature of the state with its inherent low level of social trust in the state's institutions, we have a striking mix of decisions that significantly affects the course of the presidential and parliamentary elections, as well as the intertness of the accountability and control procedures of the government.

2) Procedures, in the context of uncertainty in the nature of constitutional decisions, play but a decisive role. Even Roberto Michaels' famous oligarchy iron law urges democracy to elect members of parliament who thus hold office in the state and then, by using their office as channels of access to resources, pass such electoral legislation as would allow them to remain in office. And such cycles can last forever, until a crisis occurs in the country. However, this has nothing to do with the requirements of due process, the components of which at the micro level are the right of every interested person to be heard, the equality of parties in the process, the validity of decisions and the ability to challenge their own decision. At the micro level, this translates into requirements for moral integrity and proximity to public servants, accountability and control of election officials. Problems in the implementation of the procedures were evident in the presidential elections in the United States, France and Ukraine. This has resulted in the elaboration of special programs and electronic protocols of social media users on the Internet and determining the form of influence on target audiences, both on television and on social networks.

3) Rules on the application of social rights, according to the doctrine of "Untermaβverbot" (positive actions of the state) of the Federal Constitutional Court

of Germany, should determine the content of the measures of the state to such an extent that they are not allowed to a minimum level of ensuring a decent standard of human life and should meet the criteria of "adequacy" or "reasonableness" [20]. The basis for defining such rules and recognizing them is respect for human dignity, an equal scale of attitude and validity in differentiating the legal regulation of the status of certain categories of persons who need special protection because of their vulnerable position. The doctrine of horizontal effect, in turn, requires the equalization of the situation, in particular between the employer and the employees, since often the former can act as a monopolist in this respect. At the same time, situations of foisiting interests of the minority should also be avoided if there is a place for particularity of relations in the market.

2.3 Parameters of the institutional capacity of the state

The parameters of determining something are key, crucial to determine fairness, validity of certain research results. This is where the multidisciplinary approach will assist us. The institutional capacity of the state is declared in Article 3 of the Constitution of Ukraine as follows: "Promoting and safeguarding human rights and freedoms is the main duty of the state". Therefore, the sense of functioning of the Ukrainian state is to provide conditions for the free development of the individual in all forms of their manifestation as a self-sufficient personality. This fundamental decision also establishes requirements for the state to act in accordance with stable and predictable rules of the game, which determines the legal certainty and validity of power decisions. In accordance with the rule of law, the political process must be subject to the constitution. The doctrine of social contract as the basis of the constitution involves reaching public agreement on the restriction of power and the recognition of the universal value of human dignity as an individual's ability to self-identify, self-express and freely develop.

This is an issue of the institutional capacity of the state. It can be measured through the following parameters.

1. The ability of the Constitutional Court of Ukraine to make decisions, being guided by constitutional values and principles. This implies their proper argumentation and their presentation in a clear language for ordinary citizens. The real ability of the courts to control the actions of the executive power regarding the compliance with internationally recognized human rights standards. Effective judicial review is also measured by the enforcement of judgments. Unenforced judgment constitutes the absence of fair justice as such. For this, the courts themselves must comply with the requirements of competitiveness and equality of parties in the process, guarantee the parties to be heard in the process, and thoroughly investigate all the relevant circumstances of the case in the hearing and make a well-founded decision.

2. Upon adoption of legal acts by the Verkhovna Rada and public administration bodies, they must take care of their content, the adequacy of available resources for

their implementation and ensure the requirements of predictability and legal certainty. Therefore, behind the laws, there should be a clear algorithm for their implementation. Laws must meet the criteria of legitimate purpose. For example, the law governing the quality of a chemical product may not, even in its transitional provisions, rule the disciplinary liability of constitutional or ordinary judges. This is not in line with its legitimate purpose (material aspect) and it would be reasonable to assume that parliamentarians did not properly discuss these issues upon adopting the law (procedural aspect). Experience shows that such kind of law will not work properly.

3. The checks and balances system must work properly. Parliamentary committees are important not only for legislative activity, but also for exercising control over the executive branch. The absence or inadequate parliamentary control leads to permissiveness in the activities of the public administration, which does not contribute to the quality and effectiveness of human rights. In particular, poor quality parliamentary control in the field of national security and defense has led to a scandal over government contract fraud related to Ukroboronprom company.

4. The engagement of public administration with the people and the provision of quality administrative services to the population, the implementation of administrative procedures to facilitate the exercise of economic freedoms as a basis for ensuring the distribution of public good and access to education, healthcare, intellectual property and cultural heritage. It contains a significant share of the state's positive obligations to protect fundamental rights, based on fair access to public good. The protection of classical liberal rights is based on the requirement of non-interference with private autonomy and here the state has a duty to protect them from encroachments by third parties and public authority. Everything here is also about guaranteeing fair justice and compliance with contracts.

5. Karl Schmitt once stated that he was a sovereign able to apply a state of emergency [21]. We are by no means adherents of Schmitt, but we consider him a rather witty diagnostician of issues of transitional constitutional democracy, to which the Weimar Republic once belonged, which has not lost its relevance to Ukrainian parliamentarism to this day. The question here centers around choosing the optimal model for protecting the constitution in the event of an external threat. The right of a political nation organized into a state to defend itself against an aggressor is recognized in Article 51 of the UN Charter. The state has the discretion to take all necessary measures to protect national sovereignty from external threats, even under the guise of what is now, for some reason, called a "hybrid war", although, as evidenced by history, Russia's constant military conflicts with Ukraine are commonplace. Therefore, human rights and national security must be weighed on the principles of proportionality in resolving these issues, which should be addressed by an independent and fair tribunal.

2.4 National sovereignty and the protection of constitutional values in the context of global law

The current system of collective security is in deep crisis, within the framework of the traditional system of ensuring the sustainability of the world order. In particular, this is evidenced by the rather inert mechanisms of accountability within the UN General Assembly. Only recently has a relevant resolution been adopted stating that there was an inter-state armed conflict between Ukraine and Russia that has led to the occupation of Crimea today (A/C.3/71/L.26). Therefore, in the light of these provisions, mechanisms for defending national interests in the context of globalization processes should be considered.

Ensuring the protection of fundamental constitutional values is linked to the protection of constitutional identity. Julian Cocott and Martin Caspar highlight the struggle between sovereignty of parliament and judicial review as a key issue in the legal protection of the constitution [8]. This discussion has its origins in the views of Albert Venn Dicey, who identified two key pillars of British constitutionalism in the second half of the 19th century as the sovereignty of parliament and the common law of the courts [22].

The High Court of London, in the case on the constitutionality of a referendum on withdrawal of the United Kingdom from the European Union stated that the principle of parliamentary sovereignty is decisive in the application of foreign policy prerogatives, in particular on the approval or termination of international treaties. The government does not have the proper prerogatives to do this, because on behalf of the Crown, in accordance with the principle of parliamentary sovereignty, such decisions shall be made by parliament. With that, the court referred to the fact that the United Kingdom is a constitutional democracy, limited by legal rules and the objectives of the rule of law. Courts are empowered with a constitutional fundamental obligation to be governed by law in a democratic state by implementing the rules of constitutional laws in a different way than courts enforcing other laws. [23].

Highlighting the role of parliament in securing the rule of law, Kokott and Caspar emphasize the range of powers and procedures that belong to the parliament, which has the highest level of representation of the people [8]. The Constitutional Court of Ukraine is involved in the process of protecting fundamental constitutional values, which is intended to ensure the supremacy of the Constitution. The well-known reservations regarding the relationship between the rule of parliament and judicial constitutional control are, in fact, suggestions for resolving the dilemma of ensuring a balance between majority and minority. Thus, the American constitutionalist Thomas Baker notes the following on this matter [9]:

"In this structure, constitutional control is an asset, not a drawback. The constitution has no problems with judicial constitutional control; it has problems with the majority. In fact, the main threat to individual freedoms is government power. The

greater the power of government, the less individual freedom; the more individual freedom, the less power in government. Government power and individual freedoms are two sides of a zero-sum game".

According to the principle of republicanism (Article 5), there is a requirement that fundamental constitutional values be subject to review directly by a majority of voters in an all-Ukrainian referendum (Article 156 of the Constitution), not by parliament.

As these issues relate to national identity and the preservation of the national constitutional tradition, it is important to maintain a dialogue between different legal cultures and to ensure the compatibility of legal values while preserving and enhancing the national legal heritage. This facilitates the provision of interaction between different levels of public authority. The current Constitution of Ukraine is conservative in this regard. In addition to the fact that the provisions of Article 157 of the Constitution block the process of transferring part of the sovereign powers of the state to supranational institutions, there is also no mechanism to consult with regional institutions of power on the forms and methods of Ukraine's participation in inter-, trans- and supranational cooperation. Similarly, the Law on Transfrontier Co-operation does not contain appropriate mechanisms.

A number of researchers consider globalization as a threat to a democratic constitutional state, including its right to self-determination. Globalization is often seen as an Americanization of lifestyles, as an extension of the capitalist strategy with its associated practices of colonialism, the weakening of state institutions, in particular, according to the concept of Niklas Luhmann, on the formation of a world society (Weltgesellschaft) [11]. However, it is difficult to talk about world society, proceeding from the modern realities, which are characterized by a discussion about community in values that can serve as guidelines and standards in the construction of public institutions, rules and procedures. Such an illusion can be found in authors who express dominant discourse within the EU or the UN institutions. In light of the military conflict between Ukraine and the Russian Federation, which directly attacks the global collective security system, one can merely talk of a significant fragmentation of the world society and the process of its formation. This conclusion is also based on the experience of Ukraine's involvement in integration processes. The verification of this process was implemented the solution of the dilemma of the Euro-Atlantic and Eurasian models of integration of Ukraine. After all, the Customs Union of the Eurasian Economic Union does not correspond to the values shared by Ukrainians – democracy and the rule of law, since the highest bodies of the Union are formed by representatives of the executive power: The Supreme Eurasian Economic Council consists of heads of states and governments, and the Eurasian Economic Commission – of the deputy heads of governments.

In this context, it is accepted that the internationalization of constitutional law lies in consolidation (Verdichtung) of international law, which is observed in the context

of globalization and which is functionally necessary in these conditions to adequately secure the global interests of the common good, as well as its emancipation from the will of the individual state [15; 24]. The effectiveness of the global rule of law shall be measured by the effectiveness of human rights protection. If one is to proceed from the essence of the debate between the realistic and axiological doctrines of international law, then the constitutional and global values introduce quality to the content of the world globalization process, in which, strictly speaking, the world society is being formed, whose sprouts currenly are still weak. Furthermore, the value of human rights, democracy and the rule of law is still being challenged in many states, which is a testament to the poor adaptation of local public institutions, rules and procedures to such values.

2.5 Constitutional means of becoming of the global law

Today there is a controversial process of becoming of the world society, which has to formulate a new quality of social solidarity in the form of a world civil society. It is in this area that constitutionalism, as a rule, develops as a system of institutions, rules and procedures for ensuring the functioning of limited power and a mechanism for the protection of human rights. Since this is a two-way process – constitutional and international mechanisms for the formation of global law, then it is likely that it should become a world constitutionalism, which has been often discussed recently.

i) General principles. The emergence of global law can be ensured through certain constitutional means, which will be discussed below. We should now dwell on the concept of "constitutional security". Professor Yurii Voloshyn quite correctly considers this phenomenon in terms of human rights in the following aspects: they are an epistemological source for determining the nature of the state in the context of its legal regime; ontologically, they determine the main subject and strategic purpose of the state; in a pragmatic-demarcating sense, they are aimed at defining the concept of implementation of such an objective; in the management and statutory contexts aimed at creating a multifaceted, multi-level, complex regulatory mechanism based on constitutional and legal relations – constitutional and legal support [25]. This approach is based on the concept of national statehood, which, with the emergence of world civil society and global constitutionalism, is likely to be eroded by, first and foremost, a network of cooperation that can be vertical, horizontal and mixed. In doing so, subordination relations can also be eroded, and individual models of decisions will be transferred from standard contracts in private law and arbitration awards.

In general, this is an abstract question of the mechanisms for the formation of global constitutionalism and sovereignty at the global level. In this regard, considering the models of international law (as coordination, the combination of coordination with informal government cooperation and unilateralism), Armin von Bogdandy emphasizes the following nature of sovereignty [11]:

"The notion of sovereignty, which is understood as state independence, is, accordingly, a leading substantive paradigm and probably even a fundamental principle in the sense of the imperative requirement of optimization in the development and formulation of international law. At the same time, the central formula for the international system is sovereign equality, and certainly not democratization".

It is quite a logical assumption that global constitutionalism must develop in plane of guarantees of equality between states, which, however, depends on the real power of the state itself and the art of diplomacy, as well as its institutional capacity. At the same time, remembering the process of becoming of the supranational nature of the EU, one must first of all rely on the judgment of the Court of Justice in Costa v. ENEL, which recognized the horizontal effect and direct effect of fundamental rights and freedoms. The implementation and protection of human rights, in other words, are making a significant transformation in the world order. Similarly, private legal instruments, such as standard contracts and arbitration, form a network of rules and procedures that are independent of national states and supranational institutions, which are then codified and recognized by public authorities. Here, we would like to underline the institutional forms of influence on national, inter-, trans- and supranational institutions, which, in Niklas Luhmann's context, can be conditionally characterized as the institutions of global civil society, which produces the natural space for the exercise of freedom.

In domestic and foreign doctrine, these issues are considered through the lens of ruling capacity of the state [2–5]. In this context, they actually reveal the state's ability to defend national interests, which comes down to the institutional capacity of the state. When it comes to renouncing sovereignty, this construct most likely has the consequence of denying national statehood. Although in fact sovereignty is a certain property of the state to implement institutionally capable governmental decisions based on a balance of private and public interests, with the aim of realizing national interests at the inter-, trans- and supranational levels. If one is to consider this in the context of the relationship between law and geopolitics, the Spykman scheme [4] appears to be a rather ideal model, which is undergoing substantial transformation due to the state of development of civil society institutions, the institutional capacity of the state and the provision of a strategy for the sustainable development of the nation-state, at the heart of which is the harmony in the development of the individual and the environment. The same thing is emphasized by Zbigniew Brzezinski, who underlines the strategic legacy of mankind and the environment. Brzezinski's strategic legacy includes the sea, air, space and virtual space, as well as nuclear space related to the issue of nuclear weapons proliferation. The environmental legacy covers the geopolitical implications of water management, the Arctic and climate change [4]. Therefore, the issue of human symbiosis with nature is a global issue and requires a dramatic change in approaches to decision making at all levels of government [5].

The significance of Constitutional Law No. 2680-VIII for Euro-Atlantic integration and the prospects for Ukraine's integration with the European Union[1]. The law, which has become an integral part of the Constitution of Ukraine and the constitutional order, has a dualistic nature: it imposes specific positive responsibilities on public authorities, and on the integration of Ukraine into the EU, determines the political orientation of pursuing a foreign policy.

1) With regard to Euro-Atlantic integration, Law No. 2680-VIII[2] entrusts specific authorities with the triangle of power: the Verkhovna Rada – the President – the Cabinet of Ministers. All this is performed in the light of the requirements of "confirmation of the European identity of the Ukrainian people and of the irreversibility... of Euro-Atlantic course of Ukraine", which became part of the Preamble to the Constitution. In fact, it is difficult to accept the arguments put forward in the separate opinions of some judges of the Constitutional Court upon exercising preventive control of the constitutionality of this law, which allegedly "does not specify the procedure for amending" the Preamble of the Constitution and allegedly it only "fixes the historical moment of its adoption" at least in view of the dynamic interpretation of the Constitution, which was implemented by the Constitutional Court upon adopting Opinion No. 3-в/2018. The deepening of the content of the Constitution, which directs public authorities to implement specific measure to strengthen national security and defense within the framework of NATO cooperation, in the context of the actual Ukrainian-Russian war, is also important for the gradual transformation of the content of the Preamble and for its provisioning with specificity regarding the national and European constitutional identity of Ukraine. It is also difficult to characterize as a kind of "technique of circumvention" of the rigid procedure for amending Sections I, III and XIII of the Constitution, referring to the constitutional principles of the foreign policy of the state, defined in Article 18 of the Constitution of Ukraine, since the preconditions for the authorities serve as the provisions of the Preamble duly specified in the provisions on the constitutional powers of public authorities in this field (Articles 85, 102, 116).

Despite its different interpretations, Ukraine's Euro-Atlantic integration does not limit its sovereignty, since it is a political course towards joining an international organization on the basis of an international treaty that does not provide for the delegation of part of the sovereign powers. NATO is, by its nature, an international organization that performs collective security functions by coordinating efforts and ensuring Member States' interaction in the field of national security and defense.

2) With regard to European integration, Law No. 2680-VIII defines the goals of national policy by focusing the foreign policy course on "confirming the European

[1] Law of Ukraine "On Amendments to the Constitution of Ukraine (Concerning the Strategic Course of the State for Acquiring Full Membership of Ukraine in the European Union and in the Organization of the North Atlantic Treaty". (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2680-19

[2] *Ibidem*

identity of the Ukrainian people and the irreversible nature of the European ... course of Ukraine"[1]. With regard to Article 18 of the Constitution of Ukraine, there is no narrowing here, because, organically, the Ukrainian statehood developed within the framework of European identity with certain Byzantine influences at an early stage of its formation during the Rus' period. The positive obligations of the State regarding international cooperation within the meaning of Article 18 of the Constitution of Ukraine remain unchanged.

In this case, the implementation of the European integration course of Ukraine will depend entirely on the desire of the European Union to include Ukraine in its membership, which must meet the Copenhagen criteria of EU membership. At present, in practical terms, this means significant reform of the public service, decentralization of power, the establishment of real independent and impartial justice, the qualitative assertion of economic freedoms (Ukraine is currently only at 71 place in terms of economic freedoms), the effective and efficient provision and protection of human rights and freedoms.

As the EU is a supranational association, this issue is connected with the interpretation of the content of national sovereignty. For Ukraine, the solution is possible within the framework of three doctrines of the nature of the EU as an association of sovereign states, a sui generis supranational union and cooperative federalism. According to the tenets of the first two doctrines, it will be necessary to amend a number of provisions of the Constitution of Ukraine in accordance with a rigid procedure, since they will affect the issue of sovereignty within the meaning of Articles 5, 18 and 157 of the Constitution of Ukraine, as well as the exercise of certain powers of state authorities and local self-government bodies (e.g. according to the principles of subsidiarity, upon adopting EU acts, there should be procedures for hearing the opinions of regional public authorities). In such circumstances, the forthcoming constitutional draft law must, first and foremost, be flawless in terms of fundamental rights to participate in democratic governance. According to the doctrine of cooperative federalism, the EU is regarded as a supranational level of exercise of national sovereignty, in particular specific foreign policy functions of the state, the horizon of which is expanded by access to decision making of the relevant public authorities at the supranational level. Since Article 6 of the Treaty on the Functioning of the EU provides for respect for national constitutional traditions in the light of the potential candidate country's accession to the EU under the Copenhagen criteria, in this context the state acquires new qualitative human rights criteria, as stated by the Federal Constitutional Court of Germany the cases of Solange I (German "and so on") and Solange II. Proceeding from such practices, there is a possibility for the interpretation of the provisions of the Treaty of Lisbon and other constituent acts of the European Union by the Constitu-

[1] Law of Ukraine "On Amendments to the Constitution of Ukraine (Concerning the Strategic Course of the State for Acquiring Full Membership of Ukraine in the European Union and in the Organization of the North Atlantic Treaty". (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2680-19

tional Court of Ukraine in the light of existing constitutional principles and provisions defining the competence of public authorities in the field of foreign policy. Nevertheless, the specified measures regarding the implementation of the idea of Ukraine's potential accession into the EU will depend on the results of socio-political debate, the content of which will be to some extent filled by the doctrine of constitutional and international law in Ukraine.

CONCLUSIONS

Effective exercise of power is based on the rule of recognition of the legitimacy of authority decisions and the ability to consistently implement these decisions. These are interrelated things. In fact, the rule of recognition is true when finding the algorithm for executing power decisions. Therefore, respect for human dignity, freedom, equality, democracy and the rule of law – the system of values that underlie constitutionalism – is critically important here. This requires mutual control and balance in the state government. First of all, it consists in judicial control of authority decisions, which is impossible without guarantees of the independence of the courts. The division of powers between the tiers of the government and the holders of power at a certain level balances the system, especially in crisis situations, when a certain center of gravity of the government launches an attack on constitutional values. Then other power holders act as a counterbalance. But in any situation, judicial control is most important. For adoption of optimal decisions, it is necessary to exchange best practices through doctrine and jurisprudence, and one simplly cannot do without constitutional comparative studies here.

The ability to consistently implement authority decisions focused on the enforcement of human rights evidences the institutional capacity of the state. However, there are also safe and human-centric dimensions at play. From the standpoint of national security, it might be reasonable for Ukraine to join collective security systems and supranational institutions. The process of Ukraine's integration into global structures makes sense if these supranational and security institutions respect human dignity, human rights, freedom and the rule of law as fundamental values. From the standpoint of the value of human dignity, the activity of the courts, which should be guided by this fundamental decision as the basis of constitutional statehood, becomes more important. In particular, in the fight against corruption, the multiplication of all kinds of punitive institutions is of fundamental importance. Guarantees of economic freedom, compliance with contracts and fair justice come to the foreground.

The competitiveness of Ukraine in global structures will be achieved provided that the entrepreneur is free to choose their field of business activity without external pressure, with an awareness of the full responsibility for their risks. Therefore, the state should not engage in redundant dirigism here, excessively restricting economic freedoms, but instead maintain a modern and efficient market infrastructure based on free competition.

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МОДЕРНІЗАЦІЯ ПРАВОВОЇ СИСТЕМИ УКРАЇНИ І РОЗШИРЕННЯ ПРАВОВОГО ПРОСТОРУ ЄВРОПЕЙСЬКОГО СОЮЗУ

Анотація. *Сучасний розвиток Української держави характеризується багатьма особливостями у всіх сферах суспільного життя, зокрема й у сфері державного управління, зумовленими внутрішніми і зовнішніми явищами й процесами, серед яких чільне місце займають євроінтеграційні та глобалізаційні впливи. Тому основна мета роботи полягає у оцінці модернізації правової системи України і розширенні правового простору Європейського союзу. Застосування системи методів наукового пізнання (історико-правовий метод, системно-структурний метод, структурно-функціональний метод, метод класифікації, метод теоретико-правового прогнозування) відкрило можливість комплексно проаналізувати взаємний вплив і розкрити сутність взаємного зв'язку перетворень, які відбуваються з правовою системою України у зв'язку з розширенням правового простору Європейського Союзу. Встановлено, що процес розвитку і поглиблення режиму активної співпраці ЄС з третіми країнами на політико-правовому, економічному і культурному рівнях характеризується двома взаємодоповнюючими тенденціями – внутрішніми змінами правових систем суверенних держав, які співпрацюють з Європейським Союзом і збільшенням сфери нормативного впливу права Європейського Союзу. В роботі акцентується увага на чинниках, які гальмують процес проєвропейських перетворень в Україні. Серед них автором виокремлюються складність геополітичного становища України, високий рівень конфліктності політичного середовища України, дефіцит фінансових ресурсів, значний рівень розповсюдження корупції у державному апараті, зволікання урядових структур з імплементацією положень Угоди про асоціацію. Обґрунтовано висновок про те, що головним результатом взаємодії національної правової системи України з правовим простором Європейського Союзу є зміна методологічних підходів до аналізу співвідношення політичних кордонів Європейського Союзу і територіальної сфери розповсюдження європейського правового простору. Ця обставина окреслює перспективний напрям досліджень сучасної юридичної науки, а саме – виявлення закономірності формування оптимальної моделі запозичення Україною позитивних юридичних практик правового простору Європейського Союзу за умови збереження національної ідентичності вітчизняної правової системи.*

Ключові слова: європейські політики, конвергенція правових систем, правова реальність, універсальні цінності Європейського Союзу, права людини.

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MODERNIZATION OF THE LEGAL SYSTEM OF UKRAINE AND EXPANSION OF THE LEGAL SPACE OF THE EUROPEAN UNION

Abstract. *The modern development of Ukraine incorporates a multitude of features in all spheres of public life, including in the sphere of public administration, caused by internal and external phenomena and processes, among which the European integration and globalization influences take the main place. Therefore, the main objective of the paper is to evaluate the modernization of the legal system of Ukraine and the expansion of the legal space of the European Union. Application of the system of methods of scientific knowledge (historical and legal method, system and structural method, structural and functional method, classification method, method of theoretical and legal prediction) opened the opportunity to comprehensively analyse the mutual influence and reveal the essence of the mutual connection of transformations that occur in the legal system of Ukraine due to the expansion of the legal space of the European Union. It is established that the process of development and deepening of the regime of active cooperation of the EU with third countries at the political, legal, economic and cultural levels is characterized by two complementary tendencies – internal changes in the legal systems of sovereign states that cooperate with the European Union and an increase in the sphere of regulatory influence of European Union law. The paper focuses on the factors that hinder the process of pro-European transformation in Ukraine. Among them the author highlights the complexity of Ukraine's geopolitical situation, the high level of conflict in Ukraine's political environment, the scarcity of financial resources, the significant level of corruption in the state apparatus, the delay in governmental structures implementing the Association Agreement. It was reasonably concluded that the main result of the interaction of the national legal system of Ukraine with the legal space of the European Union is the change of methodological approaches to the analysis of the relation between the political borders of the European Union and the territorial sphere of the European legal area. This fact outlines a promising area of research in modern legal science, namely, the identification of patterns of formation of an optimal model of borrowing positive legal practices of the legal space of the European Union by Ukraine, provided the preservation of the national identity of the domestic legal system.*

Key words: European policies, convergence of legal systems, legal reality, universal values of the European Union, human rights

INTRODUCTION

In the late 20th – early 21st centuries, political change and transformation, unprecedented in content and the global scale of consequences, took place on the European continent. The most unique union of states and peoples of Europe in the recent history of the world civilization – the European Union (hereinafter referred to as "the EU") was institutionally established. The phenomenality of the results of the

creation of the EU as a regional alliance of 28 Old World countries is confirmed by relevant indicators of its development. In particular, the EU's GDP is 22% of the global gross domestic product (GDP), and as of the beginning of 2019, the EU has one of the lowest unemployment rates in the world (6.7%) [1–2]. The EU's economy, despite some unevenness, is growing faster today than the US economy and showing an average growth rate of 1.7 – 1.9% of GDP per year [3].

High indicators of EU development are the result of the implementation of the new idea of a confederate state formation [4]. In practical terms, this idea is reflected in the implementation of a consistent integrated policy to abolish internal border control between European countries, the formation of an integrated pan-European labour market, the internationalization of production and economic potentials of European states, the introduction of a single currency, the elaboration of common security bases conditions for the development of a single European educational and scientific space, the establishment of a special regime of cultural dialogue on the basis of tolerance and respect, implementation of other measures. The implementation of such measures helped to shape the EU as an original structure featured by the search for compromise and harmonization of national interests for the sake of peace and social progress [5].

The last two decades have been marked by an increase in the political role of the EU in a global-wide globalization process. This is conditioned by new Member States joining the Union, as well as establishing a regime of close cooperation with third countries at the political, legal, economic and cultural levels. If we analyse these processes through the lens of legal doctrine, we can say that the rapprochement of the EU and other countries of the world is accompanied by two complementary tendencies – internal changes in the legal systems of sovereign states, which cooperate with the EU, and an increase in the scope of the EU legal framework. In connection with the intensification of integration cooperation with the EU being a top priority for Ukraine, the urgent task of modern legal science is a comprehensive study of the aspects of harmonization of the legal system of Ukraine with EU law. Accordingly, the *purpose of the article* is to reveal the main aspects of the mutual influence of the processes of modernization of the legal system of Ukraine and the expansion of the EU legal space.

The general theoretical basis of the article is formed by the relevant ideas and conclusions of domestic and foreign scientists, who considered the general aspects of the influence of the EU legal space on the national legal systems of third countries in their research. In addition, the scientific positions of the article are also based on ideas formulated by experts who study the security aspects of European integration of Ukraine, economic issues of interaction between Ukraine and the EU. Additionally, in the process of preparing the paper, the results of the analysis of the provisions of international agreements were used, which regulate the interaction between Ukraine and the EU, as well as acts of current legislation of Ukraine, resolutions of the European Parliament, analytical materials of international organizations, individual expert assessments, etc.

1. MATERIALS AND METHODS

1.1 The concept of legal space

The analysis of the mutual conditionality of the processes of modernization of the national legal system of Ukraine and the extension of the EU legal space provides for clarification of the essence of the "legal space" category. Legal space is a sphere of life of people, organizations, states and international institutions, recognized and regulated by law to achieve agreed and common goals [6]. The EU legal space should not be equated with the supra-state legal system of the EU, since this category covers not only the territory within the national borders of the EU Member States, but also the space and substantive scope of the regulatory influence of the provisions and principles of EU law beyond the political borders of the Union (introduction of the EU standards on anti-crisis management, arms control, personal data protection, etc. at the level of legal systems of sovereign states). With that, as pointed out by I.N. Bartsits, legal space is a movable category and can expand or narrow depending on the expediency of regulation of certain social relations [7].

The main condition for the interdependence of the processes of transformation of the legal system of Ukraine and the expansion of the EU legal space is the purposeful mutual political interest of the parties to start actively making advances. This is implemented in various forms of political and legal cooperation, which are defined by the statutory provisions in bilateral agreements, and mainly in the Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part (hereinafter referred to as "the Association Agreement")[1]. The actual importance of the content of bilateral agreements between Ukraine and the EU is determined by the fact that their provisions are specific regulations of legal space and, at the same time, guidelines for the modernization (renewal) of the legal system of Ukraine. In addition, the regime of interaction of the national legal system of Ukraine with the EU legal system provides detailed legal specification of the goals of such interaction, which are defined in Art. 1 of the Association Agreement. It refers to the desire of the parties to strengthen and maximize multifaceted relations in an ambitious and innovative way [8]. The prospect of implementing such a task is boundless and promising for Ukrainian society.

1.2 Methodological bases of research of interdependence of expansion of the legal space of the EU and processes of transformation of the legal system of Ukraine

Scientific analysis of the interdependence of extending the legal space of the EU was made possible thanks to the application of a system of methods of scientific knowledge. In particular, the methodological basis of the development was delivered

[1] On ratification of the Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part: Law of Ukraine (2014, September). Retrieved from https://zakon.rada.gov.ua/rada/show/1678-18

by the dialectical and materialistic approach, which envisages consideration of the prerequisites for the expansion of the EU legal space as an objective reality, which is constantly evolving under the influence of the political and legal realities of the development of sovereign states of the world. The historical method was used to cover the genesis of Ukraine's contractual relations with the EU. The systemic and structural method allowed to determine the system of aspects of the interdependence of the processes of modernization of the legal system of Ukraine and the expansion of the EU legal space. The application of the structural and functional method helped to reveal the role and significance of the EU's universal values in shaping the principles of the EU supranational legal system. The classification method facilitated grouping of the most important areas of Ukraine's participation in EU policies. The method of theoretical and legal forecasting was applied to substantiate the perspective tasks of legal science in the part of the further research of the laws of implementation of positive EU legal practices in the legal system of Ukraine.

2. RESULTS AND DISCUSSION

2.1 The main aspects of the interdependence of the modernization of the legal system of Ukraine and the expansion of the EU legal space

The interdependence of the modernization of the legal system of Ukraine and the extension of the EU legal space is revealed through the analysis of some aspects of mutual influence. The first aspect of the mutual conditionality of innovative changes in the legal system of Ukraine and the expansion of the EU legal space is the formation of a common regulatory basis for establishing integration ties between the parties. As I.V. Yakovyuk states, such integration ties are a factor in strengthening the interdependence of nation-states, creating a single market within the region [9]. The reference point for launching the interconnected processes of transformation of the legal system of Ukraine and widening the range of regulatory impact of EU law in the Eastern European region was the signing of the Partnership and Cooperation Agreement between Ukraine and the European Communities and their Member States[1] on 14.06.1994. It was then that the parties defined the legal parameters of rapprochement between Ukraine and the EU. Within this process, the Ukrainian part undertook to gradually bring national legislation in line with Community law in order to achieve "approximate adequacy" in such areas as customs, banking, tax policy, finance, antitrust, public procurement, protection, healthcare and human life, environmental protection, consumer protection, technical rules and standards for nuclear energy and transport development (Article 51). On its part, the EU guaranteed technical assistance to Ukraine in interpreting legislation and assisting in the training of domestic specialists.

[1] On ratification of the Partnership and Cooperation Agreement between Ukraine and the European Communities and their Member States of 14.06.1994: Law of Ukraine (1994, November). Retrieved from https://zakon.rada.gov.ua/laws/show/237/94-%D0%B2%D1%80

Later, in March 2004, against the background of further intensification and deepening of relations between Ukraine and the EU, the Law of Ukraine "On the National Program for Adaptation of the Legislation of Ukraine to the Legislation of the European Union" No. 1629-IV was adopted[1]. The purpose of the adoption of this act was to achieve compliance of the legal system of Ukraine with the Acquis communautaire, with consideration of the criteria put forward by the European Union to the states that intend to accede thereto. The document clearly identified that the adaptation of Ukrainian legislation to EU law is a systematic process that requires the implementation of the rules and principles of EU law in the national practice of legal regulation of public relations [10–12]. Ten years later, in 2014, the aforementioned Association Agreement was concluded between Ukraine and the EU. The content of the document forms the legal basis for the gradual approximation of the standards of functioning of the legal system of Ukraine to the principles of legal regulation of the main spheres of public relations of the European Union. The provisions of the Association Agreement are subject to consistent implementation in national state building practice in accordance with the Action Plan for the Implementation of the Association Agreement[2]. The statutory definition of the planning and responsible entities for the implementation of the Association Agreement confirmed, on the one hand, the intensification and deepening of the convergence of the legal systems of Ukraine and the EU, and on the other – significantly expanded the territorial borders of the EU legal space in Eastern Europe at the expense of Ukraine, became a roadmap for common standards for the use of mechanisms of legal regulation of public relations.

The second aspect that characterizes the interdependence of the transformation of Ukraine's legal systems and the expansion of the EU's legal space is the legal recognition by Ukraine of the obligation to immediately uphold, protect and nationally enhance the EU's universal values system. The provisions of Art. 2 Section I of the Treaty on European Union (Maastricht Treaty) of 7 February 1992 states that the fundamental values of the EU are human rights, human dignity, freedom, democracy, equality, the rule of law, including the rights of persons belonging to national, religious and other minorities [13]. These values are fundamental to the EU Member States within the community, form the core of European law and the ideological foundation of the European legal space. A special place among universal values is taken by the institution of human rights. O.V. Petryshyn explains this by the fact that human rights have the

[1] On the National program for the adaptation of the legislation of Ukraine to the legislation of the European Union: Law of Ukraine (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1629-15

[2] On the implementation of the Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part: Decree of the Cabinet of Ministers of Ukraine (2017, December). 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-storoni

significance of the socio-anthropological foundation of the modern regulatory system and constitute the very essence of law [14].

It is worth noting that universal values in the history of the united Europe were formed in the process of evolution of the European model of coexistence of peoples and cultures of the continent. The cruel lessons of World Wars, crises, and totalitarian dictatorships have prompted Europeans to seek and find compromises between categories that seemed inconsistent and sometimes incompatible in the recent past: faith and reason, individualism and solidarity, free competition and social protection, market and state regulation, and finally, the zealous protection of national and cultural identity and the awareness of belonging to a single civilization centre – to Europe. Such a synthesis explains the development of values in the EU's integrated legal system, which are guaranteed by the use of the region's natural, internal and financial resources [15]. Accordingly, the rule of law of the EU Member States is based on legal mechanisms to ensure pluralism, inadmissibility of discrimination, tolerance, justice, gender equality, fair justice. By signing the Association Agreement, Ukraine has formally recognized that the architectonics of relations with the EU is further built solely on the implementation of common values (the preamble to the Agreement and provisions of Article 1). Accordingly, Ukraine's domestic policy should be entirely focused aimed at full performance of the said obligation at all levels and in all spheres of public life and state administration.

Another important aspect that reveals the relationship between the processes of modernization of Ukraine's legal system and the expansion of EU legal space is *Ukraine's involvement in the implementation of so-called "European policies"*. This is the provisional name of the most important forms of activity of the EU institutional apparatus for the united Europe, aimed at achieving the goals of the existence of the Union. In particular, the most important areas of engagement are involvement with EU structures in policies such as:

– EU policy for maintaining and promoting peace and stability in the regional and international dimensions in accordance with the principles and provisions of the UN, EU, Council of Europe (Article 7 of the Association Agreement[1] stipulates that Ukraine and the EU jointly develop measures aimed at involving Ukraine in the Common Security and Defence Policy (CSDP), conflict prevention, crisis management, European regional stability, disarmament, arms control and arms exports, improved mutually beneficial dialogue in the field of space);

– EU Justice, Freedom and Security policy to ensure the rule of law and respect for human rights and fundamental freedoms (Ukraine has pledged jointly with the EU

[1] On the implementation of the Association Agreement between Ukraine, of the on– part, and the European Union, the European Atomic Energy Community and their Member States, of the other part: Decree of the Cabinet of Ministers of Ukraine (2017, December). 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-storoni

to implement measures aimed at strengthening the judiciary system, combating corruption, organized crime and terrorism, money laundering and drug trafficking, protection of personal data, management of migration flows, judicial cooperation in civil and criminal cases);

– a common policy of Ukraine and the EU aimed at creating a free trade area with the EU and enhancing bilateral relations (the parties create jointly legal and organizational conditions for the formation of stable economic and trade relations, which in the future will lead to the gradual integration of Ukraine and the EU internal market, and will facilitate the functioning of an effective free trade area (a condition for this is the gradual adaptation of Ukrainian legislation to the EU acquis);

– EU humanitarian and cultural policy (provides for the formation of organizational and legal conditions for establishing a cultural dialogue between peoples, youth interaction, gradual accession of Ukraine to the European educational and scientific space, introduction of European health standards in Ukraine, etc.).

In general, the success of Ukraine's participation in these areas of EU policy is not possible without institutional and functional changes to the national legal system and, in particular, without the introduction of systemic reforms at the state level. Consistent work on aligning Ukraine's legal field with the Acquis communautaire is a prerequisite for updating the national legal system and, in parallel, for enhancing the influence of the European legal space in the country. Today, Ukrainian society welcomes the positive results of the state in the implementation of many areas of common EU policy. An example is the entry into force of the Agreement on Free Trade Area of Ukraine with the EU on January 1, 2016 [15]. According to the calculations of specialists, the potential of the Free Trade Area between Ukraine and the EU will ensure a GDP growth of 0.5% annually, as well as an overall increase in the welfare of citizens by 1.2% per year. It is also expected that the volume of exports to the EU should increase by about 6.3%, the volume of imports of goods from the EU – by 5.8%, and the average wage in Ukraine – by 5.5% [16]. Another important achievement of the common humanitarian policy of Ukraine and the EU is the introduction of a visa-free regime of crossing the EU border since 11.06.2017. Visa-free travel provides an opportunity for citizens of Ukraine to attend cultural and sporting events in EU countries, make journalistic trips, short-term training and exchange of experience, medical trips, etc. [17]. In addition, Ukraine is gradually deepening its cooperation with the EU law enforcement institutions, expanding humanitarian cooperation and constantly improving the legal framework for this. Undoubtedly, such achievements contributed to a certain politicization of the process of transformation of the constitutional order of Ukraine towards Eurocentrism. This was reflected in the constitutional fixing of the inevitability of Ukraine's pro-European course. However, we consider it justified in view of the specifics of the development of state and legal life in Ukraine, which E.I. Grigorenko and O.P. Evseev called "transitional" due to large-scale social upheavals of recent years [18].

Another important aspect of the mutual influence of the processes of transformation of the national legal system and the expansion of the EU legal space is the creation of institutions of political coordination of the development of cooperation between Ukraine and the EU within the framework of the implementation of the Association Agreement. The establishment of such institutions started back in the 1990s, but their activity was fragmented and highly specialized. Thus, since 1994, the Parliamentary Cooperation Committee has been established between Ukraine and the EU. This institution was a forum for members of the Ukrainian and European Parliaments to exchange professional opinions and hold consultations. Since 2004, an Interagency Coordination Council for Adaptation of Ukrainian Legislation to EU Law was established to implement the National Program for Adaptation of Ukrainian Legislation to European Union Law. The objective of this authority was to determine the priority areas of harmonization of Ukrainian and EU legislation. Following the signing of the Association Agreement in 2014, Ukraine and the EU have set up a number of institutions that provide direct comprehensive co-operation between the parties. In particular, it refers to an Association Council, an Association Committee, an Association Parliamentary Committee, and a civil society platform. The status of these institutions is regulated by Art. 460-470 of the Association Agreement. The functioning of these institutions in recent years has had a positive effect, which ultimately found its reflection on the modernization of many elements of the legal system of Ukraine with consideration of EU practices.

2.2. Issues of transformation of the Ukrainian legal system in the aspect of expanding the integration relations with the EU

It is noteworthy that the efficiency and dynamics of the processes of modernization of Ukraine's legal system and rapprochement with the EU are influenced by many factors, both of domestic and of global nature. In particular, the formation of a democratic state system based on the post-Soviet totalitarian system and a closed model of the economy causes some difficulties in renewing the system of legislation that regulates the standards of production and economic activity. Moreover, the transformation of the economic system of Ukraine is often performed by team methods without consideration of the tendencies of free market development, and the quality of state control over the observance of antitrust legislation remains low. Additionally, the introduction of new methods and forms of public administration is in some ways complicated by the high level of conflict in Ukraine's political system, high levels of corruption in the state apparatus, and the misunderstanding of a large part of the population of the essence of pro-European reforms.

Complementing the above, it is worth pointing at the problematics connected with the improper level of organization of work of governmental agencies in the implementation of the Association Agreement. Thus, the European Parliament Resolution

No. 2017/2283 of 12 December 2018 on the implementation of the EU Association Agreement with Ukraine[1] states that the government of Ukraine introduces reforms in the main spheres of public life slowly and inconsistently, and the social policy of the state often does not meet the hopes and expectations of the majority of the population [20–22].

Apart from the above, the realization of Ukraine's European integration aspirations is complicated by the difficult geopolitical situation in the Eastern European region. In particular, the policy of the neighbouring Russian Federation is threatening in recent years, which attempts to keep Ukraine in the field of its political influence and practices the use of unlawful methods to achieve political goals. As a result, Ukraine is forced to spend considerable money on national security policy and mobilize better human resources to address security concerns. Under these conditions, the implementation of pro-European reforms is significantly slowed down and is not always consistent.

CONCLUSIONS

The interdependence of the processes of modernization of the legal system of Ukraine and the expansion of the EU legal space is determined by the general rapprochement of our country with the EU, Ukraine's efforts to join the pan-European legal, political and cultural progress. The transformation of the legal system of Ukraine under the influence of the expansion of the sphere of statutory regulation of EU law is visible in the plane of development of four parameters of legal reality: 1) formation of the organizational and legal basis for establishing integration relations between Ukraine and the EU; 2) legal recognition, at the level of the legal system of Ukraine, of the obligation to immediately uphold, protect and enhance the EU's universal values; 3) Ukraine's involvement in the implementation of the key aspects of pan-European policy; 4) establishment and determination of the legal status of the institutions of political coordination of the development of relations between Ukraine and the EU within the framework of the implementation of the Association Agreement. The interconnection of changes in the legal system of Ukraine under the influence of the expansion of the EU legal space is visible in other areas of mutual influence of the national legal reality and the European legal system (development of contractual bases of mutual relations between the institutions of civil society of Ukraine and the EU countries, cooperation in the field of law enforcement, in the field of justice and internal affairs, improving the regulatory framework for Ukraine-EU cooperation in ensuring regional security and responding properly to geopolitical and regional security risks and challenges, etc.). The effectiveness and dynamics of further de-

[1] European Parliament resolution on the implementation of the EU Association. Agreement with Ukraine (2017/2283(INI)). (2018, December). Retrieved from http://www.europarl.europa.eu/doceo/document/TA-8-2018-0518_EN.pdf?redirect

velopment of the above parameters is determined by Ukraine's ability, with the EU's assistance, to overcome, at the national level, an array of issues of political, legal, economic, cultural development of Ukrainian society and to ensure a proper level of the state of military and national security.

A significant result of active interaction of the national legal system with the EU legal space is the change in methodological approaches to the analysis of the relationship between the European Union's political borders and the territorial scope of EU law. Accordingly, the modern scientific community faces new promising scientific research challenges. Their main content should centre around the elaboration of proposals on overcoming the issues of perception of EU legal practices by the national legal system, gradual change of the legal mentality of Ukrainian society in terms of the perception of the universal values of the EU, raising the level of protection of human rights and freedoms, raising the general level of legal culture and legal consciousness of the population. Furthermore, with consideration of the prospects of further political rapprochement between Ukraine and the EU, the Ukrainian lawyers will have to solve a complex of issues regarding the substantiation of the laws of formation of the optimal model of borrowing of EU legal institutions by Ukraine, while preserving the national identity of the domestic legal system and legal practice, to elaborate scientifically substantiated recommendations on optimizing further cooperation between Ukraine and the EU at the political and legal level in the priority areas of cooperation, to foster the ideological doctrinal basis for the development of new regulations to accelerate the process of implementation of the Association Agreement between Ukraine and the European Union, to develop perspective modalities of legal interaction between public authorities of Ukraine and EU governing institutions, to develop appropriate organizational and legal conditions for the inclusion of financial investment from the EU into the development of the national economy of Ukraine, etc.

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МЕТОДИ ПРАВОВОГО РЕГУЛЮВАННЯ БЕЗПЕКИ ОСОБИ, СУСПІЛЬСТВА, ДЕРЖАВИ В ІНФОРМАЦІЙНІЙ СФЕРІ

Анотація. *Інформаційний чинник є важливим фактором суспільного розвитку, оскільки виконує організаційно-управлінську та регулятивно-контрольну функції в сучасному інформаційному суспільстві. Тому основна мета роботи полягає у аналізі методів правового регулювання безпеки особи, суспільства, держави в інформаційній сфері. У статті запропоновано наукову гіпотезу про поділ предмету правового регулювання безпеки особи, суспільства, держави на три складові: інформаційна безпека, безпека інформації з обмеженим доступом та кібербезпека. Правове регулювання відносин щодо інформаційної безпеки спрямовується на протидію негативному інформаційному впливу в інформаційному просторі держави, унормування відносин з приводу безпеки інформації з обмеженим доступом (ІзОД) на створення організаційно-правового режиму, надання доступу до інформації тощо, а регламентація відносин щодо кібербезпеки пов'язана з виявленням, запобіганням і нейтралізацією реальних і потенційних загроз об'єктам критичної інформаційної інфраструктури. При забезпеченні інформаційної безпеки особи, суспільства і держави переважає диспозитивний метод правового регулювання, хоча зроблено припущення про перспективне посилення імперативного врегулювання питань забезпечення безпеки особи, суспільства і держави у частині протидії дезінформуванню як виду інформаційного правопорушення. Правове регулювання безпеки ІзОД здійснюється з використанням імперативного методу правового регулювання, а диспозитивний метод правового регулювання при обігу ІзОД застосовується у частині збирання і поширення суспільно необхідної інформації. Суспільні відносини з приводу забезпечення кібербезпеки урегульовуються імперативним методом правового регулювання, хоча для унормування питань державно-приватного партнерства зроблено висновок про необхідність застосування виключно диспозитивного методу правового регулювання.*

Ключові слова: інформаційна безпека, кібербезпека, безпека інформації з обмеженим доступом, правове регулювання, метод, інформаційне право.

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METHODS OF LEGAL REGULATION OF THE SECURITY OF THE INDIVIDUAL, SOCIETY, STATE IN THE INFORMATION SPHERE

Abstract. *Information factor is an important component of social development, as it performs organizational and managerial and regulatory oversight functions in the modern information society. Therefore, the main purpose of the article is to analyse the methods of legal regulation*

of security of a person, society, state in the information sphere. The paper proposes a scientific hypothesis on the division of the subject of legal regulation of the security of a person, society, state into three aspects: information security, classified information security and cybersecurity. Legal regulation of information security relations is aimed at counteracting the negative information impact in the information space of the state, normalizing relations in terms of security of classified information to establish organizational and legal regime, to provide access to information, etc., and regulation of cybersecurity relations is connected with detection, prevention and neutralization of real and potential threats to critical information infrastructure facilities. Upon ensuring the information security of the individual, society and the state, the dispositive method of legal regulation prevails, although further reinforcement of imperative regulation of issues of ensuring the security of the person, society and the state with regard to combating misinformation as a type of information offense is presumed. Legal regulation of the security of classified information is ensured through the imperative method of legal regulation, and the dispositive method of legal regulation in the circulation of classified information is used in the part of collecting and disseminating publicly required information. Public relations regarding cybersecurity are governed by the imperative method of legal regulation, although with regard to normalization of public-private partnership matters, a conclusion is made on the necessity of application of dispositive method of legal regulation exclusively.

Key words: information security, cybersecurity, security of classified information, legal regulation, method, information law.

INTRODUCTION

In the context of a transborder information society, an important strategic objective is to develop the system of international information security as a state of global information space, which excludes the possibility of violations of the rights of the individual, society and the state. The dynamics and nature of the development of the global information society offer great opportunities for intensifying the latest challenges and threats to the individual as a vulnerable subject of information relations.

Scientific interest in the problematics of information security is manifested in various humanities – philosophy, political science, cultural studies, psychology, pedagogy, economics, sociology and others, which as a general rule is reflected in the research of the laws of development of information and security field as a backbone component of life of modern society on the whole and life of every member of this society. In the global information society, the tendency to form an understanding of the features and significance of the realization of the interests of the individual, society, state, including the need for security, requires greater attention from science, especially in the context of the analysis of methodological approaches [1–4].

Large-scale transformations in the conditions of development of information and telecommunication technologies cause aggravation of national security issues, actualize modern tendencies of realization of the triad of interests of the individual, society and the state in the context of security in the information sphere. Currently, the leading principles of building an information society in Ukraine include free access to infor-

mation and knowledge, except for the restrictions established by law [5; 6]. At the same time, our state declares and consistently upholds the constitutional principles of freedom of speech, the right to information and security of the individual, society, state, and the security dimension of the researched issue is especially revealed in the light of the legal regulation of social relations [7–10]. In particular, a number of current regulations is indicative of the urgency of ensuring information security in the territory of our country, including such Laws of Ukraine as: "On Information"[1], "On Citizens' Appeals"[2], "On Printed Mass Media (Press) in Ukraine"[3], "On Television and Radio Broadcasting"[4], "On Information Agencies"[5], "On the National Archival Fund and Archival Institutions"[6], "On Libraries and Librarianship"[7], "On State Statistics"[8], "On State Secrets"[9], "On Access to Judgments"[10], "On Electronic Documents and Electronic Document Circulation"[11], "On Protection of Information in Information and Telecommunication Systems"[12], "On Scientific and Technical Information"[13], "On the National Informatization Program"[14], "On the Procedure for Reporting on the Activity of State Bodies and Local Self-Government Bodies in Ukraine by the Mass Media"[15],

[1] Law of Ukraine "On Information". (1992, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2657-12

[2] Law of Ukraine "On Citizens' Appeals" (2019, July). Retrieved from https://zakon.rada.gov.ua/laws/show/393/96-%D0%B2%D1%80

[3] Law of Ukraine "On Printed Mass Media (Press) in Ukraine" (2018, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2782-12

[4] Law of Ukraine "On Television and Radio Broadcasting" (2018, November). Retrieved from https://zakon.rada.gov.ua/laws/show/3759-12

[5] Law of Ukraine "On Information Agencies". (2019, July). Retrieved from https://zakon.rada.gov.ua/laws/show/74/95-%D0%B2%D1%80

[6] Law of Ukraine "On the National Archival Fund and Archival Institutions". (2015, May). Retrieved from https://zakon.rada.gov.ua/laws/show/3814-12

[7] Law of Ukraine "On Libraries and Librarianship". (2017, January). Retrieved from https://zakon.rada.gov.ua/laws/show/32/95-%D0%B2%D1%80

[8] Law of Ukraine "On State Statistics". (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2614-12

[9] Law of Ukraine "On State Secrets". (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/3855-12

[10] Law of Ukraine "On Access to Judgements". (2017, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3262-15

[11] Law of Ukraine "On Electronic Documents and Electronic Document Circulation". (2018, November). Retrieved from https://zakon.rada.gov.ua/laws/show/851-15

[12] Law of Ukraine "On Protection of Information in Information and Telecommunication Systems". (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/80/94-%D0%B2%D1%80

[13] Law of Ukraine "On Scientific and Technical Information". (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/3322-12

[14] Law of Ukraine "On National Informatization Program". (2016, August). Retrieved from https://zakon1.rada.gov.ua/laws/show/74/98-%D0%B2%D1%80

[15] Law of Ukraine "On the Procedure for Reporting on the Activity of State Bodies and Local Self-Government Bodies in Ukraine by the Mass Media". (2019, July). Retrieved from https://zakon.rada.gov.ua/laws/show/539/97-%D0%B2%D1%80

"On Advertising"[1], "On Basic Principles of Cyber Security of Ukraine"[2], etc. The aforementioned regulations, in their communication and interdependence, establish a system of official opinions, which defines national interests as objectively significant needs of the individual, society and the state in ensuring their protection and sustainable development. Thus, in the face of new challenges and threats of a transborder global information society, the relevance of scientific and legal issues and the development of new approaches to counteracting information and psychological, destructive influence is determined by the substantial objectives of ensuring legal information security of the individual, proceeding from doctrinal approaches and the developed methodology [11–14].

The above determines the relevance of the legal groundwork for information security of the individual, society and state, of scientific research and development of doctrinal provisions aimed at substantiating the place and role of a given legal institution in the science of information law, as well as the relevance of specifying the methods of legal regulation of the researched institution [15–17]. Proceeding from the position of representatives of the doctrine, we shall note that the subject of regulation of information law are relations regarding the circulation of information, in particular its creation, reception, collection, storage, protection, application, dissemination, etc. In turn, the methodology of legal regulation of the researched institution has a multivariate approach to its interpretation. Thus, the majority of legal research refers to classic methods of regulation – dispositive and imperative. As early as 2008, R. A. Kalyuzhny`j and A. G. Martsenyuk actualized the discussion regarding the subject and methods of information law [18]. A team of scientists led by M. Ya. Shvets, R. A. Kalyuzhny`j, and V. P. Melnyk made an attempt to systematize the information law of Ukraine on a single methodological basis [19]. The author of this paper also made an attempt to uncover the methodological foundations of information law of Ukraine in 2011 [20]. The specified direction of scientific search was also developed by I. V. Panova in the context of development of the system of information law of Ukraine [21]. In his works, L. P. Kovalenko proposed an original definition of the method of information law and substantiated the possibility of creating, with its help, proper conditions for realization and protection of citizens' rights in the information sphere, as well as normal functioning of the information society [22]. At the same time, despite the presence of sufficiently sound scientific achievements of representatives of national doctrine, the subject of the paper remains relevant in the context of modern transformational realities and new approaches to legal consciousness and methods of legal regulation.

In consideration of the foregoing, the purpose of the article is to conduct a com-

[1] Law of Ukraine "On Advertising". (July, 2018). Retrieved from https://zakon.rada.gov.ua/laws/show/270/96-%D0%B2%D1%80

[2] Law of Ukraine "On Basic Principles of Cyber Security of Ukraine". (2017, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2163-19

prehensive research of the methods of legal regulation of the security of the individual, society, state in the information sphere, factoring in the doctrinal approaches and modern realities of law enforcement practice. Proceeding from the stated purpose, the following research objectives are outlined: 1) to clarify the methodological approach to the subject of legal regulation of the issues of security in the information sphere; 2) to analyse methods of legal regulation of information security of a person, society, state; 3) to identify methods of legal regulation of cybersecurity and circulation of classified information.

1. MATERIALS AND METHODS

The methodological basis of the article is represented by a set of general scientific and special legal methods of cognition. Thus, the dialectical method was used upon researching the development patterns of the security dimension of the individual, society, state in the conditions of the global information space development. The Aristotelian method was used in the analysis of information legislation, determining the content of basic concepts, systematization of material to obtain generalized conclusions within the stated problematics. In addition, the basis of the methodology of scientific research includes a factorial, cause-consequence analysis, aimed at identifying the circumstances, components of methodological approaches to ensuring the security of the individual, state, society in the information space. Taking into account that factorial analysis as a technique is applied in various fields of knowledge, it is proposed to use it for a comprehensive and systematic research of the nature of the influence of certain factors in the form of challenges and threats to information security.

The comparative law method facilitated the identification of tendencies and comparison of approaches of foreign countries. In particular, the analysis of national legislation, as well as European Union initiatives in the information sphere, focused on normalizing the corresponding relations to ensure the security of the individual, society and the state. To obtain and summarize knowledge on the essence and stages of development of the method of legal regulation of the information security institution, the historical law method was applied.

The system analysis enabled the assessment of the formed approaches to the legal support of the information security of the individual, facilitated their correlation with objectively existing social relations, and the sociological method allowed to perform an assessment of the factors influencing the behaviour of the individual as a subject of information relations. The predictive method – in the form of legal modelling – was applied upon the determination of the legislation development prospects, aimed at creating a system of effective legal support for information security of the individual, society, state, factoring in the latest approaches to the methods of legal regulation and approbation of foreign successful practices.

The theoretical basis of the research is formed from the works of scientists in the field of information law, in particular, the works of L. P. Kovalenko on the subject and

methods of information law of Ukraine are researched [22]. Using the method of systemic synthesis, the definitions provided by the scientist were compared with the provisions of the legislation of Ukraine and the features of legal regulation of relations in the field of security of the individual, society and the state are revealed. For a detailed study of the research subject, the works of I. V. Panova were analysed, which cover the tendencies of development of the system of information law of Ukraine [21]. To compare the domestic practices of legal regulation with European approaches, the works of D. Frau-Meigs, B. O'Neil, V. Tome, A. Soriano on digital education of the population [23] and C. Wardle and H. Derakshan on "information clutter" were considered [24].

In the course of the research, national and international legal acts were processed, among which special attention was given to such acts as the Council of Europe Convention on Cybercrime[1], the Law of Ukraine "On the Fundamental Principles of Information Society Development in Ukraine for 2007-2015"[2], the Law of Ukraine "On State Secrets"[3], the Law of Ukraine "On Information"[4], as well as other regulations.

2. RESULTS AND DISCUSSION

2.1 Methodological approach to the subject of legal regulation of the issues of information security

In the light of external aggression against Ukraine there is a scientific and practical issue of defining the boundaries of regulation of relations regarding the security of the individual, society, state in the information sphere. The wording "security of the individual, society, state in the information sphere" was chosen not by chance, but with the following considerations in mind. Firstly, in recent times, the legislation of Ukraine is heading towards outlining a distinction between "information security" and "cybersecurity" [25; 26]. Instead, the "classic" regulation is inherent in the relationship with the classified information security.

The definition of "information security", enshrined in the Fundamental Principles for the Development of the Information Society in Ukraine for 2007-2015, is all-encompassing, as it was considered a state of protection of vital interests of the individual, society and the state, wherein harm is prevented through:

– incompleteness, untimeliness and unreliability of the information used;
– negative information impact;
– negative consequences of the application of information technologies;

[1] Council of Europe Convention on Cybercrime. (2001, November). Retrieved from http://zakon4.rada.gov.ua/laws/show/994_575

[2] Basic Principles of Information Society Development in Ukraine for 2007-2015. (2007, January). Retrieved from https://zakon.rada.gov.ua/laws/show/537-16

[3] Law of Ukraine "On State Secrets". (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/3855-12

[4] Law of Ukraine "On Information". (1992, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2657-12

– unauthorized distribution, use and violation of the integrity, confidentiality and accessibility of information[1]. In 2007, such a definition of "information security" included issues of information security (information resources), security of the information space and security of functioning of the information and telecommunication infrastructure [27].

Today, however, the concept of "information security" acquires a different, "narrow" meaning. Having analysed, for example, item 4.11 of the National Security Strategy of Ukraine, regarding the priorities of providing information security, we understand that it refers to "counteraction to information operations against Ukraine, manipulation of public consciousness and dissemination of distorted information, protection of national values and strengthening of unity of Ukrainian society; development and implementation of coordinated information policy of public authorities; identification of Ukrainian information space subjects created and/or exploited by Russia to wage an information war against Ukraine; creation and development of institutions responsible for information and psychological security, with consideration of the practices of NATO Member States", etc.[2]. Thus, information security encompasses processes and relationships that occur in the information space of the state. A similar approach is enshrined in the Doctrine of Information Security of Ukraine, which defines Ukraine's national interests in the information sphere, threats to their implementation, directions and priorities of national policy in the information sphere. Indeed, the priorities of the national policy in the information sphere stipulated therein are determined by ensuring the protection and development of the information space of Ukraine, as well as the constitutional right of citizens to information; openness and transparency of the state to the citizens; formation of a positive international image of Ukraine[3].

Factoring in such "narrowing" of the content of the concept of "information security", as well as the position of scientists on the issue of security in information relations we shall assume the scientific hypothesis that the security of the individual, society, state in the information sphere should be defined as a type of national security, and the corresponding public relations as a subject of legal regulation shall be conveniently divided into three aspects: information security, classified information security, cybersecurity.

Upon the determination of the methods of legal regulation of the security of a person, society, state in the information sphere, it is necessary to consider the conceptual difference between the regulation of relations in information security, where de-

[1] Basic Principles of Information Society Development in Ukraine for 2007-2015. (2007, January). Retrieved from https://zakon.rada.gov.ua/laws/show/537-16

[2] National Security Strategy of Ukraine, approved by the Decree of the President of Ukraine "On the Decision of the National Security and Defence Council of Ukraine". (2015, May). Retrieved from https://zakon.rada.gov.ua/laws/show/287/2015

[3] Doctrine of Information Security of Ukraine "On Decisions of the National Security and Defence Council of Ukraine". (2017, February). Retrieved from https://mip.gov.ua/documents/100.html

cisive is the counteraction to negative information influence, regarding the circulation of classified information, in which the clear regulation of procedures for creating an appropriate organizational and legal regime, provision of access, as well as regarding cybersecurity connected with the timely detection, prevention and neutralization of real and potential threats to critical information infrastructure objects [28].

2.2 Methods of legal regulation of information security of a person, society, state

Today, a substantial part of the information confrontation occurs precisely in the information space, where misinformation processes are increasingly influencing the security of the individual, society and the state. For example, the scientific issue of the expediency of the legal regulation of relations in social networks for a long time did not even come up in the jurisprudence as relevant in connection with the existence of a democratic concept of free circulation of information, the possibility of its free dissemination in whatever form and by whatever medium [29]. Currently, the negative effects of such dispositive regulation are detrimental to the interests of the individual, society and the state, for instance, the dissemination of video on massacres in New Zealand, the use of social media to overthrow the constitutional order, calls for violence, etc. This nature of the development of information relations has given rise to scientific controversy regarding the necessity of legal regulation of relations in social networks, particularly in terms of dissemination of harmful information. Objective reasons for this already exist, as well as the willingness of executives to regulate Internet relations. In particular, at the end of March 2019, M. Zuckerberg stated the necessity for state regulation of such relations to counteract the spread of harmful content, hold fair elections, and protect the personal data of citizens and the ability to transfer data between services [30].

It is also noteworthy that, on January 23, 2019, the Ministry of Information Policy of Ukraine and representatives of Facebook discussed cooperation in the field of information security. The result of the meeting was that Facebook restricted political advertising for Ukrainian users from February 1, 2019 for the period of the election, including the prohibition of campaigning from abroad to prevent external interference [31].

Similar tendencies in the settlement of information security issues during the elections are also observed in the European Union. Thus, at the end of February 2019, the European Network and Information Security Agency (ENISA) developed recommendations to improve cybersecurity (a term was presumably used as a type of information security – author's note) of elections. In particular, EU Member States are advised to improve national legislation to address the issues of Internet misinformation while respecting the fundamental rights of EU citizens. In particular, it is proposed to implement into national legal systems the possibility of identifying and blocking botnets, strengthening the regulation of digital service providers, social media, online platforms and messaging providers at EU level, deploying of unusual traffic detection technolo-

gies by the aforementioned subjects, reinforcing the legal obligation for Member States to classify election infrastructure as critical, as well as the obligation for political parties to ensure a high level of cybersecurity in their systems, processes and infrastructures [32].

In recent years, EU Member States have paid particular attention to counteracting misinformation by defining it as "any form of false, inaccurate or misleading information designed, presented and disseminated intentionally to harm the public or to profit" [33]. In particular, in January 2018, the European Commission established the High-Level Expert Group ("the HLEG") to develop proposals regarding the counteraction of this illegal phenomenon. In its report, the HLEG recommends that the European Commission takes o restrictive measures that would affect freedom of expression and the right to information. At the same time, it highlights the need to adhere to the following measures of counteracting misinformation on the Internet:

1) increase the transparency of online news by introducing adequate systems of information dissemination to ensure the protection of personal data;

2) introduce media and information literacy to counteract misinformation and help citizens use the digital media environment;

3) implement technical tools for users and journalists to identify misinformation and facilitate positive engagement with rapidly evolving information technologies;

4) ensure the diversity and sustainability of the European media ecosystem;

5) continue researching the impact of misinformation in Europe to develop measures for different subjects to continually improve appropriate counteraction [33].

As is evident, in 2018, experts, including scientists, offered “soft” dispositive legal solutions to counteract such a threat to the information security of the individual, society and the state as misinformation. And in February 2019, ENISA, in its recommendations (which are predominantly dispositive), focusing on the issue of information security during elections, proposes to introduce mandatory rules to prevent negative consequences for the individual, society and the state [34].

It should also be noted that misinformation is not currently classified as an offense in the information sphere. This is conditioned by the construction of legal systems based on the principles of freedom of expression and the right to free access to information. However, in view of the socially negative consequences of misinformation, a draft law has already been registered in Ukraine that provides for legal liability for this type of information offense in order to "protect a person's constitutional rights to honour, dignity and business reputation by preventing the dissemination of misinformation in the media"[1]. Objectively, representatives of civil society are against criminal liability for the dissemination of misinformation in the media and on the Internet. For example, the FreeNet Ukraine Coalition emphasizes the inadmissibility of introducing

[1] Draft Law “On Amendments to Certain Legislative Acts of Ukraine on Prevention of Dissemination of Misinformation in Mass Media”. (2019, March). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=65657&pf35401=479177.

criminal liability for the media and other persons that publicly disseminate their ideas and information, as "such legislative initiatives can be a dangerous tool for censorship and pressure on independent media" [35].

Summarizing the points outlined in this section, we shall note that upon ensuring the information security of the individual, society and the state, the dispositive method of legal regulation prevails, since the processes of circulation of mostly open information are regulated and there is a requirement to observe the constitutional principles of freedom of expression and the right to information. Participants in such relationships exercise the freedom to freely choose the forms and methods of obtaining and disseminating information. Although in this direction we make the assumption on promising strengthening of the imperative regulation of the issues of ensuring the security of the individual, society and the state, and even the establishment of legal liability for misinformation as a type of information offense.

2.3 Methods of legal regulation of the circulation of classified information

Upon regulating the security of classified information, the imperative method of legal regulation is predominantly applied, as it largely concerns the protection of the right to such information. Most clearly examples of application of the imperative method of legal regulation are traced in the formation of regimes of protection of state secrets, personal data, bank secrecy, trade secrets. For example, the regime of protection of state secrecy provides for to undertake a written obligation to keep a state secret that will be entrusted to them as a necessary condition for granting admission to such secrecy[1], or imposes on a citizen additional duties regarding the preservation of a state secret, namely:

– not to disclose in any way the state secret which is entrusted to them or which became known in connection with the performance of official duties;

– not to participate in the activities of political parties and public organizations whose activities are prohibited in accordance with the legally established procedure;

– not to assist foreign states, foreign organizations or their representatives, as well as individual foreigners and stateless persons in performing activities that harm the interests of national security of Ukraine;

– to comply with the requirements of secrecy, etc. [9].

Domestic legislation contains a worldwide democratic approach to the existence of classified information in terms of the possibility of its (classified information) dissemination, if such information is "publicly necessary, i.e. it is a matter of public interest, and the right of the public to know this information outweighs the potential harm from its dissemination"[2]. Moreover, the subject of public interest is information that:

[1] Law of Ukraine "On State Secrets". (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/3855-12

[2] Law of Ukraine "On Information". (1992, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2657-12

– indicates a threat to state sovereignty, territorial integrity of Ukraine;
– ensures the exercise of constitutional rights, freedoms and obligations;
– indicates the possibility of violation of human rights;
– indicates circumvention of the public;
– indicates harmful negative consequences of activity (inaction) of individuals or legal entities, etc.[1].

Such provisions are the result of the application of the dispositive method of legal regulation in the circulation of classified information and are used by journalists and other subjects to conduct journalistic investigations in the modern information society.

2.4 Methods of legal regulation of cybersecurity

In contrast to the definition of "information security", which, as noted, is somewhat outdated and such that does not objectively correspond to the current relations and realities of legal regulation, a rather progressive definition of the term "cybersecurity" is established in Ukraine – it is the protection of vital interests of human and citizen, society and the state upon using cyberspace, which ensures the sustainable development of the information society and digital communication environment, timely detection, prevention and neutralization of real and potential threats to national security of Ukraine in cyberspace[2].

The new Law of Ukraine "On the Basic Principles of Ensuring Cybersecurity of Ukraine" dated 05.10.2017 has expanded the understanding of the term "cybercrime (computer crime)", which is defined as socially dangerous act within cyberspace and/or with its use, the liability for which is stipulated by Law of Ukraine on criminal liability and/or is recognized as a crime by international treaties of Ukraine. We shall point at the fact that despite the general "imperativeness" of the said Law, there is place for dispositive features in the treatment as cybercrime of not only "classic" offenses, expressly stipulated by Section XVI of the Criminal Code of Ukraine "Crimes in the field of application of electronic computing machines (computers), systems and computer networks and telecommunication networks", but also of other socially dangerous actions involving the use of cyberspace. With the development of information technology, the list of such offenses will steadily increase, as the number of offenses committed without the use of the Internet grows smaller. The list of historically known criminal offenses of phishing, carding, fraud in banking (payment) systems will only expand.

It should be noted that the Council of Europe Convention on Cybercrime of 21.11.2001 (hereinafter referred to as "the Convention"), which is ratified by Ukraine, is aimed at increasing the efficiency of criminal investigations and prosecutions con-

[1] Law of Ukraine "On Information". (1992, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2657-12

[2] Law of Ukraine "On Basic Principles of Cyber Security of Ukraine". (2017, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2163-19

nected with criminal offenses related to computer systems and data, at the possibility of gathering evidence connected with criminal offenses in electronic form[1]. 56 countries have joined the Convention: EU members as well as the USA, Japan, Australia, Argentina, Chile, Senegal, Ukraine and others. In 2016, a representative of the Security Council of Ukraine was elected to the governing body of the Committee – the Bureau of the Convention Committee. Predominantly using the imperative method of legal regulation, the Convention addresses the issue of combating cybercrime as the greatest threat to cybersecurity – that is, to the vital interests of individuals and citizens, society and the state during using cyberspace.

The provisions of the Convention regarding the promptness of processing requests for the preservation of electronic evidence, the provision of information by national Internet service providers, replies to requests for legal aid, etc. are based on imperative grounds.

European and world practices indicate that public-private partnership form an integral part of law enforcement action in the field of cybercrime. The management of these relationships, both in the context of crime and in the context of cybersecurity, should be addressed with due regard for the rights and interests of stakeholders. In this context, it is advisable to create a basis for cooperation by signing a Memorandum of Understanding between the Internet service providers and Ukrainian law enforcement bodies. After all, domestic practices confirm that imperative decisions do not obtain proper implementation. For example, the decision of the Council for National Security and Defence of Ukraine dated April 28, 2017 "On Application of Personal Special Economic and Other Restrictive Measures (Sanctions)"[2], enacted by Presidential Decree No. 133 dated May 15, 2017, regarding the provision of information security and cyber security, requires the development and implementation of the mechanism of blocking of information resource by operators and providers through their telecommunication and information and telecommunication networks. However, it is known that the Draft Law "On Amendments to Certain Legislative Acts of Ukraine on Countering National Security Threats in the Information Sphere", which envisaged the creation of mechanisms aimed at prompt detection, response, prediction, prevention, neutralization of cyber threats, cyber-attacks and cybercrime and the restoration of the stability and reliability of the functioning of communication, technological systems, was not adopted. This was largely due to the lack of proper public discussion of the relevant mechanisms (the existence of which during a hybrid aggression against Ukraine is reasonable in most cases) and the lack of a basis for effective public-private partnerships. It is noteworthy that in this respect the Situation Centre for Combating

[1] Council of Europe Convention on Cybercrime. (2001, November). Retrieved from http://zakon4.rada.gov.ua/laws/show/994_575.

[2] Law of Ukraine "On Application of Personal Special Economic and Other Restrictive Measures (Sanctions)" (2017, April). Retrieved from https://zakon.rada.gov.ua/laws/show/n0002525-19

Cyber Threats of the Security Service of Ukraine is a rather progressive platform for elaboration of such a partnership in the field of cybersecurity.

Thus, relations regarding cybersecurity are predominantly governed by the imperative method of legal regulation (for example, upon establishing technical requirements for the protection of state electronic information resources). However, only a dispositive method should be applied for normalization of the public-private partnership matters.

CONCLUSIONS

This paper proposes the scientific hypothesis on the division of the subject of legal regulation of the security of a person, society, state into three aspects: information security, classified information security and cybersecurity.

Legal regulation of information security relations is aimed at counteracting negative information influence in the information space of the state, normalization of relations concerning the classified information security is aimed at creating an organizational and legal regime, provision of access, etc., and regulation of relations regarding the cybersecurity is connected with detection, prevention and neutralization of potential threats to critical information infrastructure objects.

The paper concludes that the dispositive method of legal regulation prevails upon ensuring information security of the individual, society and the state, since the processes of circulation of mostly open information are regulated and there is a requirement to observe the constitutional principles of freedom of expression and the right to information. At the same time, a presumption is made about further reinforcement of imperative regulation of issues of ensuring the security of the person, society and the state in the part of combating misinformation as a type of information offense.

Legal regulation of classified information security is predominantly performed with the application of the imperative method of legal regulation, as it mainly concerns the protection of the right to such information. Emphasis is placed on the fact that the dispositive method of legal regulation in the circulation of classified information is applied in the part of collecting and disseminating socially necessary information.

Public relations in terms of ensuring cybersecurity are predominantly governed by an imperative method of legal regulation, although it is concluded that the exclusive application of dispositive method of legal regulation is necessary for the normalization of the public-private partnership issues.

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ЕЛЕКТРОННА ОСВІТА ЯК ФУНДАМЕНТ ДЕМОКРАТИЧНОГО ТА ПРАВОВОГО МАЙБУТНЬОГО

Анотація. *Стаття присвячена дослідженню особливостей виникнення, впровадження та функціонування електронної освіти як фундаменту демократичного та правового майбутнього України та світу, що здійснюється, за допомогою вивчення та узагальнення існуючого масиву напрацювань провідних, вітчизняних та закордонних науковців й вчених. Проаналізовано різноманіття понять електронної освіти, на основі чого було надано авторське визначення цього поняття, що ґрунтується на власному розумінні даного терміну, з позиції теоретико-правового аналізу та сучасних викликів розвитку суспільства. Визначено, що основними передумовами й причинами виникнення та становлення електронної освіти є: тиск інформаційного суспільства; глобальність як характерна риса інформаційного суспільства; стрімкий розвиток інформаційних і комунікаційних технологій; експоненціальне зростання накопичених людством знань і неможливість їх ефективного засвоєння за допомогою традиційних методів і підходів; практично вичерпані можливості традиційної підготовки кадрів для реалізації завдань нового часу; брак інформаційно-комунікаційних технологічних фахівців. Досліджено світовий досвід впровадження електронної освіти, в університетах США та Європи, де навчальні програми в університетах, на відміну від більшості вітчизняних, передбачають менше аудиторного навчання і набагато більше самостійності з боку студента. На підставі якого зроблено висновок, що її ефективність не нижче ефективності традиційної освіти, за умови наявності якісного змісту освіти та грамотного розвитку курсу. Досліджено нормативно-правову базу для впровадження та розвитку електронної освіти в Україні, яка є ключовою рушійною силою в багатьох галузях і необхідною умовою розвитку сучасного українського суспільства. Розкрито зміст та особливість створення й функціонування електронних бібліотек, як невід'ємного елементу електронної освіти, що допоможе виключити дублювання робіт з переводу документів у цифрову форму, вирішити проблему якісного представлення документів користувачеві, забезпечити економію фінансових коштів та людських ресурсів. Зроблено висновок про значення модернізації змісту освітніх програм, а також основної мети електронної освіти.*

Ключові слова: електронне урядування, інформаційно-комунікаційні технології, електронна бібліотека, дистанційна освіта, Інтернет.

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ELECTRONIC EDUCATION AS FOUNDATION FOR DEMOCRATIC AND LEGAL FUTURE

Abstract. *The paper deals with the research of the features of emergence, implementation and functioning of e-education as a foundation of democratic and legal future of Ukraine and the world, by studying and generalizing the existing array of developments of leading, domestic and foreign scientists. Various concepts of e-education are analysed, proceeding from which the author's definition of this concept is provided, based on personal understanding of this term, from the standpoint of theoretical and legal analysis and contemporary challenges of society development. It is determined that the main prerequisites and causes for the emergence and development of e-education are: the pressure of the information society; globality as a feature of the information society; rapid development of information and communication technologies; exponential growth of knowledge accumulated by mankind and the inability to assimilate it effectively through conventional methods and approaches; practically exhausted possibilities of conventional personnel training for the realization of modern objectives; lack of information and communication technology specialists. The world practices of introducing e-education in the universities of the USA and Europe is researched, where the curricula at the universities, unlike most of the domestic ones, provide less class hours and much more autonomy on the student's part. It is further concluded that its effectiveness is not lower than the effectiveness of conventional education, provided the availability of quality content of education and competent development of the program. The legal framework for the introduction and development of e-education in Ukraine, which is a key driving force in many fields and a prerequisite for the development of modern Ukrainian society, is researched. The content and peculiarity of creation and functioning of electronic libraries as an integral element of e-education are covered, allowing to further eliminate duplication of digitized documents, solve the issue of quality presentation of documents to the user, provide savings of financial and human resources. The conclusion is made on the importance of modernizing the content of educational programs, as well as the main purpose of e-education.*

Keywords: e-government, information and communication technologies, digital library, distance education, Internet.

INTRODUCTION

Scientific and technological progress and the rapid development of computer technologies have led to the transition from an era of industrial to an era of information society, wherein scientific knowledge and information become the basis for the development of socio-economic, political and cultural spheres of life. The develop-

ment of society requires significant changes in the educational process. Education should always evolve with the course of time. The use of innovation in education can be regarded as a major driver of long-term economic growth and social development. Therefore, the development of information society and e-education in Ukraine and in the world is currently one of the priority directions of national policy. Hence, it is necessary to pay more attention to the content of e-learning in order to understand the importance of implementing cutting-edge technologies in educational processes. Furthermore, this issue remains understudied in domestic science, and a large number of scientists still have not come to an agreement on many key issues at hand.

The foregrounding of this issue is supported, on the one hand, by the fact that knowledge as information is the main intellectual resource in the knowledge society, and on the other hand – the volumes and rates of knowledge accumulation in such a society are constantly increasing. This, above all, is ensured by the capabilities of the communication environment, which enable the use of qualitatively new technologies in the education system. Because e-education, as a modern process of learning and acquisition of knowledge and information, which is made possible through the use of the latest information and communication technologies, which in turn make it more convenient, faster and more efficient, necessitates activation of researching the legal regulation of this problematics. And provision of the author's definition and research of the features of the emergence, implementation and functioning of e-learning will allow us to rethink its meaning and structure.

The study of the features of the emergence, implementation and functioning of e-learning in Ukraine and in the world is rather complicated, which explains its scientifically understudied nature. Some aspects of this issue were, in one way or another, explored the following foreign and domestic scholars: T. Bates [1], M. Rosenberg [2], A.B. Antopolsky [3], O. Bashun [4], V. I. Gritsenko [5], V. G. Kremin [6], T.M. Kronivets [7], S.O. Semerikov [8], O.V. Petryshyn [9], I.O. Polishchuk [10], M.P. Trebin [10], T.O. Pushkaryova [11], S.N. Filonenko [12] and others.

Purpose of the article: to research the features of the leading foreign and national scientists on the basis of studying and generalizing the array of developments of the emergence, implementation and functioning of e-education in Ukraine and the world, to formulate an author's approach to defining the concept and drawing conclusions regarding e-education.

1. MATERIALS AND METHODS

To achieve the outlined purpose and objectives of the research, general scientific and methods and means of scientific knowledge special for jurisprudence are applied. This allows to analyse all issues related to e-learning as a foundation for a democratic and legal future in detail. Thus, the dialectical method allowed to describe and research the content and ideas of e-education, which constitutes one of the elements of the e-government structure, and represents a certain modern process of learning

and assimilation of knowledge and information, which is made possible through the use of the latest information and communication technologies, which in turn, make it more convenient, faster and more efficient. The comparative legal method was used to study and compare the foreign experience and the array of data produced by leading foreign and domestic scientists, namely to explore the world experience of implementing e-education in US and European universities, where university programs, unlike most domestic ones, provide for less class hours and much more autonomy on student's behalf.

The synthesis method allowed to establish that the main prerequisites and causes for the emergence and development of e-education are: the pressure of the information society; globality as a distinctive feature of the information society; rapid development of information and communication technologies; the exponential growth of the knowledge accumulated by mankind and the inability to assimilate it effectively through conventional methods and approaches; virtually exhausted possibilities of conventional training for the realization of modern objectives; lack of information and communication technology specialists. The analysis method singled out the key challenges of e-education, subsequently establishing its significant benefits and some unique capabilities, such as moving classes in space and time, flexible timetable, improved access to and greater variety of materials, the availability of all the required educational materials online, the ability to re-listen or re-watch audio and video lectures, improved communication, and much faster teacher feedback. Using the method of interpretation, it became possible to cite the author's innovative legal definition of the concepts of e-education, based on personal understanding of the term, from the standpoint of theoretical and legal analysis and contemporary challenges of society.

The systematic method revealed the content and the specific nature of creation and functioning of e-libraries, as an integral element of e-education, which will facilitate the elimination of duplication of digitized documents, the solution of the issue of quality presentation of documents to the user, and ensure savings of financial and human resources. The method of generalization indicated that e-education should be considered not as a substitute for conventional, but as an additional, focused on acquisition of in-depth knowledge and future professional advancement or retraining, which is why e-education, as a system of training that uses information and communication technologies, should be rationally integrated into modern education, leaving conventional learning tools alongside the newest ones.

2. RESULTS AND DISCUSSION

2.1 The concept of e-education

The development of society requires significant changes in the educational process. Education should always evolve with the course of time. The use of innovation in education can be regarded as a major driver of long-term economic growth and social development. Nowadays, mastering modern information and communication

technologies is as necessary as the ability to read and write. The labour market demands highly qualified specialists who are able to work in the conditions of ever-changing and evolving technologies, to master and actively put technical innovations into practice. Before considering e-learning, it would be prudent to first specify the meaning of education. The Law of Ukraine "On Education"[1] contains no precise definition of the concept of education, but the Law enshrines a very similar and close term called "the educational process"[13; 14]. Thus, according to this Law, the educational process is a system of scientific, methodological and pedagogical measures aimed at the development of the individual through the formation and application of its competencies.

In addition, the Encyclopaedia of Education interprets this concept as purposeful cognitive activity for people to acquire knowledge, skills or abilities. The process and result of person's absorbing of a certain system of scientific knowledge, practical skills and a certain level of development of mental-cognitive and creative activity connected with them, as well as moral and aesthetic culture, all of which in their totality determine the social avatar and individual specificity of this personality [6]. E-education or e-learning is one of the information society development tools. It promotes the renovation of the forms, means, technologies and teaching methods; increasing access to knowledge for all demographic, with consideration of the possibility of building an individual learning path; the formation of students' skills in the 21st century. According to UNESCO experts, namely Tony Bates, this is online and multimedia training [1].

Marc Rosenberg's point of view is rather interesting, it states that e-learning is the use of online technologies to provide a wide range of solutions that enhance knowledge and productivity; e-learning is based on three essential principles: work is performed through the network; delivery of training content to the end user is performed using a computer with standard Internet technologies [2]. According to the scientist-theoretician S.N. Filonenko, e-education is a form of training based on Internet technologies, which provide, on the one hand, interactive self-education, and on the other hand – intensive consulting tutorial support for the student [12].

Therefore, the author of this research believes that e-education is one of the elements of the e-government structure, which represents a certain modern process of learning and assimilation of knowledge and information, enabled by the use of the latest information and communication technologies, which in turn make it more convenient, fast and efficient.

2.2 Basic prerequisites and reasons for using e-learning

Of particular interest is S. Semerikov's opinion that the main prerequisites and reasons for widespread use of e-education are as follows:

[1] Law of Ukraine "On Education". (2017, September). Retrieved from http://zakon3.rada.gov.ua/laws/show/2145-19.

1. Pressure of the information society. If in an industrial society, the learning experience was necessarily linked to the school (secondary or high), then in the information society, due to development of high technologies, some professions become obsolete, others change, others emerge, the level of requirements for the professional qualities of workers and their responsibility increases.

2. Globality as a characteristic of the information society. The advancement of information technology, the Internet and advances in communications have made society more open and its members increasingly dependent on one another and constantly expanding cooperation. This inevitably leads to the globalization of education and the use of global information resources and standards.

3. Rapid development of information and communication technologies. Moore's famous empirical law – the law of the development of an electronic base (semiconductor circuits), according to which the degree of integration (the number of semiconductors per unit area of silicon wafers) is doubled every 18 months, is also valid for clock speed (speed performance) of microprocessors, communication of data through channels and other places.

4. The exponential growth of knowledge accumulated by mankind and the inability to absorb it effectively through conventional methods and approaches. This requires intensification of knowledge assimilation processes, their actualization and use in practice.

5. Virtually exhausted possibilities of conventional training for the realization of modern objectives.

6. Lack of information and communication technology specialists. One way to solve this issue is to use new methods and techniques of intensive learning and training, including e-education. [8].

Furthermore, S. Semerikov marks down e-education as a large scientific and practical field, which has the common name of automated learning. There are three stages in its development. The first stage (20s-50s of the 20th century) covers the period from the appearance of electromechanical computers to the widespread introduction of electronic computers. The second stage covers the period of 50s-80s of the last century and is associated with the widespread introduction of electronic computers in practice, which could not leave experts in the field of education aside, that is why the ideas of cybernetics education at school are born first, elements of applied mathematics are being introduced into the educational process, computer-oriented learning environments and systems of knowledge control and management of the educational process are becoming automated. The third stage (from the 80s of the last century) is the emergence of computer networks and personal computers. An extremely powerful impetus in the development of educational technology is connected with the use of the Internet [8].

Traditionally, three generations of e-learning are distinguished in the world practice: E-learning 1.0 – the first generation of web-based teaching (in fact, training). Can be characterized by a course of 60 minutes or more. Synchronous courses are most com-

monly used, delivered through a virtual training class or asynchronous courses built using authoring tools, content design typically followed conventional teaching models developed by a learning designer. And, by all means, the courses were managed through LMS;

E-learning 1.3 is a term used for the e-learning generation that has existed over the last few years, with development progressing faster and the learning process being divided into smaller pieces. Learning is available in the context of the workplace and the delivery method is much easier. For this reason, learning is not always available through the LMS, but is delivered to the student via mail and corporate intranet links. Content in E-learning 1.3 is typically created by template experts using the Quick Development and Learning Content Management Systems (LCMS). And additionally, virtual classes or discussions can be organized as needed as part of the overall learning process;

E-learning 2.0 is a much bigger step than upon transition from E-learning 1.0 to E-learning 1.3. E-learning 2.0 is based on tools that combine simple content development, web-based distribution and built-in collaboration tools. Any employee can create content, even in the process of ongoing work.

2.3 International experience in the development of e-learning

Among educational institutions, US universities have the most experience in the development of computer information and e-learning. For a long time, they have been building and operating corporate and global data networks. And now the most up-to-date and exciting projects related to the development of the global information environment are being realized by major US universities or with their active involvement.

In the United States, there are three leading areas of e-education: training of information technology specialists; training of specialists in information systems; training of scientists in the field of information science. As examples of preparation of the named categories of specialists and construction of scientific and educational information systems, three leading US higher education institutions can be mentioned: MIT (Massachusetts Institute of Technology), which has exceptionally high intellectual and material potential; Berkeley University of California (Berkeley University), which pioneered modern networking technology and the Internet; KYVU (Kentucky Virtual University) is a new educational institution based on the use of the Internet and methods of distance learning to provide full higher education [10].

Nowadays, e-learning has become an integral part of modern education in many countries of the world. Millions of people around the globe are embraced by e-learning. The absolute world leader in this field is South Korea, which thanks to huge investments, adapts the entire education system (primary, secondary, higher, adult education and management) to the information society. When the country was faced with the task of transforming the economy in the 2000s, a decision was made at the legislative level to

equalize the rights associated with conventional education and e-learning. According to official data, the introduction of the Home Tutor program used by students at home has helped increase education in Korea by 40%. To date, the Cyber Home Learning System, which provides home-based education, is integrated into three of every four Korean schools [11].

In Europe, curricula at universities, unlike the majority of domestic ones, involve less class hours and offer a lot more autonomy for students. At a meeting of the European Commission held in Stockholm on 23-24 March 2001, on the initiative of Viviane Reding, Commissioner for Education and Culture, the European Commission endorsed a comprehensive e-learning action plan aimed at mobilizing all national EU programs and mechanisms, resources of the European Investment Bank and all stakeholders' efforts to accelerate e-learning in Europe [15; 16]. The European Commission in the eLearning Action Plan (2001) defines eLearning as the use of new multimedia technologies and the Internet to improve the quality of learning by facilitating access to resources and services, as well as through remote sharing and collaboration [17].

Subsequently, on May 10, 2001, the first European e-learning summit in Europe was held at the IBM International Training Centre in Brussels. For Europe, e-learning has been a great opportunity to maximize the unification of educational programs in different EU countries. The consistent policy on active development of e-learning continues today. In particular, the Minister of Higher Education and Science of France from 18 May 2007 to 29 June 2011, Valerie Perquez, in a speech at the Paris Dauphin University meeting, said that "… today, the main objective in the reform of the French education system is defined as 100% of educational materials in electronic form for 100% of students…; … The purpose of e-learning is to open up access to knowledge to all – young people who cannot attend all classes, as they are forced to work in parallel, and people with disabilities, for whom not all universities have the appropriate conditions…; … eLearning also connects universities around the world into a common educational process…" [7].

E-education allows to change the essence of education, increase the mobility and creativity of curricula, opens the possibility of designing and constructing various tools for the formation of professional competence. That is why, despite the fact that the electronic form of education is rather new, experience of its implementation in foreign countries has displayed that its effectiveness is not lower than the effectiveness of conventional education, provided the availability of quality educational content and competent program design.

2.4 Domestic experience in the development of electronic education

In Ukraine, at the current stage of development, the process of integration of the national higher education system into the European and world educational space is actively taking place, the educational activity is being modernized in the context of European requirements. According to the new Law of Ukraine "On Higher

Education"[1], the purpose of higher education institutions is to prepare "competitive human capital for high-tech and innovative development of the country, self-realization of the individual, meeting the requirements of society, the labour market and the state for qualified specialists".

One of the first educational organizations in Ukraine to begin real implementation of information and communication technologies in education was the International Scientific and Educational Centre for Information Technologies and Systems. In its approach to the creation and distribution of distance learning technologies, the Centre for the first time combined the advantages of new information and communication technologies with relevant pedagogical technologies by establishing a telecommunication didactic laboratory for the distribution of new methods and pedagogical technologies of distance learning in Ukraine on the basis of modern information technologies [5; 18].

In 2011, a draft regulation on distance learning was developed, which was created in pursuance of the State target program of introducing into the educational process of comprehensive educational institutions of information and communication technologies "Sto Vidsotkiv" [One Hundred Percent] for the period up to 2015, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 494 dated April 13, 2011[2]. However, this Resolution became invalid on the basis of the Resolution of the Cabinet of Ministers of Ukraine "On some issues of optimization of state targeted programs and national projects, saving of budgetary funds and recognition as invalid, of some acts of the Cabinet of Ministers of Ukraine"[3].

In 2012, work began to develop a regulatory framework that will form the basis of a new form of education. It is indisputable that e-learning is impossible without due quality content, so one of the most important steps towards e-education in Ukraine can be considered the development and approval of regulations on electronic educational resources. It defines the concept of electronic educational resources, their types, the order of development and implementation. That is, the educational content of e-learning consists, as in conventional education, of textbooks, lectures, practical tasks, tests, etc., but presented electronically[4].

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[1] Law of Ukraine "On Higher Education". (2014, July). Retrieved from http://zakon3.rada.gov.ua/laws/show/ 1556-18

[2] Resolution of the Cabinet of Ministers of Ukraine "On Approval of the State Target Program of Introduction to the Educational Process of Comprehensive Educational Establishments of Information and Communication Technologies" One Hundred Percent "for the Period up to 2015". (2011, April). Retrieved from http://zakon3.rada.gov.ua/laws/show/ 494-2011-% D0% BF

[3] Resolution of the Cabinet of Ministers of Ukraine "On some issues of optimization of state targeted programs and national projects, saving of budgetary funds and recognition as invalid, of some acts of the Cabinet of Ministers of Ukraine". (2014, March). Retrieved from http://zakon3.rada.gov.ua/laws/show/71-2014-%D0%BF

[4] Order of the Ministry of Education and Science, Youth and Sports of Ukraine "On Approval of the Regulation on Electronic Educational Resources". (October, 2012). Retrieved from http://zakon2.rada.gov.ua/laws / show / z1695-12

Electronic educational resources include: electronic document, electronic publication, electronic analogue of printed edition, electronic didactic demonstration materials (presentations, diagrams, video and audio recordings, etc.), information system, electronic resources depository, computer test, electronic dictionary, electronic reference book , electronic library of digital objects, electronic tutorial, electronic textbook, electronic methodological materials, distance learning course, electronic laboratory practicum [19–21].

The next step towards the introduction of e-education in Ukraine was the publication of the draft Conceptual Foundations for the Development of E-Learning in Ukraine on February 12, 2013 by the Ministry of Education and Science, Youth and Sports of Ukraine for the purpose of public discussion[1]. The text states that e-learning is a purposeful process and accomplishment of education and learning by means of electronic education.

The purpose of this Concept is to define the foundations and conditions for the achievement of European standards of quality of educational services and equal conditions of access to them based on the use of information and communication technologies, as well as the implementation of the main provisions of the Law of Ukraine "On the basic principles of development of the information society in Ukraine for 2007-2015[2] and the Economic Reform Program for 2010-2014 "Wealthy Society, Competitive Economy, Effective State" [22]. According to this Concept, the basic principles of e-learning are: transparency and openness; confidentiality and information security; common technical standards and interoperability; focus on the interests and needs of e-learning participants; compliance with international standards. Unfortunately, the Ministry did not go further than the publication of the project, although the adoption of improved Conceptual Frameworks for the development of e-learning in Ukraine would become the cornerstone for further development of the entire e-education system.

In the same year, an order "On Approval of the Regulations on Distance Learning" dated April 25, 2013 No. 466 was issued by the Ministry of Education and Science, according to which distance learning means an individualized process of acquiring knowledge, skills, and methods of cognitive activity of a person, which occurs mainly through the indirect interaction of remote participants in the educational process in a specialized environment, which operates on the basis of modern psychological and pedagogical, and information and communication technologies[3].

The purpose of distance learning is to provide educational services through the application of modern information and communication technologies upon training at certain educational or educational and qualification levels in accordance with state

[1] Draft Conceptual Framework for E-Learning in Ukraine. Retrieved from http: //old.mon.gov.ua.docx

[2] Law of Ukraine "On the Fundamental Principles for the Development of the Information Society in Ukraine for 2007-2015". (2007, January). Retrieved from https://zakon.rada.gov.ua/laws/show/537-16

[3] Order of the Ministry of Education and Science "On Approval of the Regulations on Distance Learning". (2013, April). Retrieved from http://zakon2.rada.gov.ua/laws/show/z0703-13

education standards; upon programs of preparation of citizens for entry into educational establishments, training of foreigners and professional advancement of employees.

In 2016, the Cabinet of Ministers of Ukraine issued an order "On Approval of the Concept of Realization of National Policy in the Field of Reforming of General Secondary Education "New Ukrainian School" for the period up to 2029". The implementation of this Concept is supposed to be implemented in 2017–2029 in three stages. In the first stage (2017–2018), it is planned to create a national electronic platform for the placement of e-courses and textbooks, to develop e-textbooks, distance learning courses by curriculum, distance learning systems for teacher training[1].

According to Liliya Mykhailivna Hrynevych, full implementation of e-education is a ready-made national platform with materials on all subjects, a developed market of electronic textbooks and an availability of appropriate devices for every teacher and student to work with. "From this standpoint, it is about to take at least five, and maybe seven years," – the minister explained [23].

In consideration of the foregoing, it can be argued that Ukraine is steadily moving towards e-learning, which is a key driving force in many industries and a prerequisite for the development of modern society.

2.5 Digital library as an integral element of e-education

Digital libraries play a significant role in e-education. Thus, in Europe, university libraries are perceived not simply as educational libraries, but as leading information services, offering library and information services without which it is impossible to acquire quality education.

At present, there is a sufficient number of definitions of the term "digital library", and it can be argued that this concept has already matured. But, unfortunately, there is not a single definition to be considered basic and comprehensive. According to DSTU (State Standard of Ukraine) 5034-2008, digital library is a library in which documents are stored and used in a machine-readable (electronic) format that can be used to work remotely. An electronic library database consists of different types of electronic document collections (text, graphics, audio, video, etc.) [4].

Many countries around the world work on creating electronic libraries. In the United States, creation of electronic libraries started in 1971 (the first electronic format was the "Declaration of Independence of the United States"), in the United Kingdom – in the early 1990s. For several years, these works gained the status of national programs and international projects. An example is the project of creating digital libraries for the G8 countries, DLI in the US and eLib in the UK, in Japan – the 21st Century

[1] Order of the Cabinet of Ministers of Ukraine "On Approval of the Concept of Implementation of State Policy in the Field of Reforming General Secondary Education "New Ukrainian School" for the Period up to 2029". (2016, December). Retrieved from http://zakon5.rada.gov.ua/laws/show/988-2016-%D1%80

Electronic Libraries project, and in Germany – the Global-Info digital library, in the United States – Google Online Library [3].

As an information system, digital library is a complex enough aggregate, which includes software, hardware, technological, organic components. It is a set of distributed information resources and the accompanying technical capabilities to create, search and use information. This system should provide a universal access tool (directory) for searching and retaining information in the entire database, which can be implemented in card or electronic form.

The catalogue of available educational and scientific materials plays a special role in the modern library of higher educational establishments of Ukraine. The emergence, active implementation of electronic catalogues and their placement on telecommunication networks allows students, faculty and staff of higher education institutions to receive information on available library resources directly in the workplace.

For example, you can cite the Scientific Library of the Yaroslav Mudryi National Law University, located in Kharkiv. The main activities of the library are: development of library and information service; ensuring openness; ensuring diversity; establishing cooperation; implementation of innovations: The library studies and introduces modern achievements in the library and information industry, which facilitates a better satisfaction of educational and scientific demands and needs of the university.

The tasks of the library are: formation of a collection of domestic and foreign publications, electronic resources: databases, electronic journals, e-books; creation of own electronic resources (with consideration of the needs of the educational process and scientific activity of the university) through publishing houses, booksellers, bookstores, information vendors, subscription periodicals, through the purchase of separate publications, as well as donated by organizations, foundations, institutions, individuals and received through book exchange with libraries of Ukraine and the world, etc.

The structural unit of the library is the information technology and computer support department (organization and support of work of databases and digital library, creation and management of full-text resources for development of the IRBIS program, electronic repository of the works of the scientists of the university, support of server activity, maintenance of the web site, social networks, performance of a bibliometric analysis of the publication activity of the scientists of the university, formation of an electronic file of the works of the scientists of the university, etc.) [24].

Recently, the priority has shifted from the use and digitization of library funds to the borrowing of accumulated information, access to distributed information resources, the creation of a single information space, as well as provision of individual experiences and developments to other foreign libraries. For example, in 2008, by the decision of the Presidium of the National Academy of Legal Sciences of Ukraine, a scientific publication was established – "Yearbook of Ukrainian Law" (Certificate of State Registration of the Printed Media Series KB 3 15596-4068P dated 09.07.2009), which publishes the best articles in the field of state and law, written by academicians and

corresponding members of the National Academy of Legal Sciences of Ukraine and scientists working in the institutions of the National Academy of Sciences of Ukraine, the National Academy of Legal Sciences of Ukraine and other leading scientific and educational institutions of Ukraine. Yearbook of Ukrainian Law is a nationwide publication that publishes scientific works of the most prominent scholars of legal science from different regions of Ukraine (Kyiv, Kharkiv, Donetsk, Lviv, Odesa, etc.).

The Yearbook of Ukrainian Law is a unique legal publication with no analogues in Ukraine. Domestic law science has reached the level of generalization when publishing the most significant articles appears to be prudent, highlighting the most fundamental and priority issues of modern legal science. The Yearbook is devoted to various issues of legal science. The purpose of this publication is to accumulate the most interesting and relevant ideas, approaches, concepts of modern legal science.

And in 2019, the eleventh edition of the Yearbook of Ukrainian Law was published in English. In the Yearbook, 47 scientific articles on topical issues of state and law development are published. Each issue of the English version is sent to more than 70 law libraries in the world, including the US, Canada, Australia, the United Kingdom, Germany, Portugal, Switzerland, Norway, Denmark, Latvia, Lithuania [9; 25–28].

That is why it is important to build partnerships with other libraries in order to consolidate the accumulated array of information and further share it. This will help eliminate duplication of digitized documents and their cataloguing, solving the issues of high quality presentation of documents to the user, and saving money and human resources.

In summary, we must agree with S. O. Semerikov's opinion that information on the state of e-learning in our country and around the world indicates the urgent necessity of its stimulation in order to ensure dynamic and progressive development and implementation at all levels of education, above all, – at the level of higher education, because e-learning is an innovative technology aimed at professionalizing and increasing the mobility of learners and at the current stage of ICT development it can be considered as the technological basis of education fundamentalisation [29].

CONCLUSIONS

Summarizing all of the foregoing, we have formed an opinion that the increase in the amount of information, world processes of humanization, globalization, integration objectively cause the modernization of the content of educational programs, educational programs, updating of forms, methods and teaching aids. This is only possible if electronic educational resources are introduced into the innovative educational space, and higher education institutions have access to global information resources using high-speed channels.

Furthermore, we can confidently state that the main purposes of e-learning are the improvement of the quality of education, training of highly professional specialists,

maturation of a person as an identity, a subject and an individuality, which ensures the development of the state as a whole, cultural and spiritual development of society.

Consequently, in Ukraine, the creation of conditions for the development of e-learning, which forms an integral part of the development of socio-economic, political and cultural spheres of life, has begun. The Law of Ukraine "On Education" states that one of the basic conditions for successful implementation of the national policy in the sphere of information society development is provision of learning, education and professional preparation of the person for work in the information society. The Law also sets out priority measures for the development of national e-education policy. On the basis of the current legislation, the educational institutions create conditions for its development, which facilitates the organization of the educational process and the training of specialists of different professions, who are interested in effective and mobile learning using modern technologies. A comparative analysis of the components of the state of e-education in Ukraine with other countries allowed to establish that in European universities, the curricula provide less class hours in favour of more self-education on the part of students.

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МЕТОДОЛОГІЧНІ ЗАСАДИ ПІЗНАННЯ ПРАВА НАЦІОНАЛЬНОЇ БЕЗПЕКИ УКРАЇНИ

Анотація. *У статті досліджуються проблеми застосування методологічних підходів у пізнанні права національної безпеки України, як галузі національної системи права. Актуальність дослідження полягає у винятковій важливості проблем, які стосуються правового забезпечення національної безпеки України в умовах глобалізаційних змін світового правопорядку, порушення суверенітету і територіальної цілісності України внаслідок агресії Російської Федерації. Метою дослідження є розкриття методологічних основ права національної безпеки України, як галузі у системі національного права. Для досягнення мети дослідження використані сучасні наукові підходи і методи. В основу пізнання права національної безпеки України покладено міждисциплінарний і системний наукові підходи. Міждисциплінарний підхід забезпечує дослідження усіх складових права національної безпеки з використанням можливостей різних наук та галузей юриспруденції. Системний підхід, маючи всеосяжний характер, дозволяє розкрити структуру цієї галузі права, визначити місце і роль суб'єктів соціальних комунікацій у системі національної безпеки України, а також здійснити критичну переоцінку методології структуралізму і теорії структурації з огляду на особливості права національної безпеки. Інституціонально-функціональний підхід доповнив можливості системного підходу і дозволив розкрити інституційні властивості права національної безпеки України, його функціональне призначення. Особливе значення у пізнанні права національної безпеки виявляє холістичний науковий підхід, який допомагає визначити предметну цілісність цієї галузі права з використанням теорії цілісності. За допомогою синергетичного підходу розкрито закономірності самоорганізації права національної безпеки з виділенням нелінійних характеристик, які з необхідністю обумовлюють використання парадигми ризоми та орієнтують на аксіологічну основу цієї галузі права. Результатом дослідження стало розкриття теоретико-методологічних основ права національної безпеки України, а застосування розглянутих у роботі методологічних підходів пізнання поряд з використанням відповідного правового режиму дозволило автору науково обґрунтувати концепцію права національної безпеки у системі права України.*

Ключові слова: право національної безпеки, цілісність права, парадигма ризоми, правовий режим, методологія права національної безпеки.

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METHODOLOGICAL BASES OF KNOWLEDGE OF THE UKRAINE'S NATIONAL SECURITY LAW

Abstract. *The article deals with the problems of using methodological approaches in the knowledge of the Ukraine's national security law as a branch of the national legal system. The relevance of the research is of the utmost importance of the problems concerning the legal support of Ukraine's national security in the context of globalization changes in the world order, violation of the sovereignty and territorial integrity of Ukraine due to the aggression of the Russian Federation.The purpose of the research is to disclosure the methodological bases of the Ukraine's national security law, as a branch in the system of national law. Modern scientific approaches and methods are used to achieve the purpose of research.The basis of knowledge of the Ukraine's national security law is interdisciplinary and systematic scientific approaches. An interdisciplinary approach provides for the research of all components of the national security law through the use of the means of various sciences and branches of jurisprudence. The system approach in understanding the Ukraine's national security law is comprehensive, allows you to discover the structure of this branch of law, defines the place and role of personality in social communications of the Ukraine's national security system, and to critically re-evaluate the methodology of structuralism and the structuration theory in the light of the particularities of national security law. The institutional-functional approach complemented the capabilities of the systematic approach and allowed to reveal the institutional features of the Ukraine's national security law, its functional purpose. Of particular importance in the knowledge of national security law is the holistic scientific approach that helps to determine the substantive integrity of this branch of law using the theory of integrity. The synergistic approach reveals the regularities of self-organization of national security law with the release of non-linear characteristics, which necessitate the use of the paradigm of rhizomes and orient the axiological basis of this branch of law. The research resulted in the discovery of the theoretical and methodological foundations of the Ukraine's national security law, and the application of the methodological approaches of cognition considered in the work, along with the use of the appropriate legal regime, allowed the author to substantiate the concept of national security law in the legal system of Ukraine.*

Keywords: national security law, the integrity of law, the paradigm of rhizomes, legal regime, methodology of the national security law.

INTRODUCTION

Cognition of national security law is based on the reflection of many social phenomena, actions and objects of the material world, which form a universal, general and individual security environment. At the same time, a scientific strategy for the study of national security law, as a certain systemic integrity, must take into account, first and foremost, the needs of human and society for a safe life and existence based on the interaction of law and the state with addressing practical issues of protection

against external and internal threats. National security law, as a subject of research, has unique features that are based on a systemic vision and are distinguished due the specificity of internal organisation, functional factors, and therefore require a special approach in understanding the meaningful and essential characteristics of its integrity.

The peculiarity of the interaction of law and the state in the context of solving the problem of national security lies in the formation of legal regimes, those concepts that provide significant opportunities for understanding the legal nature of national security, its dependence on law in any social organisation and at all levels of development and existence of society, which is manifested, first of all, in providing reliable protection of national interests against external and internal threats.

Scientific research on national security law focuses on several areas. Philosophical, theoretical and methodological problems of national security were reflected in the works of A.P. Dzoban [1]. Political and legal aspects of national security were considered by A.F. Belov [2]. The research of legal bases of national security as a complex problem was carried out in the works of V.G. Pilipchuk [3]. The problem of state policy of national security and its conceptual foundations became the subject of consideration of G.P. Sitnik [4]. The law of national security of Ukraine as a branch of law is stated in the works of V.A. Lipkan [5]. However, the analysis of scientific developments showed that there is no methodological justification for the concept of national security law of Ukraine, which does not contribute to the solution of this problem and especially emphasises the relevance and timeliness of the research conducted within the article.

The aim of this study is to uncover the methodological arsenal formed on the basis of ideological and scientific approaches, which is used and functions in the knowledge of national security law. In the conceptual vision of national security law, in the first place not just defining the nature, content and purpose of this area of law, but revealing rational features of such a complex and at the same time important doctrinal problem, which in national jurisprudence is national security law. The doctrine of national security law depends entirely on the methodological possibilities of cognition of the normative-value formation that arises in the system of national law, in fact, the right of national security, providing necessary and sufficient legal influence on social communications existing in the field of national security, implemented by the state and not related to not only society but also an individual. In this context, scholars' positions on the inextricable interconnection of methodology, theory of law and legal practice are extremely important [6]. It can be stated that the methodological foundations of national security law substantiate not only its epistemological characteristics but also the empirical background, test the ability of the national security right to exercise legal intent directly in the field of national security.

MATERIALS AND METHODS

The methodology of knowledge of national security law, first of all, must be based on the fact that in jurisprudence, national security is a complex problem, the solution

of which is possible due to the development of most research areas of jurisprudence, state and law in their dialectical unity and interaction. National security, as a phenomenon of social importance and civilisation order, is based on humanistic principles, and therefore the importance of the concept of national security law to address issues not only of the state and society, social institutions, but of an individual, is understood and perceived not only in domestic jurisprudence.

At the same time, law and national security are inseparable in the formation of models of social communications, where human attitude to the environment, its relations with numerous institutions and interpersonal relations are characterised by predictability, non-conflict or tend to remove internal and external conflicts. The role of national security law is to form and develop numerous legal communications that determine the security of an individual, society and the state against internal and external threats. Consequently, the methodological basis for cognition of national security law is quite complex, it contains many scientific approaches, among which are interdisciplinary, systemic, institutional-functional, holistic, synergistic approaches. Structural theory is important for understanding the concept of national security law. In such circumstances, the methodological foundations of knowledge of national security law are based on the application of general scientific methods that are sensitive to worldview. Abstraction in identifying the methodological basis of knowledge of national security law provides a certain, but still conditional purity of scientific development, the opportunity to focus on the general patterns of systemic vision of law and its components. Instead, the method of specification reveals the integrative properties of national security law, focuses on its complex nature, but does not remove the issue of sectoral origin in the system of law. Systematic analysis in the application of scientific approaches has a significant effect in determining the features of national security law, its regulatory and institutional features, the interaction of the internal elements of its own system and no less complex interaction with other components of the system of law. The holism method reveals and accompanies the characteristics and capabilities of a holistic approach towards defining the integrity of national security law, providing an approximation to the systemic understanding of this complex formation. It must be noted that the methodological principles of knowledge of national security law do not have any restrictions on the application of research methods, since there are no restrictions on the use of ideological and scientific approaches to address this complex problem of modern jurisprudence, the state of scientific development of which is currently not justified.

In the end, the conceptual vision of national security law is appropriately doctrinal through the separation of methodological tools that allow not only posing the problem but also finding the right solution, to draw a perfectly clear rational line of unity between the regulatory, institutional and organisational components of national security law. In this context, national security law receives a methodological platform that enables the development and resolution of a range of problems in this area of law in favour of a

more effective action of both the entire social and the greater state mechanism of national security.

It is important to apply innovative methods to substantiating not only the sectoral affiliation of national security law to the system of national law in such a systemic quality, but also internal characteristics, peculiarities of social origin of this branch of law and its functioning among other normative communicative factors existing in society. This is facilitated by the proposed and expanded nonlinear characteristics of the system of law, with the separation of the epistemological centre, which is the rhizome paradigm. It must be recognised that the rhizome of law becomes theoretically applicable in the formation not only of the methodological foundations of knowledge, but also of a correspondingly thorough concept of national security law.

RESULTS AND DISCUSSION

National security law, as the subject of the study, affirms its own integrity, but has clearly defined complex features due to the peculiarities of national security [7]. It is natural that in such circumstances the study of national security law should be conducted using an interdisciplinary approach, which sufficiently ensures the methodological relevance of the research program on the way to the described aim [8].

Of course, an interdisciplinary approach, with all its powerful methodological arsenal and considerable methodological capabilities, is sufficiently effective but not sufficient in view of the complexity of the methodological challenge in revealing all the frontiers of national security law as a whole. Therefore, the interdisciplinary approach does not in any way limit the use of other scientific approaches, which include not only systemic, holistic, but also institutional, functional and synergistic approaches. At the same time, it must be acknowledged that, in addition to the objective necessity of its application, the interdisciplinary approach guarantees the greatest scientific effect in the research work on the disclosure of the concept of national security law and its integrity. Moreover, the institution nature of law and the state requires the use of research methods that fully reveal the features of not only legal and state institutions in the field of national security, but also the interaction of law and the state in solving the problems of national security [9]. The empirical nature of national security, which should be emphasised, is in identifying the features of the real state of protection of an individual, society and state against external and internal threats[1]. At the same time, the epistemology of national security does not appear without adequate interdisciplinary research, which strongly confirms the general thesis that a multidisciplinary approach is needed in the study of national security law and its integrity.

It should also be noted that an interdisciplinary approach to national security law is driven by the functional features of law and the state. The legal regime of national security is based on the implementation of practically all functions of law and the state,

[1] Law of Ukraine "On National Security" (2018, June). Retrieved from http://zakon.rada.gov.ua/laws/show/2469-19.

both in their separation and in dialectical combination. Characterisation of the functions of law and the state forces a researcher to use methods and ways of cognition of different branches of jurisprudence, which is determined precisely by the interdisciplinary approach. Therefore, an interdisciplinary approach to national security law is necessary and important given the subject matter and strategy of the study. An interdisciplinary approach allows substantiating the concept of national security law of Ukraine, exploring issues of formation and development of this branch of law in the system of law of Ukraine. National security law in its formation undergoes a complex process of structuring, and therefore structural analysis is important for the definition and characterisation of this area of law. The structure of national security attests to its holistic nature, bringing it closer to systemic perception and definition of the unity and interaction of all system elements.

Systematic features of national security law are based, first of all, on the systematic nature of the law, but it is difficult to present the legal form and legal content of national security as a system. There is some inconsistency between the perception of national security as a system under which the state of security of an individual, society, state, and the legal solution of national security at the ontological level are formed. This inconsistency requires a scientific explanation, which is why it is needed to turn to the understanding of systematic law in the context of the formation of conceptual principles of national security law. Scientific studies of the system of law have been conducted and are being conducted quite actively, which generally contributes to the development of conceptual ideas that underpin not only the legal system but also the national legal systems. In this case, the choice of a methodological approach to research focuses primarily on the application of a systematic approach, other methodological approaches are used to the extent that compensates for the deficiency of techniques, principles and rules of cognition defined by the research program. However, it is important to understand that the system of law contains not only doctrinal but also ideological characteristics, and therefore exhibits a dualism of ideology and doctrine.

Systematic nature of law is not only its most important property, systemic nature is a methodological setting of cognition of any legal phenomena, the formation of legal constructs, among which legal integrity is important. Integrity, as a characteristic of the subject matter of the study, which is a national security law, is only one of the defining features of systematic nature. Therefore, it is expectable to turn to a systematic approach and its epistemological capabilities in understanding national security law as a certain structured integrity. The jurisprudence methodology proposes to apply a systematic approach and characterise its features at several levels. At the same time, according to the author, it is necessary to use both the classical understanding of the systematic approach and the postclassical, which is manifested, in particular, in the polysystemic vision of legal phenomena that form a general conception of law as a system in a state of constant development, and a static state of which has only a certain temporal dimension.

Polysystem [10] in the methodological provision of knowledge of law in general and national security law, in particular, allows expanding the boundaries of the systematic approach and to bring scientific research closer to understanding legal integrity. Therefore, this is not about contrasting the systemic approach to the polysystemic vision of the object of study to which it is entitled, but about forming a holistic picture of our conceptions of law and its phenomena by identifying the components that shape the common law system as separate systems. Such a research picture of the polysystemic vision of law is its integrity.

It can be argued that a polysystemic understanding of the content and properties of law allows one to successfully solve any ontological problem, including cognition of national security law. In this sense, national security receives important and necessary legal elements for internal unity, thus forming its own systemic integrity.

The question naturally arises as to whether it is worthwhile to deepen into the features of a systematic approach in the context of the formation of a conceptual model of legal integrity, and in particular of national security law as a whole. System methodology is based on many root causes. Among such root causes, polysystem and integrity are important, but not the key. At the same time, more careful clarification proves that the use of the previously accumulated arsenal of knowledge about system methodology in today's postmodern perception of law remains ineffective. This also applies to the use of the classical understanding of the systematic approach to determine the conceptual framework of national security law.

The concept of national security law must, first of all, be tested for its compliance with the universal requirement of systematicity, with the identification of institutional and functional characteristics. In solving this problem, the question remains concerning the study of the structure of law and legal phenomena, to which the law of national security certainly applies, using the provisions of structuralism. The current state of jurisprudence shows that structuralism manifests itself in post-structural views on law and legal phenomena.

The effectiveness of cognition of law using post-structural ideas is beyond doubt, but the structurality of law underlying such ideas is only one element of its system's characteristics. The structure of law in the context of applying a systematic approach remains a necessary and sufficiently organic element of the epistemological knowledge of national security law, the structure of which is complex, but affirms the integrity of this area of law. It should be borne in mind that post-structuralism for overcoming internal contradictions, which can be considered in national security law, allows going beyond the structure of objects and phenomena. Instead, the dogmatism of structuralism has a negative impact on the effectiveness of successful methodological tasks in the study of national security law. With regard to post-structuralism, the modern methodological arsenal of this epistemological approach focuses more on the philosophical explanation of reality, which has largely led to the emergence of postmodernism with the accentuation of ideas about the crisis of rationalism, deconstructivism, and ulti-

mately numerous social problems whose solutions are either unattainable or not subject to scientific discourse. Of course, it is not necessary to consider such methodological settings as acceptable for the cognition of national security law for many reasons, but the main point is that in postmodern conditions, issues of security of an individual and society come to the fore, are of primary importance for theoretical substantiation and practical application and are forced to search for more effective methodological tools. It is obvious that in the social aspect similar methodological tools and techniques are contained in the theory of structuring [11]. National security law, as a concept that needs to determine its unity, integrity in the system of law, cannot ignore the provisions of structural theory. The theory of the structure of society, and this needs to be focused on, based on a systematic approach to the study of social activity, where priority is given not just to an individual – an active social actor, but to social practices, the constant reproduction of certain social actions by individuals (social figures) [11]. These provisions are certainly important for legal communications, including in the field of national security. The theory of structuring, among other things, sufficiently substantiates the systemic paradigm of organising a society, the main actor of which is a person, as an active subject. Based on the theory of structuring, the active understanding of social reality is relevant to the cognition of law, its integrity, without which, in the end, the system itself is not imagined. The active perception of the national security system with the isolation of the subjects of this system particularly emphasises the importance of structural theory for the formation of the concept of national security law. Thus, the comprehension of law as a whole and of national security in particular, using structural theory, remains relevant and important.

The methodological possibilities of structuralism, post-structuralism, the theory of structuring, in our opinion, are conditioned by and based on the active, creative role of the systematic approach. Returning to the peculiarities of the systematic approach, it is necessary to pay attention to the important fact that systematic nature as a common property of organised phenomena and objects, as a necessary qualitative property of social activity, allows not only to successfully isolate and combine components of the system in their unity and interconnections, but to determine the peculiarities interaction between a subject and object in the process of cognition, which is not less important in the methodological aspect. This makes it possible to conclude the use of a systematic approach in the formation of the theory of legal integrity, which focuses on the integrity of law, legal phenomena that accompany not only the existence and activity of social actors, but also their associations in less complex and more complex social forms, to which national security law belongs.

All the complex aspects of systems of natural and social origin make it possible to understand the general theory of systems. Systems of social origin, of course, include, with some differences, the national security system. The difference between the national security system is that the systematic features are somewhat weakened in structural and functional dimensions. The components of the national security structure

operate independently, their autonomy is natural, but the teleological purpose of any institutional formation of the national security system compels the laws of the system, focusing solely on the goal achievement. The purpose, which is the safe conditions of human life, the existence of society and the state, determines the integrity not only of national security, but also of national security law.

Another issue that needs to be addressed and is methodologically supportive of the concept of national security law is epistemological pluralism existing in modern legal science. The multivariate scientific approaches, the widespread use of research methods cannot but affect the content and effectiveness of the systematic approach. The systematic approach has significantly expanded its cognitive capabilities, is sufficiently active in the outlook of the world, focusing not only on the epistemological disclosure of the causes and conditions of being right, but also on its institutional characteristics, largely dependent on the purpose of law, its rule in any national law system [12]. Formal features of the rule of law are more successfully revealed at a new methodological level, which can be considered as a continuation of the development of a systematic approach. Such a methodological level of research is an institutional and functional approach that is extremely relevant for scientific developments in national security law.

The institutionalisation of law is a complex enough process that demonstrates and reveals the internal linkages of law, its steady dependence on principles and rules, procedures that are manifested in both law-making and law enforcement. The solution to this problem lies in the plane of understanding law, the law as a certain social construction, which individual scholars refer to problems that are solved in the context of legal policy, not just legal doctrine [13]. At the same time, the theoretical and practical aspects of the interaction between law and the state give reason to emphasise the problem of institutionalisation. It turns out that the institutionalisation of law is closely linked to the institutionalisation of the state, it is through the institutions of law that legitimisation of state activity occurs, and the institutions of state power are increasingly seeking to actively influence the formation of the national system of law. Moreover, the activity of the institutions of state power in international relations leads to the extension of the legal foundations of the state mechanism, to the filling of the national system of law with new rules, which are effectively implemented into national legislation and legal practice, into the national legal system. This is facilitated by a continuous and dynamic process of legal acculturation.

The ontological foundations of the formation of national security law as a systemic integrity determine the question of institutional characteristics and functional purpose of such integrity, which not only in theory but also in practice allows revealing the peculiarities of the interaction of law, state and society in the direction of national security. Such interaction occurs through the regulatory and legal definition of those institutions of the state and civil society, which have to perform their functions to achieve a state of security, protection of national interests, among which the protection of fun-

damental rights and human freedoms are main. Moreover, the state of national security is considered in this case as the purpose of the activity of these state institutions, as an exclusive guarantee of the legal status of a person.

The possibility of ensuring national security is of universal importance and it is implemented with the obligatory use of institutional and functional means, which in their combination provide the basis for applying the institutional and functional approach.

Separation of social institutions, as system complexes that share common features and have the same orientation in social activity, is paramount in implementing the institutional and functional approach. The same orientation of social institutions is based on the performance of certain socially conditioned functions. That is why the society has the appropriate institutional characteristics, and the institutions operating in the society perform certain functions assigned by the purpose of these institutions. This conclusion applies not only to the state but also to law and is reinforced by the interaction of law and the state in the context of national security.

Institutional and functional approach is applied not only in the study of legal and state institutions, the unity of which in the power mechanism ensures its stability, which significantly affects the effectiveness of legal influence [14]. This methodological approach is necessary to justify the content and purpose of social systems, which are the law and the state. At the same time, focusing the cognitive process around social values, interests, goals and tasks of the establishment and development of the institutions of law and state allows identifying systemic features, concluding about the community and difference of such institutions, their static integrity and dynamic unity with respect to the respective social systems. This circumstance is extremely important for national security law, whose system is a matter of discourse and requires doctrinal justification today. However, the lack of unity in understanding the ontology of national security law and its system does not mean that such a phenomenon does not exist. The institutional and functional approach makes it sufficiently convincing to reveal the specific features of national security law and to confirm the reality of its existence within the national legal system. In fact, the law and the state, in their essence, produce social institutions that are functionally related. This is where the peculiarity of interdependence arises and clearly manifests itself – society requires legal institutions that are not only declared but also produced by the state. The state is not an impersonal, abstract concept in the social organisation of society, since it is represented in the society by certain institutions, which are formed solely on the basis of a corresponding functional order, which must come from and actually originate from society. For national security law, it is important that imposing on the public society those institutions, which do not meet social needs, is impossible, and such impossibility is based, first of all, on the effective operation of law and established constitutional mechanisms. The idea of constitutionalism [15], as one of the leading ideas of the general principle of the rule of law, is realised in the ability of the state mechanism to create such institutions that, first,

meet the requirements of law, and, secondly, exist and act (fulfil certain functions) solely on based on the requirements of law.

Turning to the institutional-functional approach, we go through a consistent, methodologically validated path that goes through the knowledge and understanding of the foundations of institutionalism and functionalism. However, the phenomenology of institutionalism and functionalism, of course, is separated from the understanding of the essence of institutions as certain groups of norms that perform certain social functions on the basis of legal prescriptions, it does not allow forming and, therefore, using the institutional-functional approach as an important means of cognition the national security law.

Instead, no matter how grounded are the provisions of the institutional and functional approach in the methodology of legal knowledge, without determining the place of an individual in the complicated mechanism of formation and operation of legal and state institutions, it is impossible to reveal the social nature, and hence the social significance of such an approach to understanding the law of national security as a coherent community in the system of law, which is open in its formation to sectoral entities [16].

The National Security Law Study Program envisages the application of other methodological approaches, including a holistic approach, which substantiates the principle of integrity and allows specifying the boundaries of cognition among systematic studies, enriching the methodological arsenal with new visions of the legal form of national security.

A holistic approach, the possibilities of which were revealed in particular by A.G. Maslow [17] is a precursor to a systemic vision of research. However, it is not possible to relate such a methodological approach to a certain kind of systematic research. A distinctive feature of the holistic approach is the researcher's explicit accent on the integrity of the object as a certain task, which is important when considering such a national security right. Those obstacles that stand in the way of distinguishing, among other characteristics of national security law, its holistic features are resolved by applying the provisions of the philosophy of integrity or holism. In the end, a holistic approach allows an individual qualities of social subjects and social phenomena to be combined into certain systematic, organised entities, which are represented by social institutions, where the determining role belongs not only to an individual, but to organised groups of socially inclined towards the achievement of a specific goal individuals. In such circumstances the mutual dependence of existing legal norms on social practice, which is most clearly represented in ensuring national security by the activity of the respective state institutions, is absolute.

At the same time, a research strategy for cognition of national security law can be successful, given the fact that an important feature (property) of systems is their intrinsic capacity for self-organisation. Self-organisation allows to provide some independence of formation and existence of systems. The system of national security law is

dependent on the system of law, but it has its own specific features that make it possible to distinguish national security law as an independent industry. The system of law, as well as the systemic integrity of national security law, are formed not only by certain common laws, but also by internal processes that have signs of self-organisation under the influence of many external factors. Among these factors, the most active is the influence of the state, its complex mechanism. The law-making and law enforcement activities of the state significantly influence the formation of the legal form of national security, its normative and institutional components, but at the same time, it is subject to the reverse of the law, which limits the possibilities of the state to apply force options for solving conflicts, brings such actions in line with the interests of the whole society and a specific person. In the organisation of the national security system, and therefore the rights of national security, the needs of the individual and society in safe living conditions and existence that clearly reveal social communications with the participation of all subjects in this field, are defining. The formation of national security law, in addition to the patterns that testify the effect of the relevant legal regime, is subject to complex rules of synergy, due to non-linear processes and interaction. The nonlinearity of the system of law and national security law is provided by the rhizome paradigm [18]. A synergistic approach to the cognition of national security law is able to effectively identify the effects of nonlinear processes on the systemic integrity of the national security law, including those characteristic of social revolutions [19].

The national security law research strategy cannot but take into account the axiological characteristics of the law and the state in general and the national security axiology in particular, on the basis of which a valuable picture of national security law is formed. The axiology of national security law proceeds from the properties of law [20], its essential features, which are most evident in legal communications. The properties of national security law not only actualise its content, but also reveal the legal values expressed by this branch of law by streamlining social communications in the field of national security. At the same time, it is precisely the properties of national security law that ensure its interaction with the state, show the ability of the right to bring the activities of state institutions in line with social demands, human needs based on value-normative requirements. There is an inseparable connection of the properties of law with the institutional and functional constituent of the state and further – with the implementation of the possibilities of law in influencing national security.

The properties of law are manifested in the rhizome, which combines the social and moral-ethical energy necessary for self-organisation of the system of law, even in the absence of interaction of law with the state, or in the face of external and internal threats, which are not able to overcome the relevant institutions of public authority belonging to the security and defence sector. In addition, the properties of law are fully responsive to needs and demands of an individual, among which is the security of life is the most important, which is certainly meaningful for the formation of national security law. At the same time, the integration of the properties of law in the

system of legal values allows ensuring the specification of national interests, their harmonisation and protection. Valuable attitudes, the normative beginning of law lead to the achievement of a goal through socially orderly activity, where it is necessary to distinguish the functional aspect of law – its regulative nature in combination with the protective functional purpose.

Social activity and interaction of subjects, undergoing in the process of regulating the value-normative influence of law, are differently manifested in different spheres of social reality, including in the field of national security. This is determined by the peculiarities of communication of social actors, peculiarities aimed at achieving a certain purpose of their activity. Socio-communicative interactions of subjects, or otherwise, purpose-mediated public relations in the field of national security, undergo a complex process of institutionalisation that acquires legal characteristics under the influence of norms of law – mandatory rules of conduct. It is important that in the process of social communication in the field of national security and the achievement of meaningful goals for the participants of communication ties such norms arise due to the reproduction of actions that are permissible and necessary for all without exception, which do not simply destroy the state of security, but form protection and provide the state national security, which is confirmed not only by domestic practice, but also by the experience of other countries not less sensitive to this problem. It is important that the behaviour of subjects in the process of communicative interaction is different. This difference is determined, first of all, by the way that influences the behaviour and in general the communicative interaction of social actors, if more broadly – their activity, as well as – the national interests that underlie this activity. In these circumstances, a certain legal environment of social activity of subjects of national security is created, special conditions for the existence of law in this legal environment, which is conditioned by the need to ensure protection of national interests, where a certain legal regime arises and operates, which forms and approves the national security law in the national system of law.

The methodological principles of knowledge of national security law confirm and expand the scientific position regarding the functional purpose of the methodological tool of jurisprudence [21], which allows to open new facets of legal reality with the assertion of separate legal communities as independent systems that exist and function in the system of law. Among other such systemic regulatory and legal community in the system of law of Ukraine is the right of national security.

CONCLUSIONS

The proposed methodological approaches to the knowledge of national security law, the search for the methodological basis of its systemic integrity, the identification of the active basis of law in its interaction with the state and civil society through the needs of an individual make it possible to make a reasonable conclusion about the formation of national security law, which occurs as a result of the relevant legal regime and nonlinear processes caused by the rhizome of law. National security law

affirms the most successful and effective active interaction between law, society and the state with a designated anthropological security centre that focuses on a human.

According to the results of the study, the national security law of Ukraine should be considered as an independent branch of law – a coherent, systematic set of rules of law, publicly defined, legitimate rules of conduct aimed at achieving and maintaining safe living conditions for human beings and the existence of society and the state. Thus, the teleology of conscious activity of human and society, the state regarding the legal content of national security, as a certain systemic integrity, and even more so – self-organisation of such activity not only under the influence of the legal regime, but also due to the action of the rhizome at the expense of internal synergy in achieving the goal, which is the national security, allow implementing the appropriate methodological setting and to formulate the concept of national security law as an independent branch in the national system of law.

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СКЛАД ПРАВОВІДНОСИН З ЕЛЕКТРОННОЇ ТОРГІВЛІ В РАКУРСІ ЗАХИСТУ ПРАВ СПОЖИВАЧІВ

Анотація. *Активізація інноваційних процесів у світовій практиці торгівлі зумовлює необхідність переосмислення методології управління на рівні суб'єктів економічної системи різних рівнів та типів. Придбання товарів через Інтернет стає все більш розповсюдженим явищем. Тому актуальність роботи не викликає сумнівів. Стаття присвячена проблемам правового регулювання відносин електронної торгівлі в Україні, що набула значного поширення завдяки численним перевагам для її учасників. Разом з тим, така торгівля може бути ризикованою для споживачів у разі зловживання продавцями своїми можливостями. Встановлено, що відносини, які виникають між покупцем і продавцем товарів, робіт та послуг в Інтернеті не відрізняються від традиційних правил купівлі-продажу і регулюються, зокрема, положеннями Цивільного кодексу України та Законом України «Про захист прав споживачів». Але прогалини в Законі України «Про електронну комерцію» створюють підґрунтя для зловживань. Цей Закон не є достатньо зрозумілим для пересічного споживача, оскільки в ньому відсутні ґрунтовні та прозорі положення про склад відносин е-торгівлі (суб'єкти, об'єкти, засоби регулювання), а також вимоги до особи, яка використовує такі ресурси, як Інтернет-магазин та/або торговельну Інтернет-платформу; схем зв'язків при е-торгівлі (особа, що пропонує товар через Інтернет-магазин, може бути його продавцем чи використовувати постачальників для надсилання товару покупцеві); змісту інформації, що повинна надаватися споживачу, та договорів зі споживачем за різних схем е-торгівлі; уповноваженого органу та саморегулівних організацій із визначенням їх ролі у сфері е-торгівлі. Згаданий акт не регулює належним чином і відносини щодо відповідальності з урахуванням специфіки е-торгівлі. Все це свідчить про необхідність вдосконалення правового регулювання зазначених відносин з урахуванням потреб громадянського суспільства і цифрової економіки, що може бути забезпечено прийняттям нової, більш ґрунтовної і зрозумілої для споживачів редакції Закону «Про електронну комерцію».*

Ключові слова: електронна торгівля/е-торгівля, склад відносин е-торгівлі, суб'єкти е-торгівлі, Інтернет-магазин, вдосконалення правового регулювання.

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COMPOSITION OF E-COMMERCE RELATIONSHIPS IN THE CONTEXT OF CONSUMER RIGHTS PROTECTION

Abstract. *Activation of innovation processes in the world trade practice necessitates a reinterpretation of the management methodology at the level of subjects of the economic system of different levels and types. Purchasing goods online is becoming more commonplace. Therefore, the relevance of the work is beyond doubt. The paper is highlights the issues of legal regulation of e-commerce relations in Ukraine, which has become widespread due to numerous benefits for its participants. However, such commerce can be risky for consumers, should sellers abuse their capabilities. It is established that the relationships that arise between the buyer and seller of goods, works and services on the Internet do not differ from the traditional rules of sale and are regulated, in particular, by the provisions of the Civil Code of Ukraine and the Law of Ukraine "On Consumer Protection". But the loopholes in the Law of Ukraine "On E-Commerce" create grounds for abuse. This Law is not sufficiently understandable for the average consumer as it lacks sound and transparent provisions on the composition of e-commerce relationships (entities, objects, means of regulation), as well as requirements for the person using such resources as the online store and/or online trading platform; e-commerce communication schemes (a person who offers a product through an online store can be the seller of the product or use suppliers to send the product to the buyer); the content of the information to be provided to the consumer and the contracts with the consumer under various e-commerce schemes; authorized body and self-regulatory organizations, with definition of their role in the field of e-commerce. The aforementioned act does not properly regulate the relationship on liability, with consideration of the specificity of e-commerce. All of this testifies to the need to improve the legal regulation of these relations, taking into account the needs of civil society and the digital economy, which can be ensured by the adoption of a new, more substantive and consumer-friendly version of the Law "On E-Commerce".*

Key words: e-commerce, composition of e-commerce relations, subjects of e-commerce, online store, improvement of legal regulation.

INTRODUCTION

One of the key features of modern state-organized social life is the development of civil society institutions and digital technologies that have given rise to such phenomena as the digital (electronic) economy and e-business. At the same time, traditional problems remain relevant in such a society, among which the issue of consumer rights protection is of paramount importance. Moreover, this issue is exacerbated both in the perspective of civil society (the latter focused on the harmoniza-

tion of public interests and private interests of members of society, which do not conflict with the common good), and in view of the specificities of the digital economy (the use of information and communication technologies in business, including with e-commerce, not only has numerous benefits but is also associated with significant risks for participants in such relationships, the most vulnerable of which are consumers) [1–4]. In such circumstances, a significant role is played by statutory regulation, which should be adequate in relation to the state of said relations.

The adoption of the Law "On E-Commerce"[1] has largely contributed to improving such regulation, but there remain significant gaps in the current legislation governing the digital economy, including consumer rights protection mechanisms. This is largely due to the novelty and complexity of such relationships, their rapid development, the use of new communication schemes by businesses to minimize the costs of organizing and maintaining *electronic commerce* (hereinafter referred to as *e-commerce*). Consumer rights protection issues in the field of e-commerce as a component of e-commerce have been raised by a number of researchers, both by theorists (M.M. Kuzmin [5], A. M. Yazvins'ka [6], N.Yu. Golubeva [7], V. Zhelihovsky [8] and others) and by practitioners (Yu. Asadchev [9], V. Bunt [10], O. Fedyenko[2] and others). At the same time, the issues of complex e-commerce communication schemes that are not reflected in the legislation, which complicate and, in some cases, make it impossible to protect the consumer rights of such commerce, remain, despite their relevance, unexplored. However, these circumstances should not prevent the current e-commerce relationship status from being revealed in terms of its subjective composition and the ability to protect consumer rights in the event of applying complex links between the seller and the buyer using an online store and business partners/contractors on the part of the entity perceived by consumer as the seller, which is the purpose of this paper.

1. MATERIALS AND METHODS

To achieve this purpose, a number of scientific methods were applied: *analysis and synthesis* in determining the place and role of e-commerce and online trading platforms in the structure of e-commerce; *interpretation* (in determining the basic features of an online store), *dialectical* (on the development of these relationships, to which the legislator should timely respond), *systemic* (in identifying the use of various e-commerce schemes that affect the ability of consumers to protect their rights and legal interests); *generalization*, which made it possible to establish the basic properties of an online store as a special category of property and the related

[1] Law of Ukraine “On e-commerce”. (2015, March). Retrieved from https://zakon.rada.gov.ua/laws/show/675-19

[2] Letter from the Chairman of the Board of Directors of the Internet Association of Ukraine O. Fedyenko No. 130/1-4 “On Amendments to the Law of Ukraine” On Protection of Consumer Rights "and certain legislative acts of Ukraine on measures for the de-activation of activities of sub- e-commerce objects”. (2017, July). Retrieved from http://inau.ua/document/lyst-no1301-4-vid-24072017-shchodo-proektu-zakonu-ukrayiny-pro-vnesennya-zmin-do-zakonu

responsibilities of its owner/user, which eventually gave the opportunity to come up with proposals for improving the legal regulation of e-commerce in order to protect consumer rights.

Using the generalization method, it is established that the Internet, as a very important component of the information infrastructure, affects all components of information security. Therefore, the legal regulation of these relations should be implemented in all areas. There are two ways of defining the basics of public policy: 1) defining the basics of public policy and approving them with a statutory legal act; 2) the regulation of those real relationships that already exist. Among the various relationships that arise in the application of Internet technologies, it is necessary to distinguish those that by their nature perceive legal regulation, that is, can become legal relations. It should be noted that among experts there is a very negative attitude to the very idea of legal regulation of relationships that arise on the Internet. As there is John Barlow's "A Declaration of the Independence of Cyberspace", which proclaims the right to freedom of the Internet space and the principle that no country interferes in regulating Internet relations.

The method of analysis allowed to determine that the advantages of e-commerce, as a rule, are lower costs of doing business and, accordingly, lower price of the offered goods, convenience for potential consumers in finding the necessary goods, including those rare, hard to find in ordinary (physical) stores. However, in this area, there are significant security risks for the parties to these relationships in the event of unfairness of the partner/counterparty, in particular, for buyers (in terms of quality, completeness, receipt of the claimed product, the possibility of its exchange or return, compensation for related losses, confidential information leaks, etc.). As V. Zwass notes, absolute security in this area is hard to hope for [11].

2. RESULTS AND DISCUSSION

2.1 Analysis of the specifics of the development of e-commerce in the works of different researchers

To clarify the specifics of e-commerce, we should first of all refer to the works of researchers of these relations, in particular, V. Zwass [11], who outlines the main stages of the development of relations with e-business and e-commerce as its component, advantages and risks of using the information and communication technologies in the process of concluding and performing the sale and purchase agreement with the consumer, participants of such relations. This researcher links the rapid development of these relationships with the spread of the Internet and the advent of the World Wide Web (1991) and the first browser to access it (1993), and more recently the availability of high-speed Internet and mobile devices (including tablets, laptops, smartphones). E-commerce is conducted in consumer-oriented e-commerce sites (or markets) and in the supply chain operating on the Internet [12–15]. Consumer-oriented trading venues include large shopping malls, consumer auction platforms (including eBay – a trading website managed by a US-based company of

the same name [16]), multi-channel retailers (organizations engaged in retail sale of consumer goods) and numerous online stores. The so-called sharing economy allows for more efficient use of resources, while virtually instant access to services is provided by platforms at the request of potential consumers. As a result of establishing semi-permanent supply chains, hub-companies surround themselves with suppliers who perform most of the production tasks and supply goods and services to the central firm (and in Ukraine, as the experience shows, directly to the consumer in order to save on supplies to the central firm). The growth of e-commerce is facilitated by electronic directories and search engines for looking up information on the Internet, software agents or bots that act offline to search for a product in the system, digital authentication services that guarantee identity through the Internet. These intermediary services facilitate the sale of goods, the provision of various services (banking, ticket booking and stock market operations, services such as distance education and entertainment).

V. Zhelihovsky [8] points to two types of e-commerce (trade in information and trade in goods); distinguishes its components: networks (corporate; Internet; commercial); processes (market research; calculations; order performance; sales; support); subjects/participants (government; suppliers; sellers; users; manufacturers); conditions for the development of e-commerce (the conquest of consumer trust by companies using the Internet as a channel for distribution of products; ensuring the reliability of participants and their operations; creating the security of transmission and further storage of data in the Internet); composition of business operations necessary for e-commerce (contact, in particular, between potential customer and supplier; exchange of information; pre- and after-sales support – detailed information on products and services, product use instructions, customer's questions; sales; electronic payment by electronic money transfer, credit cards, electronic checks, electronic money); delivery management and tracking for physical products, direct delivery of products that can be distributed electronically.

He pays attention to such an unconventional subject as a virtual enterprise – a group of independent companies that unites – although without forming organizational unity in the form of a jointly created legal entity – their efforts to obtain opportunities to provide products and services that are not accessible to individual companies (distribution between members of a business process group, jointly managed by a central company and its trading partners, receiving new opportunities of suppliers and customers as a benefit of this form of cooperation; customer response; rapid response to demand; cost savings; reduced costs through lower costs for advertising, delivery (for goods that can be obtained electronically), design and production, market analysis, strategic planning, opportunities, etc.). He highlights a number of benefits of e-commerce (equal access to the market for large corporations and small firms; access to new markets; involvement of customers in the development and implementation of new products and services, etc.) and legal problems of e-commerce, including infor-

mation protection, consumer protection, liability, unification of national e-commerce legislation.

A. Shablyenko, analysing the relations that develop in the field of e-commerce [17], draws attention to their complexity both in terms of the processes and resources necessary for securing e-commerce, and in view of the subject composition. The latter, according to this researcher, includes two categories of persons: 1) "common subjects" – persons who can participate in civil relations in accordance with Art. 2 of the Civil Code of Ukraine[1] (legal entities and individuals, state of Ukraine, Autonomous Republic of Crimea, territorial communities, foreign states and other subjects of public law, all who are customers and suppliers of goods or services via the Internet); 2) special/institutional subjects "which are so-called "invisible" entities, but without them the process of e-commerce is impossible in the technological sense, they at different stages of the relationship can affect many conditions" (place and time and or performance of the agreement, message delivery confirmation, etc.). This category includes telecommunications operators and providers, payment system operators; registrars and administrators who assign network IDs, hosting providers; certification centres [17].

The peculiarities of the subjective composition of Internet relations are explored by R.E. Ennan [18], who attributes the following categories of persons to the scope of subjects:

1) telecommunication operators and providers, which ensure the functioning of the Internet as an information system and provide a number of necessary services: connection (providing access to the network); administration (ensuring the functioning of technical means of maintaining the Internet address space); hosting (placing customer information resources on web servers and providing access to these resources); network navigation services (creation of web portals that facilitate the search and access to network information resources);

2) manufacturers, owners and distributors of information and information resources that create content on the Internet (create electronic information resources, own the rights to them, ensure the functioning of these resources and meet the information needs of users);

3) entities providing specific services for concluding electronic (network) agreements (contracts) via the Internet, that is, all that is covered by the term "e-business (commerce)";

4) consumers (users) of telecommunication services (individuals and legal entities that need, order, receive telecommunication services for their own information needs). However, the said researcher attributes online shops, online casinos, online auctions, etc. to the third group of entities (according to his classification), although, in accordance with the Law "On E-Commerce" (Art. 3), an online store is a means of presenting or selling an item, job or service through an electronic transaction.

[1] Civil Code of Ukraine. (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15

The specifics of functioning of the online store (including from the technical aspect) are rather comprehensively highlighted by A. Vasilyuk [19]:

1) defining it as a software package that allows you to sell products or services over the Internet and automate business process management, as a specialized website owned by a manufacturer, a trading company, etc., designed to promote consumer products in the market, increase sales, attract new buyers;

2) emphasizing its advantages over a traditional store (a wide range of goods, unattainable for a retail store; 24-hour availability without breaks and weekends; saving time on purchases; lower prices for goods and services; convenience of payment);

3) highlighting the functional parts of online stores (product catalogue, search engine, shopping cart, registration form, order form);

4) dividing online stores into: (a) the criterion of the business model used for the online store, which is characterized by the absence of a traditional trading network and the combination of offline and online business (online store is created on the basis of a real trading structure); (b) on the basis of stock availability – stores working under supplier contracts (they do not have significant own stock) and stores with their own warehouse facilities and corresponding stock availability, and also raising the major issues of online shopping that arise at the intersection of Internet technology and traditional business activities, both psychological and emotional (compared to traditional trading with its inherent ability to view and evaluate the consumer of the product, its delivery, etc.), and the lega lnature – legal regulation focuses mainly on traditional trade, and transparent and effective "rules of the game" in the field of its electronic version remain still desirable for consumers in the face of numerous violations of their rights, as evidenced by violations in this area [20–23].

2.2 Features of the analysis of e-commerce in the Ukrainian legislation

Recognizing the validity of most of the provisions of the aforementioned researchers, in view of this purpose, it is necessary to focus on the subjective composition of e-commerce, highlighting its direct participants (first of all, sellers and buyers-consumers, providers of information services on goods) and related by A. Shablyenko [17] to the category of "invisible" in the e-commerce process of entities (first of all, operators and telecommunication providers, providers of electronic trust services). Although these two categories of entities are important for establishing e-commerce relationships, let us focus on the first one – its direct participants, emphasized in the Law "On E-Commerce"[1], as well as on such e-commerce resources as an online store (and online trading platform (e-mall), which presents online stores of different entrepreneurs) [24].

In this regard, it is advisable to refer to the Law "On E-Commerce"[2], which defines e-commerce as an economic activity in the field of e-sale, sale of goods remotely to the

[1] Law of Ukraine "On e-commerce". (2015, March). Retrieved from https://zakon.rada.gov.ua/laws/show/675-19.

[2] *Ibidem*

buyer by making electronic transactions using information and telecommunication systems, and its subjects are, on the one hand, an entity of any legal form that sells goods, performs work, renders services using information and telecommunication systems, and on the other hand – a person who purchases, orders, uses the specified goods, works, services by means of electronic transaction (hereinafter referred to as the consumer).

The specified law more or less thoroughly defines the requirements for:

– 3 categories of subjects of e-commerce (Art. 6-9): (1) seller (performer, supplier) of goods, works, services, which is obliged to provide direct, simple, stable access to other participants in the field of e-commerce to such information (full name of the legal entity or surname, name, patronymic of the individual-entrepreneur; location of the legal entity or place of registration and place of actual residence of the individual-entrepreneur; e-mail address and/or online store address; identification code for the legal entity or the individual taxpayer card registration number for the individual-entrepreneur, or a series and passport number for the individual-entrepreneur who, due to their religious beliefs, refused to accept the individual taxpayer card registration number and officially notified the relevant authority of the state tax service, and bears a passport, license information (series, number, expiration date and date of issue), if the business is subject to licensing; regarding the inclusion of taxes in the calculation of the cost of goods, works, services and, in the case of delivery of goods, information on the cost of delivery; other information that is to be disclosed in accordance with the legislation; ensure full correspondence of the subject matter of the electronic agreement concluded by the parties with quantitative and qualitative characteristics; has the right to request from the other party only such information, without which the conclusion and performance of obligations under the electronic agreement is impossible; (2) the buyer (customer, consumer) of goods, works, services in the field of e-commerce, the rights and obligations of which are determined by the Law of Ukraine "On Consumer Rights Protection"[1], as well as Art. 7 of the Law "On E-commerce"[2] concerning: notification of the information necessary for the conclusion of the electronic agreement; (3) an e-commerce intermediary provider for disclosure of information depending on its role in the conclusion of the e-contract, including if it is the initiator of the transfer of information (Art. 9);

– order of electronic transactions (Art. 10-16), including distribution of commercial electronic communications in the field of e-commerce, which must meet the requirements of Art. 10, in particular, regarding their content; the order of conclusion of the e-contract, including its essential terms and conditions; the requirements for acceptance and the offer and the form of confirmation of the electronic transaction (in the form of electronic document, receipt, merchandise or cash receipt, ticket, coupon or other

[1] Law of Ukraine “On consumer rights protection”. (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

[2] Law of Ukraine “On e-commerce”. (2015, March). Retrieved from https://zakon.rada.gov.ua/laws/show/675-19.

document at the time of the transaction or at the time of the seller's obligation to transfer the goods to the buyer); the confirmation of the electronic transaction must contain the following information: terms and conditions and procedure for the exchange (return) of the goods or refusal to perform work or render a service; the name of the seller (contractor, supplier), its location and the procedure for claiming the goods, works, services; warranties and information about other services related to the maintenance or repair of the product or the performance of the work or the rendering of the service; the procedure for termination of the agreement, if its validity period is not determined.

However, the rights of the buyer (customer, consumer) in the field of e-commerce are often violated in relation to:

– disclosure of the above information about the seller (because the consumer-only online store is only a means – a website for the promotion and sale of goods online, not an entity with a certain legal status), warranty, terms and conditions of return of goods;

– sending a confirmation of the conclusion of the electronic agreement and its terms and conditions in accordance with the requirements of the Law "On E-commerce", which reduces the ability of the consumer to protect their rights in the event of their violation;

– determining the seller's identity at the stage of ordering a product when it comes to selling through online stores without their own inventories (the buyer learns about the identity of the seller at the stage of receipt of the product without having the opportunity to verify their business reputation in this area in advance);

– opportunities for the consumer to determine (a) the specifics of the legal regime of the online store and online trading platform, including the obligatory identification of the identity of its owner (the person in whose name such site is registered or who actually uses such resource) with the relevant information about them (regarding legal form, address, identification code, etc.) that will determine at least to a certain extent (b) the integrity of the intent of the person who created or commissioned the site as an online store (the problem of fake sites is addressed by the cyber police through provision of guidance on how to identify them [25] in the absence of appropriate legal mechanisms (in particular, the ability of the consumer to identify the person in whose name the site is registered as an online store; the requirements for such a person in order to prevent abuse on their part);

– designation of a body, authorized and competent in the field of e-commerce regarding the possibility to detect violations in this field, to prosecute violators, to protect the rights of consumers.

At present, the reliance on the provisions of the Laws "On E-Commerce"[1] and "On Consumer Rights Protection"[2] is often in vain, since the former contains only reference

[1] Law of Ukraine “On e-commerce”.(2015, March). Retrieved from https://zakon.rada.gov.ua/laws/show/675-19

[2] Law of Ukraine “On consumer rights protection”. (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12

provisions to the "law and treaty" (Articles 17–19) and the latter – in spite of the provisions on non-compliance with the requirements of the first of the mentioned laws on disclosure of information about the participants in the relationship and the offered goods (works, services) –[1], it does not properly consider the specificity of e-commerce (including the buyer/consumer's ability to confirm the fact of conclusion and content of electronic agreement, establishing the seller's identity because of the violation of obligations by the online store owner and using their suppliers to send the goods to the buyer, of which the latter only learns upon receipt of the goods) and the abilities of the body authorized in the matters of consumer rights protection to prosecute violators in this new field [20].

Liability issues in the field of e-commerce are raised by the aforementioned and other researchers [26], who propose ways to solve them, including amending the aforementioned laws[2]. The government also addressed these issues by adopting the Concept of National Policy in the Field of Consumer Rights Protection for the Period up to 2020 [10], which emphasizes the problems of consumer vulnerability due to their weak protection by the state due to the declarative nature of the proclaimed rights and the lack of mechanisms for their realization and restoration. The purpose of this Concept is to create and implement an effective system of consumer protection in Ukraine on an EU basis, with consideration of the best practices of EU countries, and among its tasks is to ensure the protection of consumer rights in the field of e-commerce, performed by economic entities through information and telecommunication networks, including the Internet. Problem solving is possible by applying a comprehensive approach to solving consumer rights protection issues, which involves the development and interaction of all components of the consumer rights protection system in Ukraine[3], in particular, and legal support.

As A.N. Novitsky points out [27], "the influence of Internet-related public relations management by public authorities in the world is steadily increasing" due to the transfer of various functions of ordinary public relations, including e-commerce, to the Internet. In this regard, there is an increasing “need for legal regulation of these relations, especially by specialized bodies of the state” [27]. However, the specificity of the Internet space (transnational in nature, huge number of users, specificity of technologies used) makes the classic form of legal regulation of public relations that have arisen in the field of Internet use, quite ineffective, which necessitates to address the international practices [28–30].

[1] Law of Ukraine “On consumer rights protection”. (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

[2] Draft Law on Amendments to the Law of Ukraine “On Consumer Rights Protection” and certain legislative acts of Ukraine on measures for the de-activation of the activities of e-commerce entities. (2017, July). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62329

[3] Concept of state policy in the field of consumer rights protection up to 2020: Approved by the order of the Cabinet of Ministers of Ukraine. (2017, March). Retrieved from http://www.kmu.gov.ua/control/uk/cardnpd?docid=249869713

For this reason, we should refer to the EU practices[1], including: E-Commerce Directives on consumer awareness, protection of their interests by contacting the competent authority, adopting codes of conduct in the field, etc.

In these circumstances, the role of self-regulatory organizations, both at the transnational level and within Ukraine, is increasing, including conferring certain functions on them to regulate relations in the field. Focusing some of them (in particular, the Internet Association of Ukraine [31]) not only on protection of the interests of its members, but also on the establishment of civilized rules in the relevant field with balanced consideration of the public and private interests of the participants in the relations [31], testifies to the expediency of determining at the level the law of their role in regulating the said relations.

Such an improvement in e-commerce relations is possible by adopting a more substantive version of the Law "On E-Commerce"[2] than the current one, that would not only fundamentally, with consideration of EU practices [32–35], regulate these relations, but also make them transparent by providing an opportunity for average consumers to understand the specifics of such trade (the legal status of its participants, the legal regime of the resources used, e-commerce technology, including the information component, liability for infringements in this area and mechanisms for its enforcement, including authorized body, etc.) in order to have protection from abuse in this field without resorting to expensive services of lawyers. Legislation oriented on civilised regulation of e-commerce relations and strengthening of the role of self-regulatory organizations in this field will facilitate the development of civil society institutions and the digitization of economic relations in line with the government's decisions[3].

CONCLUSIONS

To summarize the research, we should emphasize the following issues of e-commerce: the composition of relations arising in this field is complicated: apart from

[1] Directive 2011/83 / EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13 / EEC and European Parliament and Council Directive 1999/44 / EC and repealing Council Directive 85/577 / EEC and Directive 97/7 / EC of the European Parliament and of the Council. Retrieved from http://eur-lex.europa.eu ; Directive 2000/31 / EC of the European Parliament and of the Council of 2000/8 / EC of the European Parliament and of the Council of 22 June 2000 on certain information society services services, in particular electronic commerce, in the internal market ("Directive on electronic commerce"). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031.

[2] Law of Ukraine dated 09/3/2015 “On e-commerce”. Retrieved from https://zakon.rada.gov.ua/laws/show/675-19.

[3] National Strategy for Promoting the Development of Civil Society in Ukraine for 2016-2020: Zat. By Decree of the President of Ukraine dated February 26, 2016, No. 68/2016. Official Bulletin of Ukraine, 2016, No. 18, art. 716. The same thing. Retrieved from https://www.kmu.gov.ua/ua/gromadskosti/gromadyanske-suspilstvo-i-vlada/spriyannya-rozvitku-gromadyanskogo-suspilstva/nacionalna-strategiya-spriyannya-rozvitku-gromadyanskogo-suspilstva-v-ukrayini-na-2016-2020-roki; On approval of the Concept of development of the digital economy and society of Ukraine for 2018-2020 and approval of the plan of measures for its implementation: Order of the Cabinet of Ministers of Ukraine dated January 17, 2018, No. 67-r. Retrieved from http://zakon2.rada. gov.ua/laws/show/67-2018-%D1%80/page2.

the traditional components (subject composition: economic entities with the status of sole proprietorship – individual or business organization with the status of legal entity), we encounter virtual groups of such entities using the same online store, the same online trading platform to promote their goods to consumers; objects (property in physical form – goods ordered by the consumer, warehouses or delivery points of ordered goods, such as telecommunication networks and structures, by means of which information is transferred/exchanged between the said entities regarding the advertising and offer of goods, their order, as well as virtual objects – e-commerce, online trading platform, electronic resources used in the process of establishing e-commerce relationships); legal regulation of e-commerce relationships is not transparent to the average consumer, who usually seems to be dealing with the online store as a seller, though such a store is only a site administered by interested parties who may act as a seller or mediator.

In addition, it is difficult to call the Law "On E-Commerce" profound, the one that considers the provisions of the relevant EU directives, despite Ukraine's official course on adapting their provisions in national legislation. Such a situation contradicts our country's course on civil society development and overcoming digital inequality, since the specified law does not properly consider consumer rights regarding protection of their interests in dealing with a seller, the information on whom is often absent from an online store or online platform, and obtaining it depends on digital skills that have not yet become commonplace for the average consumer. The way out of this difficult situation is seen in the adoption of a new, much more substantiated than the current one, and understandable for average citizens wording of the Law "On E-commerce", which defines (a) the content of the concepts used in this field, (b) the legal status e-commerce participants, depending on their role in establishing e-commerce relationships, including obligations of informational nature before the consumers, (c) the relationship schemes applicable in this field and the persons responsible before the consumer in the event of use of the supplier of goods in the chain e-commerce as a direct participant of these relations, (d) a body authorized in this field with the definition of its rights and responsibilities, (e) the role of self-regulatory organizations in the field of e-commerce, the criteria for delegation of individual powers of the state to them, the place of business rules ethics established by such organizations in the system of rules governing e-commerce relationships, (e) the legal regime of the e-commerce and online trading platform, (e) sanctions applicable to e-commerce violations, and procedure for their enforcement.

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СПАДКОВЕ ПРАВОНАСТУПНИЦТВО В ЦИВІЛЬНОМУ ПРАВІ УКРАЇНИ: ПРОБЛЕМНО-ТЕОРЕТИЧНИЙ АСПЕКТ

Анотація. *Інститут спадкування є складною системою конструкцій. Залежно від способу організації та побудови цілого із складових частин спостерігаються різні варіації конструювання спадкового правонаступництва. У свою чергу, сучасні соціально-економічні умови значно прискорюють життєвий цикл людини, що привертає підвищену увагу до його прав і обов'язків, які перейдуть в порядку правонаступництва до інших осіб – спадкоємців. Тому основна мета роботи полягає в проведенні комплексного дослідження інституту спадкового правонаступництва в цивільному праві України крізь призму теоретично обґрунтованої проблематики в контексті якісних трансформацій відповідних правовідносин та їх правового регулювання. Для досягнення поставленої мети автором були використані закони та категорії діалектики, формально-логічні прийоми, засоби герменевтики. Загальну методологічну основу статті склав діалектичний метод пізнання. В результаті дослідження автором констатовано обмеження ролі сімейно-забезпечувальної функції в спадковому праві України і розвиток в ньому концепції сингулярного правонаступництва. Автором обґрунтовано висновок про те, що правонаступництво окремих об'єктів цивільного права або взагалі не підлягає цивільно-правовому регулюванню, або підтверджує, що спадковому праву притаманний сингулярних характер успадкування об'єктів цивільного права. Автором також проведено дослідження універсального і сингулярного спадкового правонаступництва через призму їх генезису від правового регулювання часів Стародавнього Риму до сьогодні. В результаті комплексного аналізу були окреслені провідні проблеми в сфері спадкового правонаступництва в цивільному праві України, які вимагають свого поступового і зваженого рішення шляхом консолідації зусиль представників доктрини і практики з метою уніфікації, поновлення, і як підсумок – якісного реформування правового регулювання інституту спадкового правонаступництва в Україні в контексті позитивного досвіду інших держав та його поступової апробації на національному рівні.*

Ключові слова: спадкове право, сингулярне правонаступництво, спадкодавець, заповідальний відказ, цивільне право.

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HEREDITARY LEGAL SUCCESSION IN THE CIVIL LAW OF UKRAINE: PROBLEMATIC AND THEORETICAL ASPECT

Abstract. *The institution of succession is a complex system of constructs. Depending on the method of organization and construction of the whole from the constituent parts, different variations of the design of hereditary legal succession are observed. In turn, modern socio-economic conditions significantly accelerate a person's life cycle, which draws increased attention to their rights and obligations, which will be transferred by legal succession to other persons – heirs. Therefore, the main goal of the article is to conduct a comprehensive study of the institution of succession in the civil law of Ukraine through the lens of theoretically substantiated issues in the context of the qualitative transformations of the relevant legal relations and their legal regulation. To achieve this goal, the author used the laws and categories of dialectics, formal and logical techniques, means of hermeneutics. The general methodological basis of the article was the dialectical method of cognition. As a result of the study, the author ascertained the limitation of the role of the family support function in the succession law of Ukraine and the development of the concept of a singular succession therein. The author substantiates the conclusion that the legal succession of certain objects of civil law is either not subject to civil law regulation at all, or confirms that the singular nature of inheritance of objects of civil law is inherent in succession law. The author also performed a research of universal and singular succession through the lens of their genesis from legal regulation of the times of Ancient Rome to today. As a result of a comprehensive analysis, the most pressing issues in the field of succession in civil law of Ukraine were outlined, which require their gradual and balanced solution by consolidating the efforts of representatives of the doctrine and practice in order to unify, update, and as a result – qualitatively reform the legal regulation of the institution of hereditary legal succession in Ukraine in the context of the positive experience of other states and its gradual testing at the national level.*

Keywords: succession law, singular succession, testator, testamentary gift, civil law.

INTRODUCTION

Civil legal succession, as the transfer of rights and obligations from one person to another, occurs in the obligation and property law relations. A special type of civil legal succession is hereditary legal succession, which involves the transfer of subjective civil rights and obligations from a deceased person to another person, or to persons on the basis of the legal provisions on succession. The institution of inheritance ensures the transfer of the rights and duties of a deceased citizen, or who is declared dead in the manner prescribed by law, due to an unknown absence, to other persons specified by law [1]. The complexity of the institution of inheritance succes-

sion, connected with the transfer of property, as well as the rights and obligations of the legal successor to the legal successor in the actual and legal preservation of legal relations that existed under the legal successor, determines the multitude of theoretical approaches to determine its legal nature.

Thus, at present, the concept of the universal hereditary legal succession remains dominant (B.B. Cherepakhin [1], V.I. Serebrovsky [2], B.S. Antimonov [3], etc.). Its main provisions boil down to the fact that the hereditary mass is an inseparable unity of the rights and obligations of the testator and passes to one or more heirs as a whole without first transferring them as an intermediate stage to any person, i.e. directly [4–7].

Thus, its supporters conclude that not every transfer of subjective civil rights and obligations after the death of the legal successor should be considered as a hereditary legal succession. The historical and legal prerequisite for the formation of the concept of universal succession was the emergence of a new social organism, the head of which was the master of his wife and children, as well as a certain number of slaves, possessing, by virtue of Roman paternal authority, the right to control the life and death of all his subordinates ("pater familias"). This approach stemmed from the entire system of the Roman family as a closed socio-economic cell with a highly developed cult of ancestors and a family hearth [8]. The person who was intended to inherit by testament, became not just the owner of the family property, but also the testator's successor in terms of the sacred legal status in the family. Since the latter was "pater familias", after his death, his heir took this place, assuming the obligation to make sacrifices and extend hospitality, to patronize those who were under protection, the cult of the dead and blood vengeance, housekeeping. The specified succession has the personal legal status of the testator, the essence of which was reduced to the idea of inheritance as a legal fiction in the posthumous extension of power [9].

Hereditary legal succession has a number of distinctive features, namely: a) the basis of the transition is a complex set of facts, stipulated by the provisions of the succession law; b) transitional rights and obligations form a certain unity called the hereditary mass; c) the person acquiring the rights and obligations (heir) is the direct general (universal), but not partial (singular) legal successor of the deceased citizen [10]. As previously noted, the subject of universal legal succession is the entire set of rights and obligations of the legal successor, passing to its legal successor (legal successors). Thus, upon inheriting, the property of the testator is transferred to the heirs as a single whole, including proprietary rights and obligations, as well as personal (non-proprietary) rights associated with it [6; 11].

1. MATERIALS AND METHODS

To achieve this purpose, the paper applies the laws and categories of dialectics (the unity of historical and logical, abstract and concrete, general and special, single and unique) and Aristotelian techniques (analysis and synthesis, induction and deduc-

tion). The general methodological basis of the article was the dialectical method of cognition, which allows to analyse the research subject from different angles, but in unity with other legal phenomena, as well as with consideration of law enforcement practices.

In addition, the research process employs a set of approaches and methods of scientific cognition: multifactorial and contextual approaches, a systemic and structural method, a method of legal modelling, a dogmatic method, a comparative law method, a historical-law method, a systematic interpretation method, and legal and technical methods. Furthermore, means of hermeneutics were used, as the comparison always deals with other cultures, traditions, orders, texts, and without revealing their contents, their understanding also remains excluded.

Multifactorial and contextual approaches enabled the consideration of the sociocultural context of the formation and functioning of the institution of hereditary legal succession in the countries of the continental legal system and in Ukraine, its relationship with social, cultural and spiritual factors; the systemic and structural method ensured the consideration of the concepts of hereditary legal succession as relatively independent, sophisticated systems; the method of legal modelling allowed to recreate the structure of the mechanism of the functional effect of inheritance law on the basis of a statutory structure (legal regulation model) and a theoretical structure (model created by the power of abstraction); the dogmatic method allowed to determine the basic constructions of hereditary legal succession in the doctrine of foreign and domestic succession law, to identify their variety in the form of legal categories and legal models; comparative law method conditioned the search for similarities and differences, common, special and unique in the institute of hereditary legal succession in different legal systems; the historical-law method facilitated the identification of the prerequisites for the formation of the basic concepts of hereditary legal succession in foreign countries and in Ukraine; the systematic interpretation method and legal and technical method provided the opportunity to determine the true will of the legislator in the field of regulation and practical implementation of the analysed institution.

The use of the specified methods and theoretical and applied techniques facilitated the identification of the peculiarities of the formation of the institution of hereditary legal succession in the historical and theoretical aspect, the issues of its formation, development and reform, the formation of models and concepts of hereditary legal succession in modern Ukraine and the peculiarities of introducing the doctrine of hereditary legal succession of foreign countries into domestic civil law in the context of its improvement in the context of European integration of our state and transposition of legal provisions.

The empirical basis of the research performed within the scope of the article was composed of laws and other statutory acts of the countries of the continental system of law and Ukraine, judicial practice, revealing the problematics of implementing legal regulation of the research subject.

2. RESULTS AND DISCUSSION

The universal nature of the hereditary legal succession in classical Roman law, which held the heir unlimitedly liable for the testator's debts, was based on the mystical idea that the legal identity of the deceased was embodied in the inheritance. At the same time, a distinctive feature of the hereditary legal succession is a one-time transfer (in a single act) to the legal successor of all rights and obligations that are part of the property of the predecessor. Thus, a characteristic feature of the hereditary legal succession is that the universal heir is the direct successor of the testator's property: the inheritance passes from the deceased to the heir not only immediately and simultaneously, but also directly from the testator [12].

It can be stated that universal legal succession in the succession law is fundamental, formed back in the law of Ancient Rome. Nevertheless, we shall point that the transfer of the entire set of rights and obligations of the testator to the heir is a general rule from which there are many exceptions (inheritance of certain objects of intellectual property, inheritance of an interest (share) in an entrepreneurial partnership, inheritance of securities, etc.). However, the legal nature of these exceptions, according to supporters of the concept of universality of hereditary legal succession, does not allow to attribute the succession of separate rights of the deceased to the hereditary legal succession, considering them not as hereditary, but as other legal relationships – legally binding. A typical example of this is the inheritance of testamentary deposit in a financial institution [13].

Thus, as per V.I. Serebrovsky's opinion, upon inheriting deposits in banking institutions, there is a contract in favour of a third party, and not a testamentary disposition, therefore there is no hereditary legal succession [2].

It is interesting that O.S. Ioffe considers these laws, supposedly inherent to succession, to be "specific methods or means of legal regulation that... condition direct and universal legal succession, which are understood to be the requirement of constructing inheritance as a universal and immediate succession, and interpret rules of the succession law in this regard" [11].

Universal legal succession is recognized as the main form of hereditary succession in the civil legislation of France [14], Japan [15] and other countries of the continental legal system [16]. A sign of the universality of hereditary legal succession found its reflection in foreign legal systems. Thus, in paragraph 1922 of Book 5 (Succession Law) of the German Civil Code of 1896, it is stated that after the death of a person, the inheritance passes to the heirs as a single whole [17].

With that, civilists that support the outlined concept of hereditary legal succession indicate that singular succession as a legal construct inherent in the civil law of Ukraine, in particular in legally binding obligations (assignment of debt, transfer of the right of claim) – does not occur in hereditary legal relations due to their polarity. When pointing out that, in the event of the death of their owner, the rights and obligations to certain civil law objects subordinate to the special legal regime are transferred to other persons,

one should speak not about the occurrence of hereditary legal relations, but about other legally binding and proprietary relations regulated by corresponding provisions of civil legislation.

At the same time, the specified opinion is far from being the only one in the science of civil law. A proponent of a different scientific theory is, in particular, P.S. Nikityuk, who noted that legal succession in separate rights (a singular one) is not a distinctive feature of exclusively binding legal relations. A singular legal succession is also included in the subject of regulation of succession law and determines the occurrence of hereditary legal relations. This conclusion of P. S. Nikityuk is based on the fact that upon universal legal succession, as upon singular, the heir acquires an independent proprietary right of succession. It is noteworthy that in Roman private law the singular succession, along with universal, was also considered a form of the same phenomenon – succession, and was part of the system of succession law [18–24].

Singular legal succession gained a foothold in the succession law of Ancient Rome due to implementation of such a legal structure as hereditas testamentaria, which was conditioned by the strengthening of legal succession elements in the proprietary status of the testator [12], as well as the weakening of the family-securing function of succession law [25].

Thus, in particular, the structure of the Civil Code of Ukraine, Book 6 "Succession Law", indicates the expansion of freedom of will, which entails a reduction in the rights of heirs (with the exception of persons entitled to a mandatory share in inheritance) who are the testator's family members. Furthermore, the appearance of the regulation in the Civil Code of Ukraine (Article 1223), according to which, the right to inherit belongs to the persons indicated in the testament, and only if there is no testament – to the heirs by law (persons who were in a relationship with the testator during his lifetime or were conceived during the life of the testator, but born after their death), indicates that the will of the testator is of paramount importance in succession, and not family relations[1].

The foregoing allows us to talk about the absence of a tendency to strengthen the family in the institution of succession, which was characteristic of the succession law of the USSR period and is not a fundamental factor at the present time. This conclusion is justified by the fact that the purpose of succession is not to ensure the interests of the close relatives of the testator, as V.I. Serebrovsky points out [2], but, in the author's opinion, to transfer property or property rights, the preservation of civil-law relations, which the testator was a party to, with third parties, ensuring their stability in general. Therefore, in our opinion, the position of N.P. Aslanian does not quite correspond to the realities of legal and socio-economic life, in stating that the exclusion of the idea of strengthening the family, strengthening family and kinship ties from the succession

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

law will complicate the justification of the existence of the very institution of inheritance in our society [25]. Thus, the succession law of Ukraine has its own objectives, which are not always aimed at strengthening family ties, although the existence of a family principle in it is not debatable [26].

Thus, the position of R.R. Weber, that the function material support of disabled family members in succession law has lost its significance and is not its most distinctive feature, being inherent in social security law related to public law, appears to be justified [27].

Granting a person the right to draw a will in favour of persons not included in the circle of heirs by law, as well as a possible reduction in the size of the mandatory share in inheritance (Article 1241 of the Civil Code of Ukraine)[1], a special legal regime of sucession of certain types of property and proprietary rights, allow to point at the shift of emphasis in the methodology of building the science of civil law in matters of hereditary legal succession. Namely, this refers to restriction of the role of the family support function in the succession law and the development of the concept of singular legal succession in the succession law. Thus, an analysis of the current legislation of Ukraine displayed that it largely borrowed the legal models of the researched institution that were developed back in the era of Ancient Rome, implementing them in the national legal system.

Considering the issues of hereditary legal succession, P.S. Nikityuk concludes that the authors of the concept of universality of hereditary legal succession do not derive its main provisions the material basis of the succession law, and do not connect them with the economic nature of succession, personal or other property of citizens, with social purpose of succession in a socialist society, raising the question of whether the requirements of universality of hereditary legal succession correspond to the family nature of succession law, to the objective of securing the proprietary interests of the family, and finally, to the promotion of the family in carrying out its social functions [13].

Universality, immediacy, and other "properties" of hereditary legal succession derived from these two theses are presented, in fact, in the form of self-evident certain invariable principles inherent in any hereditary legal succession [28–31]. These postulates are submitted as the indisputable and self-evident basis of the substantive institution of succession and the procedure for registration of the right to inheritance [13].

Defending the position of the singular legal succession in the succession law, it should be noted that the current legislation of Ukraine, in particular, the succession law, provides examples far from solitary as to the allocation of individual objects of succession law from the general rules on succession. Such is, in particular, the inheritance of a share in a farm (agriculture) by members of the corresponding economy [32].

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

Nevertheless, the above, as well as other cases of inconsistency of succession with the idea of universality (inheritance in copyright, inheritance of securities, inheritance of a contribution to a financial institution, an obligatory share in inheritance, etc.) are described in the science of civil law as an exception to the general rule on the universality of hereditary legal succession, as well as cases not characteristic of the succession law in general [2]. However, if we assume that this approach is correct, it is quite advisable to classify such objects of succession law in order to determine their legal regime on the one hand, and assign them to the provisions of obligation, property or succession law on the other hand.

If we adhere to the position of supporters of the concept of universality of hereditary legal succession, then we will inevitably come to the conclusion that the legal status of the specified objects is determined by the regulations of property law or the regulations of law of obligations, but not in any way by the succession law. With that, the transfer of rights to securities, as well as objects of intellectual property to third parties after the death of their owner is governed exclusively by the rules of property law. However, such conclusion is highly debatable, as proprietary relations determine the statics of civil relations, while the transfer of rights to securities is an indicator of the dynamics of civil-law relations. The regulation of specified objects by the provisions of law of obligation, however, indicates that securities can be a form of fixing obligations between the parties, which, in turn, is also incorrect, as the contract cannot be an object of civil law.

The above allows us to conclude that the legal succession of certain objects of civil law (securities, contributions to a financial institution, etc.) is either not subject to civil law regulation at all, or confirms that the singular nature of inheritance of civil law objects is inherent in the succession law.

Justifying the stated position, it should be noted that the scope and specific legal regime of these objects of civil law is such that it is possible to speak not so much about the exclusion of their rules of universality of hereditary legal succession, but about the principle of hereditary legal succession inherent not only to universality, but also to singularity in hereditary legal succession. In addition, the very fact of existence of the established procedure for the inheritance of a number of succession law objects that are subjected to a special legal regime, allows us to imply not an exception to the rules, as it assumes an unsystematic, one-time nature, but a part of the inheritance rule itself.

Upon consideration of the order of succession by testament, in our opinion, it should be pointed out that succession, contrary to the opinion of V.I. Serebrovsky [2], is not characterized by the principle of universality as a whole. This conclusion of the author follows from the analysis of the provisions of civil legislation of Ukraine.

Thus, in accordance with Articles 1235–1236 of the Civil Code of Ukraine, the testator has the right to independently appoint one or more persons as their heirs, regardless of the existence of family, kinship or other relations between them. Furthermore, the testator may, without indicating reasons, deprive any person from the number of

heirs by law of the right to inherit. The testator has the right to cover the will with the rights and obligations that belong to him at the time the will is being drawn up, as well as those rights and obligations that may belong to them in the future. Moreover, the testator has the right to draw up a will regarding the entire inheritance or part thereof[1].

In addition, in accordance with Articles 1237-1239 of the Civil Code of Ukraine, the testator has the right to establish a testamentary refusal to the legatee regarding the proprietary right or property that is or is not part of the inheritance transferred to the property, or by other proprietary right. Thus, upon inheriting by testament, the principle of unity of the hereditary mass and universality of the hereditary legal succession cannot be observed, as in this case the testator independently determines the amount of the hereditary mass transferred in the order of hereditary legal succession to a certain heir.

Upon conducting a comparative analysis of two concepts of hereditary legal succession, it should be noted that the most consistent understanding of the principle of universality of hereditary legal succession corresponds to the unlimited liability of heirs for the testator's debts [13; 33]. Nevertheless, the responsibility of the heirs is not an indispensable attribute of the universal legal succession, since the volume of this responsibility is directly proportional to the volume of the hereditary mass transferred to a particular person. The indicated conclusion is also reached by one of the founders of the concept of universality of hereditary legal succession, B.B. Cherepakhin, who claimed that the heir who accepted the inheritance is liable for the testator's debts within the actual cost of the inheritable property transferred to them [7].

The limitation of liability for the testator's debts was also recognized by V.N. Nikolsky as a derogation from the principle of universality of hereditary legal succession [34–35]. The considered provisions of the concept of universality and the singularity of hereditary legal succession, in their turn, indicate that the succession law is characterized by a singular nature.

Proceeding from the foregoing, it seems rather prudent to generalize the conceptual provisions in the context of a comprehensive analysis of doctrinal approaches and legal regulation of the researched institution:

Hereditary legal succession, namely, the transfer of the testator's rights to the heir, is based on the general principles of legal succession, however, it is distinguished by its originality. Discussions on the essence of the transfer of the rights and obligations of the testator to the heir failed to solve the multitude of issues of the theory of hereditary legal succession. Many points of the theory still remain debatable, moreover – and now you can observe a fundamentally different approach to identifying the essence and content of hereditary legal succession.

The performed analysis of the researched institution displayed that hereditary legal relations do not fit into the theory of legal relations and traditional views on its object,

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

common in the legal literature. Moreover, the analysis of hereditary legal relations led to a different view on the object of legal relations and on the legal relationship itself.

Two approaches to the question of the nature of hereditary legal succession were formed in the doctrine of civil law.

According to the first one, upon inheritance, legal succession bears a universal nature. Proponents of the second point of view note that the singular legal succession is inherent to the succession law along with universal one.

The concept according to which the universal nature is inherent to the succession law along with the singular one is currently the most justified, which is conditioned by the consistent tendency of the succession law of Ukraine to expand the rights of subjects of hereditary legal relations, the allocation of objects from the hereditary mass, which feature a special legal regime for regulating their succession, and the tendency to weaken the family support functions of succession law.

Hereditary legal succession is a special type of legal succession in civil law and is characterized by the following features: a) it takes place only in the event of death of a person; b) it is embodied in proprietary and non-proprietary rights and obligations; c) transitional rights and obligations are dual in nature (universal and singular); d) as a result of the transfer of proprietary and non-proprietary rights and obligations in the order of hereditary legal succession, the legal relationship does not stop, but continues to exist in an amended form.

Hereditary legal relationship should not be considered solely as a relationship of universal legal succession of the testator's rights and obligations. A singular character is also inherent to it, along with universal legal succession.

The formation of the singular nature of hereditary legal succession, along with universal legal succession, as one of the features of hereditary legal succession is conditioned by the shift from the requirement of direct succession in the personal legal status of inheritance characteristic of the USSR period that did not recognize the legal and economic foundations of private property, to the requirement of direct transfer of property that currently corresponds to the concept of private property.

Determination of singular legal succession as means of transferring inheritance rights from the legal predecessor to the legal successor is conditioned by the following criteria: a) the specificity of the legal regime of certain types of property included in the estate; b) the socio-legal significance of the objects of succession law, transferred in the manner of a singular legal succession; c) the volumetric nature of the hereditary mass transferred in the order of a singular hereditary legal succession.

Universality and immediacy in inheritance is not a fundamental principle of Ukrainian succession law. The variety of the legal regimes of the hereditary mass objects serves as the justification of the necessity for further differentiation of both the principles of succession law and individual objects of inheritance, depending on their legal regime.

The analysis of hereditary legal succession indicates the differentiation of the hereditary mass depending on the scope of the rights transferred and the specifics of the legal regime of the transferred property, in the order of hereditary legal succession, of the procedural order for registration of inheritance rights.

Without a doubt, a singular legal succession in succession law is typical for hereditas testamentaria, and upon inheritance by law, only in legally binding and proprietary relations, the objects of which are subjected to a special legal regime (the right to a mandatory share in inheritance – Art. 1241 of the Civil Code of Ukraine, the establishment of servitude in a testament – Art. 1246 of the Civil Code of Ukraine, testament with a condition – Art. 1242 of the Civil Code of Ukraine, testamentary refusal – Art. 1237 of the Civil Code of Ukraine, inheritance of the right to deposit in a bank, financial institution – Art. 1228 of the Civil Code of Ukraine)[1].

On the other hand, the universal nature of hereditary legal succession is inherent, as a rule, to succession by law, as well as in legally binding and proprietary relations, objects of succession law, in which they are subjected to the general legal regime (inheritance of the right to compensation for losses, moral damage and payment of the penalty – Art. 1230 of the Civil Code of Ukraine, inheritance of the right to receive insurance payments, insurance compensation – Art. 1229 of the Civil Code of Ukraine, inheritance of the land title – Art. 1225 of the Civil Code of Ukraine, the right to receive wages, pensions, scholarships, alimony, other social benefits belonging to the testator – Art. 1227 of the Civil Code of Ukraine, inheritance of the obligation to compensate property damage (losses), as well as moral damage caused by the testator – Art. 1231 of the Civil Code of Ukraine).

The conducted analysis of doctrinal approaches to the researched institution and law enforcement practices provided an opportunity to formulate the following issues in the field of hereditary legal succession in the civil law of Ukraine, which require gradual and balanced solution:

– the necessity of unification and legalisation of a single approach to the nature of hereditary legal succession, the formation of a single conceptual approach with elements of existing theories;

– the essence of the institution of hereditary legal succession and its content remains understudied from a holistic perspective;

– the lack of a unified approach to the procedure for satisfying the claims of creditors upon recognition of the inheritance by the deceased, in particular their turn, the scope of the hereditary mass;

– the circle of heirs is determined unequally by law and by testament;

– various requirements for the form of the testament are established;

– various systems for the distribution of hereditary property exist;

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

– questions arise more frequently in the field of legal regulation of hereditary legal succession with a foreign element;

– issues of succession of various types of inheritance objects remain unsolved;

– the variability of approaches to hereditary legal succession of corporate rights in the context of new laws of the current legislation of Ukraine and others.

This list of issues is not exhaustive and is subject to an expanded interpretation, as well as to be supplemented, with consideration of modern transformation of civil-law relations. However, the solution of the outlined issues will become possible only by consolidating the efforts of representatives of doctrine and practices in order to unify, update, and, as a result, to qualitatively reform the legal regulation of the institution of hereditary legal succession in Ukraine in the context of the positive experience of other states and its gradual testing at the national level.

CONCLUSIONS

Inheritance is traditionally considered to be one of the oldest and most stable institutions in the law of any state. The regulation of inheritance by the regulations of national substantive law is ensured by many historically established legal institutions that differ in the degree of detail of regulation, the specific composition of institutions and some other parameters at the national levels of different countries. In the course of the research, it was found that most of the basic principles of inheritance enshrined in the legislation of Ukraine and countries of continental law, were introduced back in the times of Roman private law. However, the development of public relations is gradually modifying the economic relations, which, in turn, affects proprietary relations, the variability of which necessitates the development and improvement of the provisions governing the transfer of rights from one person to another, both as general rules and as provisions of succession law as special legal regulation. In turn, the legal succession is characterized by the fact that there is a legal dependence of the rights and obligations of its predecessor. Upon legal succession, a new entity in legal relations takes the place of the initial one, and the rights received by it remain identical to the rights of the initial entity. This process can be considered as a replacement in the static legal relationship of one subject by another, and as a transition from one subject to another of all elements of a legal relationship, which allows the new subject to "fit" into the legal relationship that previously existed.

Today, two trends have formed and are operating on the territory of the state – the singular and universal hereditary legal succession. Representatives of each approach emphasize the prudence of choosing only one universal approach to the investigated legal relations. The research of the main features of hereditary legal succession led to the conclusion that these legal relations do not fit under the theory of legal relations commonly used in legal literature and traditional views on its object, which allowed to

state the necessity of combining the existing approaches into a single doctrinally substantiated concept of the essence of the institution of hereditary legal succession, which will become the object of further scientific research.

It can be stated that representatives of national scientific schools have not yet formed a unified approach to the essence of the institution of hereditary legal succession, which characterizes its complexity and produces various issues of legal regulation related to this phenomenon and the practice of its enforcement. So, as a result of a comprehensive research, the main issues in the field of hereditary legal succession in civil law of Ukraine were formulated. The above list requires its vector resolution by means of combining scientific and practical approaches in order to qualitatively reform the legal regulation of the institution of hereditary legal succession in Ukraine in the context of the best practices of other states and its gradual testing at the national level.

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РОЗВИТОК АДМІНІСТРАТИВНОЇ ЮСТИЦІЇ В УКРАЇНІ ТА НІМЕЧЧИНІ: ПОРІВНЯЛЬНО-ПРАВОВИЙ АСПЕКТ

Анотація. *Розвиток адміністративної юстиції в Україні сприяє вдосконаленню захисту прав і свобод людини та громадянина. У наукових роботах акцентується увага на необхідності врахування у вітчизняній адміністративно-правовій доктрині, державо- та правотворчій практиці, національному законодавстві сучасних європейських та інших зарубіжних принципів, стандартів, що у своїй сукупності та взаємодії створюють міцний фундамент для дієвого захисту прав і свобод, законних інтересів фізичних та юридичних осіб, колективних утворень, держави. Тому основна мета роботи полягає у аналізі розвитку адміністративної юстиції в Україні та Німеччині. Для досягнення поставленої мети використано загальнонаукові принципи, методи та способи пізнання об'єкта дослідження. Логіко-семантичний метод дозволив визначити наукознавче підґрунтя дослідження правових засад організації адміністративного судочинства в Україні. У статті авторами наведено поняття та призначення адміністративної юстиції в Україні та Німеччині в питаннях захисту порушених прав, свободи інтересів людини і громадянина рішеннями, діями та бездіяльністю суб'єктів владних повноважень, новели процесуального законодавства України, які більш ефективно сприяють розгляду адміністративних справ в судовому порядку, розглядаються світові моделі функціонування адміністративної юстиції, аналізується система та структура адміністративних судів Німеччини, їх спеціалізація, особливості розгляду деяких категорій публічно-правових спорів та розмежування юрисдикції адміністративних судів та загальних судів при вирішенні деяких категорій справ. Установлено, що в Німеччині створені інститути Ве-*

ликих Сенатів і Високого Сенату для уникнення ймовірності виникнення судової помилки. В Україні ж сьогодні система адміністративних судів отримала більш досконале процесуальне законодавство, яке дозволяє швидше вирішувати справи незначеної складності.

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

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DEVELOPMENT OF ADMINISTRATIVE JUSTICE IN UKRAINE AND GERMANY: COMPARATIVE LAW ASPECT

Abstract. *The development of administrative justice in Ukraine contributes to the improvement of protection of rights and freedoms of human and citizen. The scientific works emphasize the necessity of consideration of the national administrative and legal doctrine, state and law-making practice, national legislation of modern European and other foreign principles, standards that in their totality and interaction create a solid foundation for the effective protection of rights and freedoms, legal individuals and legal entities, collective entities, the state. Therefore, the main purpose of the paper is to analyses the development of administrative justice in Ukraine and Germany. For this purpose to be achieved, we applied the general scientific principles, methods and means of cognition of the research object. The logical-semantic method allowed to determine the scientific basis for the research of the legal foundations of the organization of administrative justice in Ukraine. The authors describe the concept and purpose of administrative justice in Ukraine and Germany in the matters of protection of violated rights, freedoms and interests of human and citizen by decisions, actions and inaction of the power entities, new procedural legislation of Ukraine, which more effectively facilitate the consideration of administrative proceedings in the court of law, the world models of functioning of administrative justice are considered, the system and structure of the German administrative courts, their specialization, features of consideration of some of the categories of public-law disputes and delimiting of jurisdiction of administrative courts and general courts upon resolving certain*

categories of cases. It was established that in Germany, institutions of the Grand Senate and the High Senate are created to exclude the possibility of a judicial error. As of Ukraine, currently the system of administrative courts has received more advanced procedural legislation allowing to faster resolve cases of minor complexity.

Keywords: administrative courts, public-law disputes, public service, public interest, administrative act, power entity.

INTRODUCTION

Administrative justice exercises judicial control over the activities of power entities regarding the taking of unlawful decisions, the implementation of actions, inaction in the public-law field, which violate the rights, freedoms and interests of the individual and the citizen. Administrative justice provides protection against arbitrariness of public authorities and local self-government, as well as control over the correctness of the exercise of their governmental administrative functions. Administrative justice is one of the most effective mechanisms for protecting human rights and freedoms from unlawful or unjustified harassment by public authority. And the specificity of this mechanism is that the administrative courts restore the violated human and citizen rights in cases where the offender is the corresponding power entity upon the exercise of its governmental administrative functions, and the violated right of an individual is not of private, but of public nature. In Ukraine, administrative courts have been set up in accordance with Presidential Decree No. 1417/2004 dated November 16, 2004[1], which has the task of protecting and restoring the rights, freedoms and interests of an individual against violations on the part of power entities, which was a huge positive step in the development of the statehood and the establishment of Ukraine as a rule of law.

Problems of formation and development of administrative justice are covered in the following scientific works: A. Mihr [1], J. Bader [2], K. Braun, [3], J. Giesinger [4], M. Kaufman [5], R. Schmidt [6] and others. However, the functioning of the institution of administrative justice in Germany and other EU countries remain quite understudied [7–9]. Thus, in particular, I. Melnyk [10] points out that the presence of administrative justice is an indicator of the compliance of the national judicial system with international legal standards for human rights, as well as the affirmation of the principle of legality in the sphere of executive power. Implementation of administrative justice and the establishment of administrative courts in this regard has the purpose of guaranteeing the right of everyone to challenge in court the decisions, actions or inaction of public authorities, local self-government bodies, officials and public figures, which, in turn, shall ensure the implementation of the constitutional principle of responsibility of the state for its activity before the human. Practices of many European countries prove that administrative courts are an accessible and effective tool for protection of human rights,

[1] Law of Ukraine "On the Establishment of Local Administrative Courts". (2017, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1417/2004

freedoms and interests from violations by public authorities and local self-government [11]. At the present stage of state formation, the introduction of administrative justice as a separate jurisdictional activity of specialized courts has become not just a direction for improving the judicial system of Ukraine and a means of unloading general and commercial courts. This measure aims at realizing the objective need for the existence of a special judicial mechanism for resolving legal disputes in the field of public-legal relations [12]. Administrative justice in Germany is a special procedure for resolving public-law disputes of an unconstitutional nature between individuals and public authorities, which is implemented by administrative courts of general and special jurisdiction in a special procedural form, which is an administrative legal proceeding [5]. Unlike in Ukraine, where it is possible to appeal against acts of the authorities in administrative proceedings and to challenge them in court, in Germany an appeal to the administrative court is possible only in the event that the complaint of the individual was rejected by the power entity superior to the one that committed the contested act. Therefore, an action for objection to an administrative act can be filed with the administrative court only after reviewing this act on the basis of an administrative appeal [4].

The purpose of the article is to research the distinctive features of the functioning of the administrative courts in Ukraine after the reform of procedural legislation in the light of the amendments introduced to the Constitution of Ukraine in the part of justice, the functioning of the system of administrative courts in Germany, which may be of considerable practical interest for the domestic legislator upon the development and implementation in the current legislation of Ukraine.

1. MATERIALS AND METHODS

The methodological basis of the research was designed to ensure a comprehensive and complex study of the development tendencies of administrative justice in Ukraine as an urgent issue of modern national legal science and practice, to formulate theoretical approaches that are relevant to contemporary challenges, and to draw conclusions on the necessity of improvement of the current national legislation in the context of new regulation of the procedure of administrative litigation in the manner of the successfully tested and sustainable model of Germany. That is why the methodological basis of the paper was represented not only by the general scientific principles, methods and means of cognition of the object and subject of research, such as systematicity, comprehensiveness, concreteness. In particular, in the context of the stated purpose of the article, both general scientific (dialectical, systemic, logical-semantic, synergistic, analysis and synthesis, formal-logical, legal modelling, instrumental, sociological, statistical, etc.) and special scientific methods were tested (historical law, comparative law, formal law, special law, etc.). The most important in this system is the general scientific dialectical method, which facilitated the consideration and research of the issue in the unity of its content and legal form, as well as the systematic analysis of the legal principles of the organization of administrative

justice in Ukraine and Germany. Moreover, this method facilitated the determination of the status, tendencies and prospects of the development of administrative justice research in the context of sustainable world models.

It is prudent to underline that the greatest attention was also paid to the use of the comparative law method, which enabled a thorough research of the genesis of legal regulation in the field of administrative justice and its practice in the territory of Ukraine and Germany, which in turn became a sound basis for the author's conclusions and further scientific research. With the help of the logical-semantic method, an insight into the conceptual apparatus was furthered, the scientific basis for the research of the legal foundations of the organization of administrative justice in Ukraine was determined. The systematic method proved useful upon analysing the domestic legislation of Ukraine and Germany in the researched field. The formal-logical method was applied to identify the connections and contradictions existing in the theory and practice of the enforcement of procedural law in Ukraine and Germany. The method of analysis and synthesis allowed to explore the theoretical prerequisites for the introduction of an institution of administrative justice as a separate jurisdiction of specialized courts. The use of sociological and statistical methods facilitated the generalization of legal practice, the analysis of empirical information related to the topic of the article.

It became possible to formulate specific positions regarding the state and prospects of the system of national legislation of Ukraine through the method of legal modelling. The special legal method of research was of particular importance for the work on the paper, involving the external processing of regulatory material. The becoming of the domestic model of administrative justice is analysed in its historical retrospective using the historical law method. This method also provided an opportunity to further the insight into the becoming and development of the legal bases for administrative justice reform in the territory of our state and Germany.

It can be stated that the methodological basis of the research is, in a complex combination, represented by scientific concepts and grounded judgments, produced by the realities of the present, and qualitatively formulated by prominent representatives of the doctrine of state and law theory, constitutional, administrative and other branches of law and judicial process. Furthermore, this foundation also has a theory of knowledge of social and legal phenomena as its component. The scientific and theoretical basis of the paper is represented by the scientific development of domestic and foreign specialists in the field of law, the references to which support the chosen research methods.

2. RESULTS AND DISCUSSION

2.1 The system of administrative courts in Ukraine

Ukrainian scientific opinion is the only one in the position that administrative justice is a system of judicial bodies (courts) that control compliance with the law in public administration by resolving in a separate procedural order the public-law disputes arising in connection with applications of individuals or legal entities to executive

authorities, local governments or their officials [13]. Administrative justice is the procedure established by law for the consideration and resolution in the court of law of cases in the field of public administration between citizens or legal entities on the one hand and bodies of executive power and local self-government (officials) – on the other, carried out by courts, either general or specially created for the settlement of legal disputes [14].

In Ukraine, a proper legislative framework for the functioning of administrative justice is established, in particular, in accordance with Art. 125 of the Constitution of Ukraine[1], administrative courts operate in order to protect the rights, freedoms and interests of a person in the field of public-law relations. In accordance with Part 1 of Art. 18 of the Law of Ukraine "On Judiciary and Status of Judges" No. 1402-VIII dated June 2, 2016[2], courts specialize in civil, criminal, economic, administrative cases, as well as the cases on administrative offenses. Local administrative courts are district administrative courts as well as other courts designated by procedural law. Local administrative courts consider cases of administrative jurisdiction.

The Administrative Court Procedure Code of Ukraine, as amended in 2005, defines the procedural mechanisms of the activity of administrative courts and creates a proper legal basis for the due functioning of administrative justice and delivery of justice in administrative cases, protection of human and citizen rights and freedoms, legal interests of legal entities from violations by power entities [15]. Amending the procedural legislation of Ukraine was another step towards judicial reform. In 2016, the Verkhovna Rada of Ukraine adopted the Laws of Ukraine: "On Amendments to the Constitution of Ukraine (regarding Justice)"[3], "On the Judiciary and Status of Judges"[4], "On the High Council of Justice"[5], a new wording of the Administrative Court Procedure Code of Ukraine[6] was adopted in 2017. The constitutive essence of the reform of procedural legislation in Ukraine was to increase the efficiency of the judicial process, to more clearly differentiate the jurisdiction of courts of different specializations, to introduce effective mechanisms for the exercise of procedural rights, etc.

Thus, since December 15, 2017, proceedings in administrative courts have been carried out in accordance with the new wording of the Administrative Court Procedure Code of Ukraine[7] (hereinafter referred to as "the ACPCU").

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[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[2] Law of Ukraine "On Judiciary and Status of Judges". (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19

[3] Law of Ukraine "On Amendments to the Constitution of Ukraine (on Justice)". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1401-19

[4] Law of Ukraine "On Judiciary and Status of Judges". op. cit.

[5] Law of Ukraine "On the High Council of Justice". (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1798-19

[6] Administrative Procedure Code of Ukraine. (2017, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2147-19.

[7] *Ibidem*

The ACPCU has divided the administrative cases into cases of minor complexity and all others. For the first category, the ACPCU envisages simplified litigation, for the other category of cases, the ACPCU envisages general litigation. The essence of these innovations is that the consideration of cases of minor complexity shall be carried out under a simplified procedure and in a shorter timeframe, furthermore, such cases should be considered by the court of appeal as the final instance. For the Supreme Court to review the case of minor complexity, in accordance with Art. 328 of the ACPCU, the applicants must provide reasoning as to the fundamental significance for the formation of a single law enforcement practice or a considerable public interest or the exceptional personal importance of their case.

According to the ECHR, such restrictions on cassation appeal do not violate the guarantees of the Convention for the Protection of Human Rights and Fundamental Freedoms (decision dated 09.10.2018 on inadmissibility in the case of Azyukovska v. Ukraine, application No. 26293/18).

The current ACPCU defines a public-law dispute as a dispute wherein at least one party exercises governmental administrative functions, including the exercise of delegated powers, and the dispute arises in connection with the performance or non-performance by such party of the said functions; or at least one party provides administrative services on the basis of the legislation that authorizes or obliges to provide such services solely the power entity, and the dispute arises in connection with the provision or non-provision of the said services by such party; or at least one party is an electoral or referendum subject and a dispute arises in connection with violation of its rights in such a process by a power entity or another person[1].

Furthermore, the ACPCU has identified the categories of these public-law disputes, the resolution of which falls under the jurisdiction of an administrative court (Part 1, Article 17). The adoption of the ACPCU in the new wording has introduced significant innovations in the consideration of public-law disputes in administrative courts.

The Unified Judicial Information and Telecommunication System became one of such innovations. However, due to the lack of budgetary funding for administrative courts, the start of operation of the UJITS was postponed. A new approach to the application of the institution of proof through the electronic evidence was introduced, where the ACPCU provides the parties to a case with more means to prove their position before the court. An expert's opinion to reinforce the position of one of the parties to the dispute may be concluded to order of the party to a case. An advocatory monopoly was introduced, which was enshrined in the Constitution of Ukraine with a gradual enforcement until 2020, the essence of which lies in the representation of individuals by the advocate in all judicial authorities. The order of removal of judges was also changed to allow for the judge to be dismissed in the event that one of the parties

[1] Administrative Procedure Code of Ukraine. (2017, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2147-19.

to an administrative case doubts the impartiality of the judge. The ACPCU regulates the actions of the parties to a case, which the court may qualify as abuse of procedural rights. For such actions, the ACPCU stipulates corresponding measures of procedural coercion in the form of warning, fine, removal from the hall, etc. The current ACPCU also expands the list and requirements for procedural documents, terms and procedure for their submission. Not least important in the ACPCU is the introduction of a dispute resolution institute with the participation of a judge, which should be held prior to the initiation of the case consideration upon the consent of both parties. Deviation from preliminary opinions by the Supreme Court became possible at the stage of cassation review by the Supreme Court of decisions of courts of preceding instance on the issues of application of the rule of law in such legal relations, with consideration of the circumstances of the case, the legal nature of the public-law dispute.

It is also noteworthy that administrative justice in Ukraine is created and operates by the example of the German model, the main provision of which is that the judicial branch in Germany is divided into administrative courts of general and special jurisdiction, which are standalone judicial authorities, independent of public administration or courts of general jurisdiction.

2.2 World models of administrative justice

Ukraine is not the only country in the world where administrative justice operates. Virtually every country in the world has implemented a certain way of organizing judicial control over the activities of public administration through a system of relevant judicial authorities [16–18]. There is a number of countries using the system of courts of general jurisdiction (the UK, the US, Australia, New Zealand, Denmark, Norway, etc.) and a number of countries using the system of courts of specialized jurisdiction (Germany, Italy, Sweden, Greece, etc.).

In the first case, among countries using general courts to control public administration, the following models of administrative justice organization can be distinguished:

– a model of exclusive jurisdiction of the general courts, wherein the existence of both administrative courts and quasi-courts is completely excluded. Judicial control is performed according to the rules of civil procedure (Denmark, Norway, Malta, Morocco, etc.);

– the Anglo-Saxon model, wherein, together with the general courts, the control of public administration is exercised by a variety of specialized quasi-judicial bodies – administrative tribunals (the UK, the US, Australia, New Zealand, India, Canada, Kenya, Belgium, Denmark, Norway, etc.);

– the model of courts of general jurisdiction with specialized administrative litigation (Japanese model). The control over the activity of the executive authority in Japan is exercised by the courts of general jurisdiction, but civil and administrative proceedings are carried out under different procedural rules established under the 1960 Civil Procedure Act and the 1962 Administrative Disputes Act;

– the model of administrative specialization within a single court system, wherein separate chambers in the matters of administrative cases exist within the single judicial system (Spain, Madagascar, Mexico, etc.). This model does not preclude the creation of administrative courts. In Spain, for example, administrative and economic courts exist along with the chambers in the matters of administrative disputes.

In the second case, countries using the system of courts of specialized jurisdiction use the following models of administrative justice:

– the dualistic (French) model. It is based on a specific interpretation of the principle of separation of powers, which prevents courts of general jurisdiction from interfering with the activities of executive bodies. This led to the formation of administrative courts within the public administration itself. Thus, in France, the general court, even upon consideration of a civil or criminal case, removes itself from the resolution of administrative disputes and submits a request to the administrative tribunal;

– the German model of administrative justice functions through the "division" of the judicial branch into separate "embranchments". In this way, the separation of justice from the public administration is achieved, and the field of public interest becomes subject to special judicial consideration. The administrative courts are completely separated from the general courts and are headed by the High Administrative Court. This model is also adopted by Sweden, Indonesia, and Mozambique;

– the model of a multiplicity of judicial bodies authorized to consider administrative disputes. This model enables the control of both administrative courts and tribunals (quasi-courts) and general courts (Switzerland, Finland, Belgium).

2.3 The administrative justice system in Germany and the specialization of administrative courts

The German model of administrative justice is characterized by the creation of specialized courts for the resolution of public-law disputes in administrative cases arising in the field of public activity of power entities. Administrative courts belong to a single judicial system and are independent in the exercise of their functions of justice both by the power entities and the general courts. The system of administrative courts of general jurisdiction in Germany consists of three levels [1]:

– at the lower level, administrative courts (das Verwaltungsgericht) are established in the federal states, where chambers of 3 judges and two "honorary judges" are rendering decisions in the first instance (paragraph 5 of the Administrative Courts Act[1]).

– at the middle level, the High Administrative Courts of Land (das Oberverwaltungsgericht), operating in each land, are established, which in some lands are referred to simply as administrative chambers. Here, in the second instance, decisions are rendered by chambers consisting essentially of three professional judges.

[1] Law of Germany "On Administrative Courts". Retrieved from https://germanlawarchive.iuscomp.org/?p=292

– at the highest level, in accordance with para. 1 of Art. 95 of the Fundamental Law, the Federal Administrative Court (das Bundesverwaltungsgericht) is established. Senates rendering the decisions in the final instance are composed of five professional judges (paragraph 10 of the Administrative Courts Act[1]).

In the Supreme Land Administrative Courts and in the Federal Administrative Court exist the so-called Grand Senates (paragraphs 11, 12 of the Administrative Courts Act). In order to comply with the public interest in accordance with paragraph 35 of the Law on Administrative Courts, the Chief Prosecutor acts at the Federal Administrative Court, and in other courts a so-called public interest representative is appointed. The Administrative Courts Act is a legislative act that regulates the organization and functioning of administrative justice courts in the field of administrative law cases. The administrative courts of Germany settle only public-law disputes, either between public law entities or between citizens and public administration, with a large proportion of these public-law disputes arising from the adoption of the necessary administrative act and, according to the plaintiff, a valid administrative act affecting the plaintiff's rights or freedoms [3].

The Law of the Federal Republic of Germany on Administrative Courts consists of two main parts: the first part covers the matters of judicial system (Gerichtsverfassung), and the second part specifically covers the process (Verfahren). The first part consists of six sections: the first section is devoted to the administrative courts, their hierarchy and structure (Gerichte), the second section – to the judges of the administrative courts (Richter), a separate section covers the categories of honorary judges (Ehrenamtliche Richter), another one – the representatives of public interests (Vertreter des oeffentlichen Interesses), followed by the section on judicial administration (Gerichtsverwaltung), and finally, the section on the procedure for appealing to the administrative court and jurisdiction (Verwaltungsrechtsweg und Zustaendigkeit). The second part consists of only two sections: the procedural requirements of a general nature (Allgemeine Verfahrensvorschriften) and special provisions for claims challenging the administrative acts and the obligation of public administration to adopt the corresponding administrative act (Besondere Vorschriften fuer Anfechtungs- und Verpflichtungsklagen).

The Law of the Federal Republic of Germany "On German Judges" contains basic provisions on the status, training, appointment and exercise of functions of a judge, although many provisions are duplicated in the Law on Administrative Courts itself. The Law of the Federal Republic of Germany on Administrative Courts establishes the basic requirements and general principles for building a system of administrative courts [19; 20]. A number of lands in Germany may agree on the creation of a joint judicial authority or the extension of judicial districts to a specific category of administrative cases. This provision is essential for lands with small territories and populations where

[1] Law of Germany "On Administrative Courts". Retrieved from https://germanlawarchive.iuscomp.org/?p=292

there is no need for the existence of all administrative justice bodies stipulated by law. Each court creates a presidium composed of the President of a given court or judge, who performs the functions of a chief justice, and a certain number of professional judges elected from the composition of the court, with that, the exact number of judges in the presidium elected in each court is defined proceeding from the total number of judges working in the given court.

The Law of the Federal Republic of Germany "On the Judicial System" very thoroughly discloses the procedure for election to the presidium, the most important provisions of which are assigned to all judges working in a particular court, the right to elect and be elected, with an exception to this rule only for judges who have worked for over three months in another the Administrative Court. The presidium is elected for four years and is renewed by rotating half of its members every two years. The presidium of the court is the body that handles the organizational tasks that are important for the court, namely: it distributes cases admitted to the court between judges. The final decision on which judicial tasks will be resolved by the presidium of the court is taken solely by the President of the court. One of the duties of the presidium of the court is the division of cases between judges, this function is organizational in nature, but its importance is quite great, since special attention is paid to the proper determination of the specificity of the administrative case in the specialization of each judge.

Furthermore, the presidium resolves the issue of dismissing judges, changing the composition of judges, transferring them from one judicial chamber to another. All decisions of the presidium shall be taken by a simple majority of votes, and, in the event of an equal number of votes, the vote of the President of the presidium shall be decisive. Therefore, the administrative court consists of the president, presiding judges and professional judges, the number of which is determined by the needs of a particular court in each individual case.

Due to the fact that the court structure can be divided into several chambers, each such chamber of the administrative court adopts a decision on the settlement of administrative disputes in the composition of three professional and two honorary judges in circumstances where the case cannot be heard by one judge individually. Honorary judges participate in litigation at almost all stages, but their participation is excluded only in adjudication and rulings beyond oral proceedings.

The case may be heard by the judge individually. First, the case is referred by the presidium to a particular judicial chamber, and then the case is referred to one of its judges under the following circumstances: in the event that the case is not of legal concern and of considerable public interest and in the event that the case is insignificant in complexity. Thus, only administrative cases which, by their very nature and the relevant grounds under the procedural law of Germany do not require the establishment of a panel, are subject to an individual hearing.

The current legislation of the Federal Republic of Germany also regulates circumstances where a case cannot be referred for consideration to a single judge. Thus, a case

cannot be heard by a judge individually in the event that it has already been heard orally, and a decision of an administrative court with a reservation or a decision on the protection of private law has already been adopted in the context of these proceedings. The judge hearing the case individually may independently refer it to the trial chamber if, after hearing the parties, the subject matter of the claim became substantially altered, or new circumstances arose in the case. In this event, the trial chamber will no longer be able to refer the case back to a separate judge for consideration [2].

Structure and organization of the administrative court of the second instance. The only difference between these courts and the administrative courts of the first instance is that in the courts of the second instance not chambers are created, but boards or senates. With regard to the composition of the judicial panel responsible for decision-making, the federal legislation of Germany provides for the presence of three professional judges as the main option, but the legislator allows the Landtags (local representative legislative bodies) of the lands of Germany, at their discretion, to provide alternative compositions of the judicial panels in the amount of five judges, two of which are honorary, or five professional judges and two honorary ones.

The Federal Administrative Court is the highest administrative justice body in Germany, consisting, same as courts of the previous instance, of the president, presiding judges and professional judges. The working bodies of the Federal Administrative Court of Germany are the Chambers, which have the power to adopt decisions of five professional judges. The decisions of this court, outside the oral proceedings, shall be adopted by at least three judges. Administrative justice in Germany has its own specificity, different from that of Ukraine. In particular, it is in the fact that administrative courts have special courts in its composition. Thus, in the Federal Administrative Court, there are two special "disciplinary" senates that hear cases of disciplinary responsibility of federal employees as the second instance. The first instance in this category of cases is the federal disciplinary court (das Bundesdisziplinargericht). In the cities of Munich and Ulm there are disciplinary courts for servicemen (die Truppendienstgerichte), which are empowered to impose disciplinary penalties and administrative penalties on servicemen. Decisions taken by disciplinary tribunals for servicemen may be appealed to the Federal Administrative Court, wherein two special senates review the decisions on cases of army conscripts and retired servicemen (die Wehrdienstsenate) on their administrative claims. In the system of administrative courts of Germany there are also special disciplinary courts that deal with offenses committed by officials of legal entities (for example, medical workers whose actions harmed the rights and legitimate interests of citizens). These courts are called "courts of honour" or "professional courts" (die Berufsgerichte fuer Heilberufe). Their organization is within the competence of the land and is governed by the land legislation in Germany. The administrative cases in such courts are reviewed in a collegial manner [4].

The current legislation of Germany establishes that the administrative procedure for judicial review of relevant administrative cases applies to all public-law disputes

that are not constitutional and legal, except the circumstances where, in accordance with the federal law, the case must be referred to court in another jurisdiction. Public-law disputes in Germany may be brought before a court of another jurisdiction on the basis of land legislation, proceeding from the legal nature of each individual dispute. Thus, property claims arising from the right to demand reparations for damages caused to a private person as a result of the exercise of governmental administrative functions by the power entities are subject to the ordinary proceeding in a court of general jurisdiction [6].

In Ukraine, however, upon resolving land disputes, for example, in the event of local governments adopting a decision to transfer land to property or lease, further contestation of the lawfulness of acquisition of the disputed land by an individual should be resolved in the order of civil jurisdiction, since a dispute on civil law arises, which is not related to the protection of the rights, freedoms or interests of the plaintiff in the field of public-law relations, and although a local government body was exercising a governmental administrative function, it is still connected with the ultimate goal – ownership or use of the land. When local government bodies as power entities exercise governmental administrative functions in the field of land relations and their decisions (for example, regarding the permit for the development of a land management project for land allotment) are not related to obtaining a right of ownership, land lease, etc., i.e. to civil law, then such a land dispute should be resolved in the order of administrative proceedings. In Germany, cases involving the civil service and compensation for property damage regarding the annulment of the unlawful decisions of the authorities are also outside the jurisdiction of the administrative courts. This provision is referred to in German legal doctrine as a general caveat and is crucial for litigation. It establishes that the administrative courts are liable for all cases of a non-constitutional nature unless otherwise determined. This provision is based on the provisions of the Fundamental Law of Germany, the principle of delivering independent justice only through judges, which gives its citizens the opportunity to defend themselves against the unlawful decisions, actions or inaction of the power entities in Germany [2].

It is quite important that the federal legislation of Germany no longer uses a simple enumeration of cases upon determining their jurisdiction, but defines that jurisdiction through common boundaries established by law at the junction of branches of law, which means that a person's legal protection is in no way dependent on the type of activities of the state that caused the violation of its rights, including those foreseen by the Convention. That is, in such circumstances we are referring to the upholding of the principle of continuous legal protection, when the situation of the insecurity of a person from illegal decisions, actions or inaction of the German public authorities is impossible.

Moreover, the aforementioned general caveat serves as a delimitation of jurisdiction between administrative courts on the one hand, and courts of general jurisdiction on the other. However, nowadays there are still some cases where some acts of the au-

thorities may not be appealed to the administrative courts under the rules of administrative justice. Thus, there are two types of similar acts of the power entities: 1) individual law administrative acts; 2) decision (acts) on pardon. Pardon decisions affect the scope of administrative jurisdiction when their subject matter is relations governed by civil service legislation [6].

In Germany, the definition of public-law dispute is absent from the federal legislation, unlike the Administrative Court Procedure Code of Ukraine. On the basis of other provisions of the federal legislation of Germany, it can be concluded that such a dispute occurs when the subject matter or cause is contained directly in the field of public law and there is no reason to consider it as a private law. This raises another question regarding the determination of boundaries between private and public law. Both in Germany and in Ukraine, this matter has no unambiguous solution and is separately dealt with in a court of law every time, proceeding from the circumstances of the case, the subject matter of the dispute and its legal nature. German legal doctrine also leaves the solution of this issue to the discretion of judicial practice.

With regard to public-law relations, from which the aforementioned disputes arise, their main feature is that one of the participants must be in a relationship of subordination to the public authorities. The holders of public authority in Germany are the federation, lands, communities and their associations, as well as various legal entities of public law, performing governmental administrative functions and activities of which are governed by public law and/or which were created by the relevant act of power entity [1]. In Germany, as well as in Ukraine, another interesting issue can be observed, the essence of which lies in the difficulty of determining when a power entity acts as a civil law entity, and by what criteria it is possible to distinguish such a case from a situation of performing governmental administrative functions. As a rule, the German legal opinion proceeds from the fact that in the event of such difficulties in determining the legal nature of the arising relations, it is necessary, first of all, to establish the existence of relations of inequality of the parties to the dispute, their administrative and legal status. With regard for the delimitation of public-law disputes from disputes of a constitutional nature, in Germany this issue is resolved much easier. Constitutional disputes refer to disputes connected with federal or land constitutional law. It should be noted that within the framework of constitutional law only such relations can exist, which occur between the power entities created on the basis of the provisions of the Fundamental Law, but in no case the relations between the citizen and the state.

Types of jurisdiction that occur in the administrative process. With regards to the substantive jurisdiction, as a general rule, all cases within the administrative jurisdiction are considered by the administrative courts of first instance on the merits. Further, in administrative jurisdiction, the administrative case is considered by the administrative courts of the second instance, which have the authority to consider administrative cases in the order of appeal against the decisions of the courts of first instance, or in the order of cassation. Within the framework of substantive jurisdiction, the German ad-

ministrative courts consider two large groups of administrative cases as courts of first instance: cases of illegality (unlawfulness or incompatibility with a supreme legal act) and invalidity in whole or in part of a legislative instrument; cases relating to public buildings.

The first group includes cases, the subject of which is the judicial determination of the legality of the various instructions, rules, governmental regulations of a subordinate nature, adopted on the basis of federal laws. This also includes consideration of the claims of individuals and legal entities concerning the decisions of the power entities, the enforcement of which violated or may violate the rights of these persons. The administrative court of the second instance is obliged to provide an opportunity of expressing their position in the process to every person whose rights were violated upon application of the corresponding act of the power entity [4]. As the acts of the power entities aimed at an unlimited circle of persons are most often considered in such manner, the current federal legislation of Germany obliges the administrative body that adopted such an act to publish the court's decision on rendering the act to be unlawful (invalid) the same way it was promulgated. This is a kind of guarantee that the information on the invalidity of such an act is communicated to all persons whom it may concern and whose rights and interests were violated by this act.

The second group includes administrative cases related to public buildings of considerable public interest. This is a fairly large category of cases, of particular importance here are the cases of construction, operation, modernization of power plants and installations of other technical purposes, stationary plants (for example, waste processing plants), operation of public roads, airports, etc. [4]. The Federal Administrative Court of Germany considers cassation appeals against the decisions of the administrative courts of the first and second instance. In some circumstances, the Federal Antitrust Service (FAC) considers cases as a court of first instance, for example, the consideration of public-law disputes between the federation and lands (or between lands), provided that the public-law dispute is not of constitutional nature.

Apart from the substantive and instance jurisdiction, there is also a territorial jurisdiction to help determine in which particular court can a corresponding administrative claim can be filed. With regard to public-law disputes on public buildings, they are considered by the administrative court of the judicial district wherein the relevant object of immovable property is located. Same rules apply when the subject matter of a dispute is a right relating to a land or property.

In the event that the claim is directed against any federal power entity, then such an administrative case is to be considered in court at the defendant's place of residence. If the claim is aimed at declaring the illegality of a regulatory act, which is not issued at the federal level, then the public-law dispute is to be considered at the place of adoption of the disputed act. Particular mention should be made of the circumstances when an administrative case on provision of asylum is being considered in court, then the dispute should be considered by the court of the judicial district where the person

claimed asylum. The claim may be directed by a private person against the power entity over the resolution of a public-law dispute arising from the relations of the public service or its special types, then such dispute will be considered at the place of residence of the claimant, and in the absence of permanent residence – at the location of the defendant.

If in some circumstances it is difficult to determine which court of administrative jurisdiction should have the competence to resolve the dispute, then the jurisdiction of a particular case is to be determined by the high court.

2.4 Specialized courts in the system of administrative justice in Germany

Comparing to Ukraine, Germany has gone a long way in matters of court specialization. In particular, administrative justice in Germany is characterized by the presence of special courts of administrative justice: financial and social courts. In accordance with the Law of the Federal Republic of Germany "On Financial Courts", there are only two instances in the system of financial courts. Administrative cases are considered by the Land Financing Courts (die Finanzgerichte) as a court of first instance. The Senate at the Financial Court of the Land carries out a hearing with three professional judges and two honorary ones. The Senate may refer the case for individual hearing to one of its judges. The second and final instance is the Federal Financial Court (der Bundesfinanzhof).

Financial courts are liable to litigate public-law disputes over claims against power entities (e.g. tax disputes or other public-law disputes arising from public financial activities of the state). The Federal Court is a revisionary instance, which considers the appeals against decisions and rulings of the corresponding financial court. The next specialization of courts is social courts (or social security courts). Their organization is regulated by the Law of the Federal Republic of Germany "On Social Courts"[1]. They are established to consider public-law disputes related to social insurance, provision of free or preferential health care, payment of unemployment benefits, etc.

The social court system has three levels unlike the financial courts. The first are the social courts (die Sozialgerichte). The second level is the social court of the land (das Landessozialgericht). Their chambers consider complicated cases as courts of first instance, and are empowered to review decisions of courts of first instance. Social courts of land are organized in 16 subjects of the federation. The third level in the system of courts for social security is the Federal Social Court (das Bundessozialgericht), which consists of 14 chambers (on the matters of insurance of the unemployed, on the violation of the insurance rights of individuals, on the social security of victims of war, on the insurance of miners, etc.). Organizationally, the structure of the court includes the Grand Senate. The courts in the social affairs include, in particular, disputes on social security: insurance of the sick, pension, care for the sick, victims of war, etc. [1]. In the

[1] German Law “On Social Courts”. Retrieved from https://e-justice.europa.eu/content_specialised_courts-19-de-maximizeMS-en.do?member=1

social court of first instance, the decision is adopted by the chamber of social affairs, consisting of one professional judge and two honorary ones. In the social court of the land, the decision is adopted by a senate consisting of three professional judges and two honorary ones (judges on a public basis). In the Grand Chamber of the Federal Social Court, 12 professional judges and 6 honorary judges adopt decisions.

The judicial system of Germany does not rule out the possibility of a judicial error, even if a similar case was considered by another court. To avoid possible mistakes, an institution of the Grand Senate and the High Senate was established, which is composed of the senates of different courts that ensure the unity of judicial practice in Germany. The Senate acts at the Supreme Courts. The Senate, which adopts a decision different than another Senate or the Grand Senate that has decided on a similar issue, must convene the High Senate. In Germany, such issues are governed by a special law on the unity of enforcement. The Grand Senate decides whether the FAC Senate can move away from a decision by another FAC Senate or the FAC Grand Senate. Transfer of the case to the FAC High Senate is possible only in the event that the Senate, the decision of which the other Senate deems necessary to withdraw, responds to the request of the latter that it continues to maintain its legal position.

Otherwise, the FAC Senate has the right to bring before the FAC High Senate the issue which, in its opinion, is a matter of law that is fundamental to the formation of a uniform law practice and which may further affect the development of law as a whole, or if this issue urgently requires solution for the particular case under consideration, to protect the rights, freedoms and interests of the individual and the citizen. It should be noted that the High Senate decides only on matters of law, that is, the factual side of the case should in any event remain outside the jurisdiction of the court. The decision of the High Senate is binding on the decisions of other FAC senates.

CONCLUSIONS

Thus, the administrative justice of Germany as a standalone, independent judicial branch is characterized by internal specialization (administrative courts of general jurisdiction and special jurisdiction). But as of today, there is a debate on the necessity of reforming the judicial system of Germany, which, in addition to specialization in the fields of justice and the presence of two and three levels, is complicated by the federal form of territorial organization. In particular, an opinion is entertained regarding the practicality of having a two-tier judicial system with regard to the majority of cases of minor complexity and preservation of a three-tier judicial system solely for administrative cases that are fundamental to the formation of a unified law enforcement practice, are of considerable public interest or of exceptional importance to the party involved.

Administrative justice in Germany is the activity of administrative courts of general and special jurisdiction operating within the entire judicial system and administering justice by protecting the subjective rights and legitimate interests of individuals

from unlawful decisions, illegal acts and inaction of the executive authorities and local self-government and their officials.

In Ukraine, in comparison with Germany, before the introduction of amendments to the Constitution of Ukraine in the area of justice, the four-tier judicial system operated, which to some extent caused the devaluation of the court decision as such and caused the desire and habit of individuals and economic entities to demand its review for the sake of the process itself, wasting time on adoption of the decision and its enforcement, which in some way resulted in the loss of the effect of the protection of the infringed law by the judicial system. As of today, the system of administrative courts in Ukraine has received more sophisticated procedural legislation that allows faster resolution of cases of insignificant complexity, which has put into practice new procedural institutes and the procedure for resolving public-law disputes that allow more efficient handling of administrative cases, although not flawless; which introduced so-called cassation filters, the essence of which is to determine the exceptional grounds for cassation appeal in cases where such an appeal is really necessary, which should serve to form an effective judicial system and guarantee the person the right to a final and binding judgment. The introduction of the cassation "filters" defined in the current ACPCU evidences the implementation by Ukraine of the recommendations of the Venice Commission on improving the justice system and the administration of justice by allowing the Supreme Court to consider any case through the use of cassation "filters".

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МОДЕРНІЗАЦІЯ КОРПОРАТИВНОГО ЗАКОНОДАВСТВА РЕСПУБЛІКИ КАЗАХСТАН В КОНТЕКСТІ ЗАКОНОДАВЧИХ РЕФОРМ І КОНЦЕПЦІЙ

Анотація. *Вивчення корпоративного права та корпоративних правовідносин за останні кілька років перетворилося на один із найактуальніших напрямків правових досліджень в науковому співтоваристві. Це явище зумовлене багатьма факторами, серед яких превалюють: глобалізація, трансформації економічних правовідносин, нові виклики сучасних демократій, динаміка реформ національного корпоративного законодавства та посилення міждержавного транскордонного співробітництва. В умовах трансформації суспільних відносин новітні погляди на корпоративні правовідносини стали невід'ємною складовою сучасного світу, умовою його існування, і отримали екстериторіальний характер. Метою статті є проведення комплексного дослідження тенденцій і проблем модернізації корпоративного законодавства Республіки Казахстан в контексті законодавчих реформ і концепцій, а також формування авторських пропозицій у зазначеній сфері, спираючись на аналіз Концепції вдосконалення законодавства Республіки Казахстан, спрямованого на поліпшення правового регулювання корпоративних правовідносин, корпоративного управління, діяльності корпоративних груп і правового становища холдингових компаній. Методологічну основу наукового дослідження становить ряд загальнонаукових та спеціальних методів пізнання, зокрема: діалектичний, системний, формально-логічний, метод системного аналізу, соціологічний та ін. Автором констатовано, що, незважаючи на велику кількість новел, які містяться в проаналізованій Концепції, закон на її основі так і не був прийнятий, що пов'язують, в своїй більшості, зі збільшеною деталізацією договірного правового регулювання, яка може привести до обмеження свободи угоди. Також в роботі аргументована доцільність виключення необґрунтованого впливу на корпоративні відносини за допомогою норм кримінального та адміністративного права; акцентовано увагу на необхідності законодавчого закріплення публічної достовірності реєстру юридичних осіб; розроблено та обґрунтовано пропозиції якісного реформування корпоративного законодавства Республіки Казахстан за допомогою внесення змін в існуючі норми національного правового регулювання.*

Ключові слова: корпоративне право, концепція, корпоративні правовідносини, модернізація законодавства, юридична особа.

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MODERNIZATION OF CORPORATE LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN IN THE CONTEXT OF LEGISLATIVE REFORMS AND CONCEPTS

Abstract. *The study of corporate law and corporate relations in the past few years has become one of the most relevant areas of legal research in the scientific community. This phenomenon is caused by many factors, among which prevail the following: globalization, the transformation of economic relations, the new challenges of modern democracies, the dynamics of reform of national corporate legislation and the strengthening of interstate transborder cooperation. In the context of the transformation of public relations, the latest views on corporate legal relations have become an integral component of the modern world, a condition for its existence and have acquired extraterritorial character. The purpose of the article is to perform a comprehensive research of the trends and issues of modernization of the corporate legislation of the Republic of Kazakhstan in the context of legislative reforms and concepts, as well as the formation of original proposals in this field, proceeding from the analysis of the Concept of improving the legislation of the Republic of Kazakhstan targeted at improving the legal regulation of corporate legal relations, corporate management, activities of the corporate groups and the legal status of holding companies. The methodological basis of scientific research is represented by a number of general scientific and special methods of cognition, namely: dialectical, systemic, Aristotelian methods, method of system analysis, sociological and others. The author stated that, despite the large number of new laws contained in the analysed Concept, the law on its basis was never adopted, which is connected, for the most part, with increased detailing of contractual legal regulation, which may lead to a restriction of freedom of contract. In addition, the paper argues the prudence of eliminating unreasonable effects on corporate relations through criminal and administrative law; the necessity for legislative consolidation of the public reliability of the register of legal entities is emphasized; proposals are developed and reasoned for a qualitative reform of the corporate legislation of the Republic of Kazakhstan by means of amending existing provisions of the national legal regulation.*

Keywords: corporate law, concept, corporate legal relations, modernization of legislation, legal entity.

INTRODUCTION

In 2018, on the instructions of the Ministry of Justice of the Republic of Kazakhstan and its contractor, the Reed Smith company, a Concept was developed for improvement of the legislation of the Republic of Kazakhstan aimed at bettering the legal regulation of corporate legal relations, corporate management, the activities of corporate groups and the legal status of holding companies (hereinafter referred to as the "Concept")[1].

[1] The Concept of Improving the Legislation of the Republic of Kazakhstan. Retrieved from http://www.zqai.kz/sites/default/files/rus_2015.pdf

The purpose of the Concept is to state the most important aspects of improving Kazakhstani legislation on business enterprises of a corporate type in such a way, so as to:

– restore the logic of the initial (after the transition to a market type of national economy in the early 1990s) structure and content of corporate legislation in accordance with the general provisions of the Civil Code of the Republic of Kazakhstan ("Civil Code") on legal entities[1];

– modernize corporate legislation with consideration of the experience of developed democratic foreign countries of a market type in regulation of entrepreneurial activity and the legal forms available for its implementation;

– ensure the convergence of corporate legislation with the law of the states of the European Union, the United Kingdom, including the countries of the Commonwealth, and other member states of the Organization for Economic Cooperation and Development (OECD) on the basis of harmonization or implementation of the most effective and universal corporate law institutions in the legislation of Kazakhstan [1–3].

It is assumed that such improvement of the legislation will create additional conditions for enhancing entrepreneurial activity, reducing the number of corporate conflicts and changing their quality towards minimizing the degree of their materiality for general civil circulation, reducing the manifestations of raiding and corporate blackmail. The aim is also to create the soil for the formation in Kazakhstan of a sustainable class of professional directors and managers, committed in their activities to the best international standards of corporate governance, protection of shareholder rights and respect for investors.

Convergence of corporate legislation with the best examples of legal regulation will also facilitate the increase of the inflow of investments into the national economy, on the one hand, and mutually beneficial integration of the domestic market infrastructure into the system of international economic relations for Kazakhstan and the countries that are its business partners, on the other hand [4; 5]. In general, it is advisable to improve corporate law that would allow, within the framework of regulations relating to private international law, to develop modern and appropriate international corporate law (international law of companies).

1. MATERIALS AND METHODS

The methodological basis of scientific research is represented by a number of general scientific and special methods of cognition, in particular: dialectical, systemic, Aristotelian, conceptual, logical and legal, comparative law, historical-law, systemic-functional, system analysis method, sociological, abstracting, analogy method, legal modelling, etc.

[1] Civil Code of the Republic of Kazakhstan. (1994, December). Retrieved from https://online.zakon.kz/document/?doc_id=1006061

The dialectical method enabled the estimation of the state, tendencies and prospects for the development of scientific research in the field of corporate law reform in the context of the development factors of the state and national legal system. The systematic method was used during the analysis of corporate legislation of the Republic of Kazakhstan and other countries that underwent modernization of national corporate legal regulation. The Aristotelian method was used to identify the relationships and contradictions in the conceptual categorical apparatus that exist in the theory of corporate law, national and international corporate law.

The conceptual method served as a means of scientific research of the categories "corporate law", "protection of corporate rights", "corporate legislation", "corporation", etc. as concepts, which, in turn, allowed to go beyond the framework of the statutory approach and consider them as a multidimensional social and legal phenomenon. The historical-law method facilitates the identification of the basic laws and features of the emergence and development of the concept and essence of corporate law, its maturation and reform.

The comparative law method was employed to perform a comparative analysis of the legal regulation of the processes of corporate legislation improvement in the Republic of Kazakhstan and other states; the method of abstraction was applied to define and clarify individual concepts, in particular, the concept of corporations, corporate rights, corporate entity, corporate dispute. Using the systemic-functional method, a circle of conceptual directions for the modernization of corporate legislation in the Republic of Kazakhstan was determined. Aristotelian and logical and legal methods allowed to identify the shortcomings of the current legislation and substantiate the directions for its improvement. The analogy method allowed, with consideration of practices of other states, to conclude the necessity of improvement of the domestic system of corporate legislation. Upon formulating legislative proposals, we employed the statutory-semantic technique, logical methods of cognition and the method of legal modelling.

The information base of the research is formed by the Constitution of the Republic of Kazakhstan, civil and corporate national legislation, international provisions and standards, decrees of the Constitutional Council of the Republic, laws and other regulations, data from ministries and sociological services, monographic and periodic literature, court case reports, results of author's personal research.

The analysis method allowed to determine that the emergence of variable forms of ownership caused the gradual maturation of modern forms of economic activity, which, in turn, facilitated a qualitative update of domestic legislation governing the existence and functioning of corporate legal relations in the Republic of Kazakhstan. In turn, today's realities require a qualitative review of the existing legal regulation, its modernization and fragmentary adaptation of foreign practices with consideration of the national identity.

2. RESULTS AND DISCUSSION

2.1 Background and issues of adoption of the researched Concept in the Republic of Kazakhstan

Over the years of independence, the entrepreneurial environment has undergone qualitative changes connected with the expansion of contractual types of commercial relations, the transformation of corporate legal relations mechanisms, the dynamic growth in the number of foreign economic operations, as well as an increase in the number of foreign investments. Integration processes today act as the basis, proceeding from which the approbation of foreign practices in legal regulation of economic relations in the Republic of Kazakhstan takes place, furthermore, law enforcement practice is also subject to the direct influence of foreign treaty institutions. It should be emphasized that in the context of globalization, the foundations of reforming corporate legislation and law, which as a result can create a qualitatively new level of the national legal system for the state and increase its competitiveness, are also of particular importance [6–8]. Thus, today one of the leading priorities of the national policy is to ensure high and sustainable rates of economic growth. For this, a developed and flexible corporate legislation is required that would allow investors to perform their activities in the Republic of Kazakhstan, as well as to contribute to the development of a new business and its conduct. It is precisely for these reasons that it is of paramount importance to implement international and approbated standards in this field into national legislation and law enforcement practice.

It should be noted that the adoption of the Concept in the Republic of Kazakhstan was not a spontaneous phenomenon, but was the result of a long discussion, thorough legislative work and doctrinal justification of its provisions in the context of the realities of globalized corporate legal relations. Thus, the main results of the research were reflected in the form of analytical reports, draft legislative acts and their concepts. With that, experts have repeatedly noted that the perception of the elements, principles of foreign legal systems should be exercised with great care, maintaining the identity of the legal system of Kazakhstan. In particular, a research of the trends in improving legislation on legal entities facilitated the development of an appropriate concept for legislation improvement, with consideration of the recommendations of participants in numerous conferences in the field of corporate law, legislation and management. This concept is based on the implementation of the provisions of English law, its main purpose is to identify a number of legal ideas and constructions that can be fragmented into legislation from English law with the justification of the corresponding possibility through the lens of the necessities of law enforcement practice and the achievements of the Kazakhstani civilistic doctrine.

It should be noted that for a long time, scientists have been suggesting and developing similar concepts. Thus, for instance, back in the 90s, F.S. Karagussov suggested areas in which the improvement of corporate legislation and management appears to

be most prudent. These developments were based on a research of the experience of development of joint-stock legislation and the practice of its application in the Republic of Kazakhstan and other CIS countries, on the results of a comparative comprehensive analysis of the legislation on joint-stock companies of developed market-type states (Germany, France, Switzerland, England, the USA) and regulatory documents of the European Union, as well as model (recommendation) acts of the Interparliamentary Assembly of the CIS Member States [3].

Consequentially, the adoption and gradual implementation of the Concept of legal policy of the Republic of Kazakhstan for 2010 – 2020 [3] had a special influence on the formation of the researched Concept. The main areas of development, among other things, in this document were identified as follows: limiting state interference in the field of private entrepreneurship and expanding the scope of application of the principle of free disposition in the regulation of proprietary relations and relations within the framework of the civil process, development of corporate law and legislation on non-profit organizations, "clarification of the concept of transactions, their composition and consequences of non-execution of transactions", "improvement of the institution of recognition of transactions as null and void". This Concept of legal policy in the field of vector corporate legislative reforms has become a partial example of the implementation of the provisions of English law. However, even the development of the Concept in scientific circles was perceived very ambiguously and became the subject of discussion. In the course of its subsequent examination, the head of the school of the Kazakhstani civilistic thought, academician M. K. Suleymenov, proposed the most appropriate ways and means of perceiving the concepts and institutions of English law proposed for "implementation" [9]. It should be highlighted that the linking of the analysed document to English law is rather conditional, due to the fact that many legal constructions are used in international trade or business practice, and are also subject to legal regulation in the legislation of many countries of the world.

It is noteworthy that in the second half of 2018, a research group of scientists composed of M. K. Suleymenov [9], F.S. Karagussov [3], K. V. Mukasheva and A. E. Duisenova [10] conducted a comprehensive comparative research of Kazakhstani national legislation with legal regulation in other countries in the field of reforming and modernizing legislation on entrepreneurial activity, based on which a unified national report was developed containing proposals for adapting the positive experiences of other countries and expert conclusions on the results of the completion of reforms (including analysis of the laws of Russia, Germany, Singapore, the Canadian province of Quebec, and English law). This analysis was performed in such areas as: corporate law and management, regulation of holding companies and corporate groups, individual legal structures used in business, issues of contractual liability and protection of foreign investors [11]. The results of this work also laid the foundation for the basis of amendments and changes to the Concept of the draft Law of the Republic of Kazakhstan "On Amendments and Changes to Some Legislative Acts of the Republic of Kazakhstan on

the Improvement of Civil Legislation and Improving the Conditions for Entrepreneurship Based on the Implementation of the Principles and Provisions of English and European Law"[1].

Based on the results of processing theoretical and empirical material by scientists and practitioners with the participation of the Ministry of Justice of the Republic of Kazakhstan, a concept for improving the legislation of the Republic of Kazakhstan aimed at bettering the legal regulation of corporate legal relations, corporate management, the activities of corporate groups and the legal status of holding companies was developed and presented to the public [3]. We shall emphasize that the developers positioned this concept as a powerful mechanism for transforming legal reality through reformed corporate legislation, moreover, it was supposed to intensify cross-border cooperation and increase investment immediately after the adoption of this Concept. Without a doubt, this document is a comprehensive guideline, devoid of fragmentation, on the path to systematic implementation of a qualitative update of corporate legislation of the Republic of Kazakhstan.

Despite the large number of new laws contained in the analysed Concept, the law on its basis was never adopted. In particular, positions were expressed that an increased detailing of contractual legal regulation would lead to unnecessary build-up of provisions, and, as a result, to difficulties in law enforcement. Some scholars even emphasized that legalising the provisions of the Concept may lead to a restriction of freedom of agreement. To form a comprehensive understanding of the Concept and the corresponding conclusions, it is necessary to analyse its content and the subsequent impact on the modernization of corporate legislation of the Republic of Kazakhstan.

2.2 Analysis of the conceptual provisions of the proposed Concept

The Concept proposes steps to improve the legal regulation of profit corporate organizations created in those legal forms that provide legal guarantees and mechanisms to protect the rights of investors and shareholders, allow the formation of corporate groups (including transnational ones), for which effective regulatory measures aimed both at protecting the domestic market and at promoting international (transborder) economic ties[2]. This refers to the legal regulation of profit private-law corporations, which in foreign law are called business companies or companies based on membership using the principle of separation of membership in the corporation from its management [12–15]. The issues of legal regulation of non-profit corporations, as well as profit organizations based mainly on a personal element, which involves the personal participation of a member of the corporation in the conduct of its affairs, the implementation of its activities and its management (these are full and limited

[1] The concept of improving the civil legislation of the Republic of Kazakhstan on the basis of the implementation of the provisions of English law. Retrieved from http://www.zqai.kz/sites/default/files/rus_2015.pdf.

[2] *Ibidem*

partnerships, as well as production cooperatives) are left out of the framework of the Concept.

The presentation of the Concept itself is preceded by a brief description of the structure and content of the corporate legislation of the Republic of Kazakhstan, which is currently in force. In addition, a separate section of the Concept is devoted to the description of the development of corporate legislation in the Republic of Kazakhstan from 1991 to the present.

The Concept itself is very extensive in content. However, all directions of the development of legislation contained therein can be divided into three large groups. The first group includes ideas regarding a general model for regulating corporate relations, the structure and content of corporate legislation, as well as the basic concepts and classifications of corporate law and corporate organizations. The second group deals with the provisions governing the issues of corporate structure and corporate management, and first and foremost, upon using the legal form of a joint-stock company. The third group of ideas focuses on the institution of corporate groups as a set of provisions, proceeding wherefrom the existence of a group of companies and the emergence of holdings are recognized, and corporate management is regulated within the framework of such a group of companies.

The number of proposed improvement directions is quite large. In this regard, only some conceptual (ideological) directions of the proposed modernization and improvement of corporate legislation are outlined below.

It appears prudent to proceed from the fact that it is legislation as a set of legal provisions united by a single purpose (namely, to regulate corporate relations) that is preserved by the source of corporate law and regulation of corporate relations; self-regulation in this field should be substantially limited. It can be stated that corporate law at this stage is a branch of civil legislation, the object of which is corporate relations, regulated on the basis of general principles (fundamentals) of civil legislation by special rules of corporate law, as well as contractual and obligatory law, other applicable legal provisions.

The preservation of the current model of civil relations regulation was noted as promising: general provisions of the Civil Code (general principles of civil legislation, rules on legal entities and corporations, general provisions on property, obligations, contracts and civil law liability) and corporate legislation based on them (on profit organizations of corporate type of various legal forms, legislation on non-profit organizations)[1].

A legislative classification of corporate contracts, regulation of the grounds and conditions for their conclusion, performance and termination is proposed. With that, the features of the exclusive or combined application of the provisions of contractual

[1] Civil Code of the Republic of Kazakhstan. (1994, December). Retrieved from https://online.zakon.kz/document/?doc_id=1006061

and/or corporate law upon regulating corporate contracts still require understanding. It will be necessary to determine how much in a certain case the corporate legislation can take precedence over the general provisions of the Civil Code[1] on contracts and obligations? Can there be special features of regulation of issues of validity of corporate contracts, can special or other grounds for the invalidity of corporate contracts be established?

A special block includes proposals on improving regulation of the issue of liability of company officials, the regulation of so-called derivative actions, increasing the degree of personal and professional independence and competence of members of the board of directors, reviewing requirements for the status of an independent director.

Among other proposals directly related to issues of organizational structure and corporate management, the idea of an agreed withdrawal from the shareholders/members of the company should be noted; new provisions governing changes in the composition of shareholders; on improving the mechanism for withdrawing from the membership of a limited liability partnership (LLP (LLC)); regulation of remote control in companies; improving regulation of corporate management transparency issues and disclosing information on the company and its activities; creating a register of beneficiaries of companies; improving the rules on special categories of transactions of a joint-stock company (JSC). Additionally, it is proposed to restore full transparency in decision-making regarding the conclusion of transactions by the company with an interest in their implementation and public disclosure of information on each of them [16–18]. It is proposed to improve the procedures of merger and separation of joint-stock companies, the regulation of mixed forms of reorganization, as well as measures for the efficient distribution of property remaining after the liquidation of the joint-stock company among its shareholders.

It is separately proposed to accept the idea of the legal formation of a corporate group on the basis of an agreement; regulate in detail all transactions between a holding (dominant) company and a subsidiary (subordinate company). It is important to establish certain exemptions for subsidiaries included in the corporate group in terms of corporate management issues, based on the right of the holding company to give binding instructions to the subsidiary and liability of the holding company for the obligations of the subsidiary.

Proceeding from the abovementioned main provisions of the Concept, it can be stated that, in spite of the expressly modernizing component, there is an inherent excessive detailing that can both minimize the risks of activities of subjects of corporate legal relations and lead to confusion in legal regulation and enforcement. It is worth emphasizing that only subsequent drafting of the provisions, which are proposed in the Concept, by the legislator with the participation of representatives of doctrine and

[1] *Ibidem*

practice, will lead to the achievement of the necessary result and increase the efficiency of the current corporate legislation of the Republic of Kazakhstan.

2.3 Proposals for the modernization of corporate legislation in the context of the analysed Concept

Particular attention in the context of modernizing corporate legislation should be given to the essence of corporate relations that it regulates. Note that currently there is no legalized definition of the concept of "corporate relations", however, it is prudent to outline them as relations regulated by civil legislation and limit the circle of subjects of such relations. It appears necessary to unambiguously determine that corporate relations are those related to the establishment, membership and management of corporations.

A clear understanding of who can be recognized as subjects of corporate relations is important. These include: the corporation itself, its members and officers. Only they can act as parties to a corporate dispute, and only in relation to them can the criminal and administrative-law prosecutions for socially dangerous acts stipulated by the law be applied. Establishment of the definitions and the list of subjects of corporate relations is considered as inappropriate from the standpoint of universally recognized methods of legal technology. However, the development of a single position is possible in judicial practice and/or as a result of its generalization.

Profit and non-profit corporations are the majority of legal entities involved in modern civil circulation. However, until the final abandonment of the form of state enterprise in Kazakhstan law, the possibility of the existence of both corporate and unincorporated profit organizations will remain. In this regard, it is deemed appropriate to legislatively consolidate the legally relevant criteria of the corporation, determining that the corporation is a legal entity, the founders/members of which, in exchange for contributions to its property or charter capital, acquire the rights (or possess rights) of membership in relation to it (this legal entity) The content and/or scope of the concept of "membership right" should be determined in relation to the corporation of each individual type (profit or non-profit) and each individual legal form.

The methodological approach is also important for establishing special regulation of not only legal forms, but also of types of legal entities, since the unifying factor in each type is not so much the organizational moment of membership in the corporation as the permissibility or prohibition of the distribution of its income among members of the corporation. This factor directly affects the content of membership rights, the regulation of the corporation, the features of its corporate structure and corporate management; it also conditions the impossibility of type transformations for legal entities (in any case, the transformation of a non-profit organization into a commercial organization is prohibited, and this must be enshrined in the Civil Code)[1].

[1] Civil Code of the Republic of Kazakhstan. (1994, December). Retrieved from https://online.zakon.kz/document/?doc_id=1006061

In this regard, the law of non-profit organizations should be separately outlined, combining the regulation of such legal entities that can be established as corporations and in other (unincorporated) forms, in particular, institutions and foundations [19–21]. In turn, there is separate corporate legislation related to the regulation of commercial legal entities established and operating as corporations (corporate type organizations). It also seems appropriate to prevent the use of the same legal forms for profit and non-profit organizations. And business companies and business partnerships should be recognized by commercial organizations only by virtue of their respective legal form [22]. With consideration of the foreign practices, it is reasonable to provide for classification of commercial corporations into business companies and business partnerships in the Civil Code[1], as well as to ensure separate regulation of companies and business partnerships. It is also prudent to maintain a commitment to an approach where the legal forms of profit corporations (as well as of all profit organizations in general) should be regulated by law, and their legally established list should be exhaustive[2].

Legislative regulation of features with regard to companies recognized by legal entities of public law (LEPL) may be permissible. At present, Kazakhstani law does not recognize the existence of LEPL. However, if this concept is adopted, one should bear in mind that such LEPL can be created in the legal forms provided for legal entities of private law, including in the form of business companies. Corporate structure and corporate management issues should be fully regulated by the legislation on companies. Features may relate to the regulation of issues regarding the grounds for their establishment, determination of special legal capacity, control over the achievement of the creation purposes and grounds for termination of activity.

At the same time, considering the diversity of types of entrepreneurial activity, it appears to be appropriate to consolidate the concept of "national corporate management standard" ("NCMS") in the field of entrepreneurship and to allow the creation of such non-statutory legal standards as well as model internal corporate acts (such as, for instance, model code of corporate management, regulations on company bodies, regulations and methodologies) by an authorized entity in order to promote the improvement of practices of corporate management and improve the investment attractiveness of Kazakhstani companies. Of course, such NCMSs should not contradict the legislation as the minimum mandatory standard.

A certain acceptability may be gained by the idea of legislative classification of the NCMS as mandatory for certain categories of companies (for example, depending on the type of activity it performs, being listed on a stock exchange, circulation of its shares in trading or quotation systems of the OTC market, the circle or number of its share-

[1] Civil Code of the Republic of Kazakhstan. (1994, December). Retrieved from https://online.zakon.kz/document/?doc_id=1006061

[2] The concept of the legal policy of the Republic of Kazakhstan for the period from 2010 to 2020, approved by Decree of the President of the Republic of Kazakhstan. (2009, August). Retrieved from http://www.adilet.gov.kz/ru/policy-documents.

holders, other circumstances) and recommendatory (including referring to them model corporate acts as well). With that, it will be necessary to determine by whom and in what cases NCMSs of a certain kind must or might be accepted, and what are the consequences of their non-compliance.

Legislative identification of decisions of meetings in the Civil Code as the basis for the emergence of civil rights and obligations will facilitate the introduction of legal certainty in relations connected with corporate management, reduce the number of corporate disputes, increase the degree of responsibility of corporation members and its officers for the proper exercise of their membership rights and company management responsibilities, and in general will improve the quality of corporate legislation, and will also facilitate its convergence with the legislation of developed countries and countries that are major economic partners of Kazakhstan[1].

The aforementioned register of legal entities is one of two public registers that are of importance to joint-stock companies. To confirm and exercise the rights of shareholders with respect to shares, the register of securities holders is of legal significance.

In the legislation, it is prudent to unambiguously determine that the formation of the bodies of the company is the responsibility of its founders, subject to execution upon deciding to establish a company. The obligation of the members/shareholders of the company to ensure the continuity of proper management of the company should be established separately. Effective mechanisms should be created in order to encourage or coerce the members/shareholders to form company bodies at any time during the company's activity, when it becomes necessary. This is especially important for joint-stock companies, as well as for any other public interest companies.

Regarding the corporate structure regulation issues, it is proposed to strictly follow the principle of separating membership from management, to narrow the competence of the general meeting, the model of mixed regulation of the issue of the applicable corporate structure of the company, as well as to bring the regulated corporate structure models in line with the models applied in developed jurisdictions.

CONCLUSIONS

The analysed Concept, developed with consideration of varied doctrinal approaches and positive foreign experience, facilitated the formation of a comprehensive idea of the necessity for modernization and high-quality reform of the current corporate legislation of the Republic of Kazakhstan, as a result of which the following conclusions were proposed.

The necessity of excluding unreasonable impact on corporate relations via provisions of criminal and administrative law is argued: public-law sanctions should be applied only in cases of deliberate illegal actions against property and proprietary

[1] The Concept of Improving the Legislation of the Republic of Kazakhstan. Retrieved from http://www.zqai.kz/sites/default/files/rus_2015.pdf

interests of corporate relations entities that are unable to enjoy civil-law remedies in the absence of direct legal relationship with the offender.

It is proved that the legal status of joint-stock companies and limited liability companies (superadded liability companies) should be regulated by independent laws, and the approach used in the current legislation to regulate the features of legal entities from these legal forms appears to be prudent. A separate law should regulate the legal status of business partnerships in the form of a full and limited partnership, without extending the provisions general for them to companies with limited and superadded liability. The legal status and corporate management system in a joint-stock company should be governed primarily by imperative regulations. In turn, LLCs and SLCs can be used for start-up businesses, small and medium enterprises. Regulation of the legal status of such companies may be more dispositive and, in many matters concerning the formation of a corporate structure and performing corporate management, allow their members to take more initiative and establish rules at their discretion to the extent permitted by law, without violating third party rights and public policy.

It was stated that corporate legislation should constitute the minimum standard for creating a corporate structure and regulating relations within the framework of corporate management. With that, such a standard should be common for all companies of the corresponding legal form (JSC or LLC), regardless of which entity is its major shareholder/member. In this regard, it seems prudent to establish a rule on the unconditional applicability of the legislation on companies to any joint-stock companies and limited liability companies with the exception of companies belonging to corporate groups that are governed by special rules on corporate groups, regardless of whether these companies some are part of a certain corporate group provided for by law or arising by force of law. Furthermore, such legislative exceptions should also be common in application to any corporate groups.

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ЦИВІЛЬНИЙ КОДЕКС РЕСПУБЛІКИ БІЛОРУСЬ: ПРОБЛЕМИ І НАПРЯМКИ РЕФОРМУВАННЯ

Анотація. *Рівень юридично-технічної досконалості цивільного законодавства в тій чи іншій країні в значній мірі визначається конкретно-історичними тенденціями і проблемами його функціонування. Сьогодні головною інноваційною домінантою для Республіки Білорусь є формування адекватної системи реформованого цивільного законодавства. У свою чергу, Цивільний кодекс Республіки Білорусь, безумовно, є суттєвим досягненням вітчизняних цивілістів, як вчених і практиків, так і законодавців. Але, як і будь-який закон, він викликає деякі питання і труднощі в його застосуванні. Тому основна мета роботи полягає в тому, щоб на підставі дослідження теоретико-емпіричного матеріалу розкрити особливості, проблеми та напрямки реформування Цивільного кодексу Республіки Білорусь, із визначенням місця цього кодифікованого нормативно-правового акту в національній системі цивільного законодавства. Для досягнення визначеної мети використано діалектичний, порівняльно-правовий, історико-правовий, формально-догматичний методи дослідження. Встановлено, що в нормах Цивільного кодексу Республіки Білорусь існує заміна дефініції та правової сутності фундаментального принципу верховенства права, яка належить до обов'язкового приведення у відповідність з нормами міжнародно-правових актів. Визначено, що чинний кодекс має послідовну і органічну архітектоніку, проте, незважаючи на прогресивне правове регулювання в порівнянні з країнами-учасницями СНД, вимагає якісної модернізації, перегляду деяких положень і підходів до тлумачення понятійно-категоріального апарату в контексті реалій сьогодення. У роботі автором запропоновано напрями вдосконалення Цивільного кодексу Республіки Білорусь (врахування практики застосування цивільного законодавства з метою уніфікації тлумачення норм; закріплення нових інститутів цивільного права; інтенсифікація транскордонного співробітництва в сфері реформування цивільного законодавства).*

Ключові слова: реформування законодавства, цивільне законодавство, понятійно-категоріальний апарат, принцип верховенства права, глобалізація.

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CIVIL CODE OF THE REPUBLIC OF BELARUS: ISSUES AND DIRECTIONS OF REFORM

Abstract. *The level of legal and technical perfection of civil legislation in a particular country is largely determined by specific historical tendencies and the problems of its functioning. Cur-*

rently the main innovative dominant for the Republic of Belarus is the formation of an adequate system of reformed civil legislation. In turn, the Civil Code of the Republic of Belarus, of course, is a significant achievement of domestic civilists, both scientists and practitioners, and lawmakers. However, like any law, it raises some issues and difficulties in its application. Therefore, the main purpose of the paper is to reveal the features, issues and directions of reforming the Civil Code of the Republic of Belarus proceeding from the research of theoretical and empirical material, to determine the place of this codified statutory instrument in the national system of civil legislation. To achieve this purpose, dialectic, comparative law, historical-law, formal and dogmatic research methods were applied. It is established that in the provisions of the Civil Code of the Republic of Belarus there is a substitution of the definition and legal essence of the fundamental principle of the rule of law, which must be brought in line with the provisions of international law regulations. It is determined that the current code has a very consistent and organic architectonics, however, despite the progressive legal regulation in comparison with the CIS countries, it requires high-quality modernization, a review of some provisions and approaches to the interpretation of the conceptual and categorical framework in the context of today's realities. In the article, the author suggests improvement directions for the Civil Code of the Republic of Belarus (with consideration of the practice of applying civil legislation with the purpose of unifying the interpretation of provisions; consolidation of new civil law institutions; intensification of transborder cooperation in the field of civil law reform).

Keywords: legislative reform, civil legislation, conceptual and categorical framework, rule of law principle, globalization.

INTRODUCTION

The state of civil society and civil legislation is traditionally perceived and evaluated proceeding from the definition of the role and significance of the civil code in a given state. This idea permeates the works of the civilistic scientist N.S. Kuznetsova, who notes that "the civil code of any country reflects the values of a particular society, allows to determine the ideological and property basis on which this society plans to build its development and its future. Moreover, such a codified act is not only the main act of civil law, but also the basis for the entire system of private law, the code of life for the entire civil society" [1].

It is noteworthy that the Civil Code of the Republic of Belarus (hereinafter referred to as "the Civil Code of Belarus") was developed on the basis of the Model Civil Code for the CIS Member States, and, being simultaneously generally adopted in 1998, entered into force by a general rule on July 1, 1999[1]. The Republic of Belarus, of course, correlates itself with the Romano-German legal family through the legalization of "the rights of the countries of the civil code". As a codified act in the field of civil law regulation, the Civil Code of Belarus fixes the main principles of civil legislation, and also reveals their content, which has been repeatedly noted in the works of domestic and foreign law researchers, especially in a positive way [2–5]. With that, it is unam-

[1] Civil Code of the Republic of Belarus. (1998, December). Retrieved from http://pravo.by/document/?guid=3871&p0=hk9800218

biguous to determine whether the Civil Code of Belarus is the main act of civil legislation, as it is, in particular, directly defined in para. 2 of Art. 4 of the Civil Code of Ukraine[1] is impossible [6]. This issue is being actualized in connection with a comprehensive review of the Civil Code of Belarus, which resulted in a Draft Law on amendments to certain codes submitted for public discussion[2].

This context determines the purpose of the article, which, proceeding from the research of theoretical and empirical material, is to reveal the features, issues and directions of reforming the Civil Code of the Republic of Belarus, determining the place of this codified statutory instrument in the national system of civil legislation.

1. MATERIALS AND METHODS

The versatility, variability and diversity of civil law regulation of the relevant legal relations conditioned the use of a set of general scientific and special scientific methods of cognition of state legal phenomena and processes, which, in turn, ensured an objective analysis of the issue under research, as well as the reliability of the results and conclusions. The methodological basis of the article is formed by such methods as: dialectical, comparative law, historical-law, analysis and synthesis, dogmatic, analogy, legal modelling, linguo-legal, structural and functional, induction, deduction, formal and dogmatic, logical, prognostic and other.

The leading method in the research process was the dialectic method of cognition of phenomena and processes, which facilitated the determination of the state, directions and prospects for the development of scientific research and legislative developments in the field of improving the civil legislation of the Republic of Belarus in general, and the Civil Code in particular. Application of special epistemological methods (linguo-legal, structural and functional) assisted in performance of the analysis of the regulatory material connected with the research topic, forming the basis for the development of an original list of the most relevant issues of improving the Civil Code of the Republic of Belarus.

A special place is also occupied by the comparative law method, which was applied in the process of comparative analysis of the scientific and legislative development of the issues of formation, existence and development of a civil law system in the territory of our state and the member States of the Eurasian Economic Union in order to identify positive legislative practices that would be appropriate and eligible for approbation in the Republic of Belarus, with consideration of the specificity of the domestic legal system and realities. In addition, this method provided an opportunity to outline substantial issues and shortcomings in the current Civil Code of the Republic of Belarus.

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

[2] Amending Certain Codes of the Republic of Belarus". Retrieved from http://forumpravo.by/files/nczpi_zakon_proekt_izmenenija_v_kodeksi.pdf.

The historical-law method was applied upon the research of the genesis of the formation of the civil legislation system of the Republic of Belarus and the features of the formation and change of architectonics and provisions of the Civil Code of the state; analysis and synthesis methods were used to establish the substance and content of the Civil Code of the Republic of Belarus, the criteria affecting its current and future transformations. In addition, these methods allowed to determine the variability of legal definitions of concepts stipulated by the Civil Code of the Republic of Belarus, as well as the multivariance of doctrinal approaches to the outlined issue. Using the dogmatic method, conclusions were formulated in accordance with the purpose of the research. The analogy method facilitated, with consideration of foreign practices, the conclusion on the necessity of improvement of the domestic civil legislation system, the development and adoption of the Concept of the civil legislation reform of the Republic of Belarus on the basis of a single set of backbone reform factors.

Upon formulating legislative proposals, a normative-semantic technique, logical methods of cognition, and the method of legal modelling were employed. The methods of induction and deduction provided the definition of the formation of a system of reformed civil legislation – the main innovative dominant for the Republic of Belarus that is adequate to state interests and balanced, factoring in the national factors of the evolution of society. The formal dogmatic method was applied in the interpretation of legal categories, as a result of which the conceptual and categorical framework of civil legislation was improved and refined. The logical method was used as a universal means of argumentation of scientific conclusions in the field of reforming the Civil Code of the Republic of Belarus in the context of the indicated problematics. The prognostic method was used to determine the prospects for the development of civil legislation directed at the establishment of a system of effective legal support for the legal relations of individuals, society, and the state, with consideration of the latest approaches to the methods of legal regulation and testing of foreign positive experience. Such a comprehensive use of methodological procedures has several advantages in terms of the stated problematics and allows a more thorough analysis of the issues and directions of reforming the Civil Code of the Republic of Belarus.

The theoretical and empirical basis of the research is formed by the Constitution of the Republic of Belarus, the Civil Code of the Republic of Belarus, the provisions of civil legislation of the researched republic and other states, international regulations and standards, monographic and periodic literature, the results of the author's personal research.

2. RESULTS AND DISCUSSION

Before moving on to the issues and features of the Civil Code of Belarus, it would be prudent to initially note its architectonics. Thus, this code contains 8 sections, 75 chapters, 1153 articles. Its structure is very consistent and organic. However, despite the very progressive legal regulation – for example, in contrast to the Civil Code of

Ukraine[1], the Civil Code of Belarus[2] legalizes franchising, – lately some provisions have been increasingly regarded as archaic. Thus, not all legalized provisions correspond to the challenges of globalization and the development of a digital economy. It should be noted that representatives of the doctrine, practice and lawmakers have been working on improving the content of the Civil Code of Belarus for several years with the goal of organically correlating it with other acts of civil law, eliminating inaccuracies and modernizing in the context of intensive transformations of civil legal relations. Nevertheless, the concept of reforming the civil code is constantly undergoing changes, as a result of which, many concepts do not receive an adequate coverage in the legislation and their logical consolidation at the national level.

Another concerning point is the multivariance of approaches to modernizing the provisions of the Civil Code of Belarus, which leads to conflicts in legal regulation, as well as a distortion of international standards in the process of their adaptation. In particular, the foundations for the implementation of international principles and features of civil law regulation in the Civil Code of Belarus have not yet been developed and legalized, but are demanded by the realities of today.

In this context, special attention should be paid to the consolidation of the rule of law principle in the code, which, according to civilists, only fragmentarily corresponds to the doctrinal approaches and its modern interpretation developed by the international community.

The principle of the rule of law, in accordance with the provisions of the Report of the European Commission for Democracy through Law "On the Rule of Law" (Strasbourg, 4 April 2011, study 512/2009) [7; 8], is a fundamental value. The concept of the rule of law pervades both the national and international levels, is one of the fundamental values of the Council of Europe, acts as the basis for the adoption of UN documents, is enshrined in the preamble to the Treaty on the European Union and other EU documents. The rule of law in itself forms an integral part of any democratic society, and, in particular, requires that all officials treat everyone with respect for their dignity, respecting the principle of equality, rationally and on the basis of law, and that everyone has the opportunity to appeal against any decisions in independent and impartial courts. In the recent past, as the report draws attention, the essence of the rule of law in some countries was distorted to the point where it became equivalent to such concepts as "rule by law" or "rule by the law". Such forms of interpretation introduce the possibility of justifying the authoritarian actions of governments and do not reflect the true meaning of the term "rule of law". A.S. Dovgert points out, emphasizing that the rule of law acquires semantic meaning only when the rule and the law are not identified, and it means the application of positive law created by people – a natural one, which limits the power of the state and is a measure of positive law [9]. The Venice Commis-

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

[2] Civil Code of the Republic of Belarus. (1998, December). Retrieved from http://pravo.by/document/?guid=3871&p0=hk9800218

sion offers a generalized understanding of the rule of law, highlighting its constituent aspects such as legality, legal certainty, prohibition of arbitrariness, respect for human rights [1].

It is noteworthy that in the Civil Code of Belarus, the specified provisions are expressed through principles of civil legislation, initially established as the fundamental (Art. 2 of the Civil Code of Belarus), based on the natural behaviour of people in society: presumed good faith and reasonableness; inviolability of private property, designed to act as a guarantor of the stability of property relations, which form the basis of property turnover; freedom of contract, which is enshrined not only as a special principle of contract law (Article 391 of the Civil Code of Belarus), but also as a general principle of behaviour for all participants in civil circulation, the inadmissibility of arbitrary interference in private affairs; unimpeded implementation of the protection of civil rights, ensuring their restoration, judicial protection. The new Law of the Republic of Belarus dated July 17, 2018 "On Regulations"[1] summarizes and reflects these aspects as the main principles of rule-making, in particular, such as the principle of legality, protection of the rights, freedoms and legitimate interests of citizens, legal entities, social justice, stability of legal regulation. Proceeding from the legalized interpretation of the contents of the Civil Code of Belarus[2], it can be stated that in fact there is a substitution of the principle of the rule of law with the principle of legality. This circumstance produces its direct impact on law enforcement, which, inter alia, is associated with the assessment of the dispositivity in the civil law of Belarus, which forms an integral and indisputable feature of the method of civil law regulation.

The issue of dispositivity as a principle of regulation and enforcement remains quite debatable to this day, which is caused by many factors, including the methods used to interpret provisions as imperative or dispositive. A very positive example of the settlement of this issue is the Civil Code of Ukraine[3], which contains a provision that allows parties to derogate from other provisions of civil legislation and regulate their relations at their own discretion (p. 1 of para. 3 of Art. 6 of the Civil Code of Ukraine). Furthermore, there is a clear certainty of situations when the application of the above provision is prohibited (p. 2 of para. 3 of Art. 6 of the Civil Code of Ukraine). Thus, the dispositivity of the rule laid down in the provision is being presumed. In turn, in the Republic of Belarus, courts proceed from a literal interpretation. Thus, a provision is recognized as dispositive if it expressly provides for it; accordingly, a provision acquires a dispositive nature only by the will of the legislator, if it contains a direct indication of that. As a rule, in the wording "unless otherwise provided for by the agreement" offers variants (alternatives) of behaviour that can be selected by the subject of law [10]. Without

[1] Law of the Republic of Belarus "On Regulations: Law of the Republic of Belarus". (2018, July). Retrieved from http://pravo.by/document/?guid=3961&p0=H11800130

[2] Civil Code of the Republic of Belarus. (1998, December). Retrieved from http://pravo.by/document/?guid=3871&p0=hk9800218

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

a doubt, such an approach, being the rudiment of the Soviet past, does not contribute to convergence with developed civil law and order, it requires rethinking and change. In the context of this question, we would like to quote N. S. Kuznetsov, who repeatedly drew attention to the fact that the analysis of the mechanism of the influence of civil law on public relations, the application of civil law provisions (dispositive, imperative), interpretation of civil law provisions are of particular importance [11]. It can be stated that this wording of the Civil Code of Belarus requires a qualitative review of the conceptual and categorical framework, in particular, the adaptation of terminology to international standards and fundamental principles of law.

The next shortcoming of the analysed codified regulation should be recognized in the legal regulation of acts of civil legislation in time. One of the fundamental tenets that ensures the stability of civil relations is based on the universally recognized rule according to which acts of civil legislation are not retroactive (do not have a retrospective effect), does not apply in Belarus in the field of contract law. According to para. 2 of Art. 392 of the Civil Code "if, after the conclusion and prior to the termination of the agreement, an act of legislation is adopted that establishes binding rules for the parties, other than those that were in effect upon the conclusion of the agreement, the terms and conditions of the concluded agreement shall be brought in line with the legislation, unless otherwise provided for by law." If the parties fail to introduce the corresponding changes in the agreement, the court, by its decision, approves the necessary changes to the agreement from the moment the act of legislation enters into force, establishing rules binding on the parties, other than those that were in effect upon the conclusion of the agreement. In the absence of appeals to the court and failure to amend the agreement by the parties themselves, the parties should, from the moment it enters into force, apply the corresponding provision of the legislation instead of the terms and conditions of the agreement that contradict the legislation, unless such provision is dispositive, applicable insofar as the agreement of the parties does not establish otherwise. It is noteworthy that the general rules on the operation of civil legislation in time were proposed to be excluded from the Civil Code of Belarus altogether, while the provisions on the agreement and legislation in accordance with the draft Law on amendments to the Civil Code of Belarus are subject to revision proceeding from the general principle that "the legislative act has no retroactive effect".

In the context of the specified substantial shortcomings, one should understand the place of the Civil Code of Belarus in the system of national civil legislation. A comprehensive analysis of the legal regulation of civil relations gives grounds to argue that the Civil Code of Belarus does not possess the highest legal force in regulation of such relations and is only one of the legislative acts of the first level of the civil legislation system[1]. The given approach fully covers the specificity of the national legislation

[1] Resolution of the Plenum of the Supreme Economic Court of the Republic of Belarus "On the application of the provisions of the Civil Code of the Republic of Belarus governing the conclusion, amend-

system, which is significantly more complicated than the conventional approaches generally accepted within the framework of the continental system of law, as it obliges to consider not only the correspondence between the acts of the first and second levels of the system (other acts of civil legislation that must correspond to legislative acts), but also the acts of the first level of the system, represented in accordance with Art. 3 of the Civil Code of Belarus, by the Constitution of the Republic of Belarus, laws, including codified ones, by decrees and orders of the President of the Republic of Belarus.

With reference to the relationship between the laws, the author draws attention to the fact that until recently the Law of the Republic of Belarus "On Regulations" determined that the Civil Code of Belarus possesses a greater legal force in relation to other codes and laws containing civil law provisions (Art. 10 of the previous Law of the Republic of Belarus "On Regulations" dated January 10, 2000)[1]. Since February 1, 2019, this provision has been excluded from the legislation, although de facto it had not been applied before. Administration of law confirms the approach of subsidiary (unless otherwise provided for) application of the Civil Code of Belarus not only to relations directly named in the Civil Code of Belarus (family, labour, land relations, relations on the use of other natural resources and environmental protection). It is worth mentioning that, within the framework of the Working Group on Amendments to the Civil Code of Belarus, the issue of expanding this list by relations in the banking sector was considered. To date, the issues of correlation of provisions contained in the Civil Code of Belarus and the Banking Code of the Republic of Belarus (hereinafter referred to as "the Banking Code of Belarus) are very relevant. A case in point here is the regulation of the issue of increased interest on the use of a loan (credit). In accordance with the Banking Code of Belarus, the increased interest is considered as a payment for a loan, proceeding from the provisions of the Civil Code of Belarus – as a measure of civil law responsibility. Therefore, there are inaccuracies in legal regulation and approaches to the interpretation of legal provisions as such in industry legislation.

Without delving into theoretical considerations about the relationship between the Civil Code of Belarus and the unipersonal acts of the Head of State, we shall only state that in accordance with Belarusian legislation, the Civil Code of Belarus must comply with the temporary decrees and orders adopted by the President of the Republic of Belarus. To date, such a provision of the Civil Code of Belarus in the civil legislation system is no longer challenged by law enforcement practice and is quite unambiguously covered in the resolution of the Plenum of the Supreme Economic Court of the Republic of Belarus No. 16 dated December 16, 1999 "On the application of the provisions of the Civil Code of the Republic of Belarus governing the conclusion, amendment

ment and termination of agreements". (1999, December). Retrieved from http://pravo.levonevsky.org/bazaby/org450/basic/text0104.htm

[1] Law of the Republic of Belarus "On Regulations: Law of the Republic of Belarus". (2018, July). Retrieved from http://pravo.by/document/?guid=3961&p0=H11800130

and termination of agreements"[1], according to which "a decree or an order of the President of the Republic of Belarus, issued not in connection with the authority granted by law to publish them and having discrepancies with the Civil Code of Belarus or other law, should be applied by economic courts as acts of higher legal force in relation to the Civil Code of Belarus or another law, regardless of the date of entry into force of the decree or the order" (para. 1) [12]. Taking the intended purpose for granted, in particular, of such legislative acts as temporary decrees, the question arises regarding the assessment of the situation for compliance with the characteristics highlighted in the special literature, namely, extraordinary (i.e., the presence of special necessity) and the exceptional character of such legal acts predetermined by this (i.e. other methods of settlement cannot provide the proper effect) [13]. It can be stated that only in the aggregate the specified signs can become the basis for the urgency of an emergency change in the foundations of civil law regulation enshrined in the Civil Code of Belarus (this applies not only to decrees, but also to orders as legislative acts competing with the Civil Code of Belarus). In this context, it is very difficult to find reasoning for provisions of the Civil Code of Belarus regarding the restriction in court of the rights of an individual as a result of its participation in gambling, by virtue of which it puts himself and(or) its family in a difficult financial situation, which does not fit into the legal constructions (Decree of the President of the Republic of Belarus dated August 25, 2016 No. 319), the statement of certain period of inconsistency of the regulations of Art. 300 of the Civil Code of Belarus with the Decree of the President of the Republic of Belarus "On the Priority for Repayment of Claims on a Monetary Obligation" (before bringing them in line with the provisions of the decree). In fact, the prevalence of the provisions of acts adopted by the President of the Republic of Belarus over the provisions of the Civil Code of Belarus does not comply with generally recognized civilistic standards of legal regulation, thereby creating a build-up of provisions and difficulties in law enforcement.

In the context of the problematics under consideration, the issue of using the mechanism of raft adoption of amendments to the legislation deserves special attention. Thus, the issue has become especially relevant today, when the raft adoption of amendments to the legislation leads to the fact that the Civil Code of Belarus transforms into a service act that adjusts itself to other legislation and does not set the basis for legal regulation. For instance, an inexplicable, from the standpoint of economic and practical significance, situation of the exercise of the rights to dispose of property by non-owner legal entities occurred in connection with the adoption of the Law dated July 12, 2012, directed at the improvement of the regulation of collateral relations. As a result, special rules on collateral, which were introduced in the Civil Code of Be-

[1] Resolution of the Plenum of the Supreme Economic Court of the Republic of Belarus "On the application of the provisions of the Civil Code of the Republic of Belarus governing the conclusion, amendment and termination of agreements". (1999, December). Retrieved from http://pravo.levonevsky.org/bazaby/org450/basic/text0104.htm

larus, split the general concept of disposing of property by subjects of operational management rights.

In the context of global trends towards alignment and harmonization of legislation, the issue of the relationship between civil legislation and international law provisions remains very problematic for Belarus. Within the framework of the research we shall note that recognition of the priority of universally accepted principles of international law, including the principle of the obligatory performance of international treaties (pacta sunt servanta), is not tantamount to recognition of the priority of the regulations of international treaties [14]. This position fully correlates with the current legislation of the Republic of Belarus, including the Civil Code of Belarus. In accordance with Art. 6 of the Civil Code of Belarus (as amended), "the Republic of Belarus recognizes the priority of generally recognized principles of international law and ensures compliance of the civil legislation with them. The civil law provisions contained in the international treaties of the Republic of Belarus that have entered into force form an integral part of the civil legislation in force on the territory of the Republic of Belarus and are subject to immediate application, unless it follows from the international treaty that the application of such provisions requires the publication of an interstate act, and have the force of that legal act, which expresses the consent of the Republic of Belarus to be bound by the relevant international treaty." Thus, in the field of regulation of civil relations, the legislator does not prioritize the provisions of international treaties; the strength of an international treaty regulating civil relations is determined by that act which implements the international treaty in the domestic legislation (law, presidential decree, government decree) [15–17].

Planned changes to Art. 6 Civil Code of Belarus, submitted for public discussion, once again actualized the issue of the application of international treaties upon regulation of civil relations. It is noteworthy that, factoring in the new version of the Law "On international treaties of the Republic of Belarus" dated May 11, 2018[1], international treaties in the field of civil law regulation are no longer recognized as part of the current national legislation, and, consequentially, are not implemented in national system, but are applied by virtue of expressing consent to their obligatory nature. The draft law on amendments to the Civil Code of Belarus proposes to conceptually change the general approach, setting forth in the Civil Code of Belarus the absolute priority of the rules, which are established in international treaties, over the rules contained in civil legislation. At first glance, such an innovation will be the logical result of natural progressive development. However, we cannot but take into account that the general rule contained in the updated Law on international treaties remains the same: "the provisions contained in international treaties of the Republic of Belarus have the force of the regulation, which expresses the consent of the Republic of Belarus to be bound by a corresponding

[1] Law of the Republic of Belarus "On International Treaties of the Republic of Belarus". (2018, May). Retrieved from http://pravo.by/document/?guid=3871&p0=h10800421

international treaty" (Art. 36), which gives rise to issues of a doctrinal nature, in particular, those related to the issue of relationship between national law and domestic legislation, the formation and contents of the latter, and the practical application of complex regulations [18–21].

Highlighting the features of the Civil Code of Belarus as a codified legislative act in the field of civil law regulation, it is noteworthy that over 60 times it has undergone changes, varying in degrees of depth and coherence. It has already become a tradition to receive amendments to the Civil Code of Belarus twice a year (July, December), moreover, there could be several laws within the framework of one session of the Parliament. At the same time, official recommendations appeared back in 2016, directed at stabilization of the legislative activity. In accordance with the order of the Prime Minister of the Republic of Belarus, the Chairperson of the Council of the Republic of the National Assembly of the Republic of Belarus, the Chairperson of the House of Representatives of the National Assembly of the Republic of Belarus, the Head of the Administration of the President of the Republic of Belarus, the State Secretary of the Security Council of the Republic of Belarus No. 22pa/113p/19/4/53pcб dated March 25, 2016 "On improving the quality of legislative activity" (para. 5.3)[1] it was established that laws should be amended, as a rule, no more than once every two years, amendments to the Code may be introduced, if necessary, no more than once a year. In the new Law "On Regulations", which came into force on February 1, 2019, as a measure to ensure the stability of the legal system, it is stipulated as a general rule that amendments to regulations may be introduced no earlier than a year after their adoption (Art. 35)[2].

The matter of a comprehensive review of the Civil Code of Belarus is connected with the approval by Decree of the President of the Republic of Belarus No. 9 dated January 10, 2018[3] of the Plan for drafting laws for the current year. In accordance with the new legal regulation, conceptual issues of interpretation of legal texts and practice of law enforcement, it is prudent to single out the following areas for improving the Civil Code of Belarus.

1. *Factoring in the enforcement practices,* the actualization of which is justified by the conflicting approaches of the courts to the interpretation of the current legislation, wherein the literal interpretation prevails, sometimes without the consideration of the nature and functional purpose of the legal provision or legal phenomenon. In general, as was indicated above, this is manifested in determining the boundaries of the dispositive behaviour of participants in a civil law relationship, based on the absolutization of the criterion "unless otherwise provided for by consent of the parties." On the other

[1] Decree of the Secretary of State of the Security Council of the Republic of Belarus "On improving the quality of legislative activity". (2016, March). Retrieved from http://mfa.gov.by/upload/12/nekotorie%20punkti.pdf

[2] Law of the Republic of Belarus "On Regulations" (2018, July). Retrieved from http://base.spinform.ru/show_doc.fwx?rgn=108640

[3] Decree of the President of the Republic of Belarus "On approval of the plan for drafting laws for 2018". (2018, January). Retrieved from http://pravo.by/upload/docs/op/P31800009_1515790800.pdf

hand, in some cases, we can observe changes of a cardinal nature in the interpretation of the institution in the absence of any objective legal prerequisites, which, as an example, has occurred with regard to the permissibility of applying such a method of securing performance of obligations as an advance to a preliminary contract (conclusion from practice changing court decisions: the legislation does not contain provisions prohibiting the security of an advance for a preliminary agreement).

2. *The consolidation of new civil law institutions.* This is primarily connected with the entry into force on March 28, 2018 of the Decree of the President of the Republic of Belarus dated December 21, 2017 No. 8 "On the development of the digital economy"[1], which has already been called unprecedented (at least in the post-Soviet and East European territory) [22; 23]. The subject of legal regulation of the Decree are public relations in the field of high technologies, designed for the use with the participation of a special subject composition of such relations – residents of the High Technology Park (HTP). At the same time, new institutions and phenomena for Belarus, such as options, convertible loans, were originally planned to be used as universal, which implies expanding the scope of legal regulation through the Civil Code of Belarus. In addition, certain provisions of the Civil Code, which are established and perceived as traditional, conflict with the provisions of the already existing Decree No. 8 (for example, in terms of permissibility of irrevocable and unlimited power of attorney), which, accordingly, involves the correction of the provisions of the Civil Code.

3. *Unification of civil legislation in the context of combining the legal regulation of the Member States of the Eurasian Economic Union,* which is a general tendency of improvement of Belarusian legislation.

In this context, it is necessary to mention the significant influence of the experience of Russian colleagues in the field of implementation of the Concept for the Development of Civil Legislation of the Russian Federation adopted back in 2008. E.A Sukhanov, upon giving an assessment of the reform of the Civil Code of the Russian Federation, drew attention to the fact that in essence the Concept identified three main aspects of work: 1) improvement of civil law registration of proprietary relations (property law); 2) clarification of the status of legal entities (corporate law); 3) factoring in the accumulated judicial practice (to a large extent concerning the law of obligations) [24].

In turn, as the result of the activity of the Working Group on Amending the Civil Code of Belarus displays, property law was practically not subjected to adjustments; the updating of legislation on legal entities has quite a reserved nature, being based on existing legislation and not providing for major changes [25]. At the same time, the first version of the draft law "On Amending Certain Codes of the Republic of Belarus" [26] proposes a number of fundamentally important, in some cases conceptual changes and amendments to the Civil Code of Belarus, which in general allows us to talk about its

[1] Decree No. 8 "On the Development of the Digital Economy: Decree of the President of the Republic of Belarus". (2017, December). Retrieved from http://president.gov.by/ru/official_documents_ru/view/dekret-8-ot-21-dekabrja-2017-g-17716/

reform. Within the framework of the General Provisions, these are: changing the approach to the matter of correlation of national civil legislation and international treaties; securing the decisions of assemblies as an independent basis for the emergence of civil rights and obligations, as well as introducing a new special chapter on "Decisions of assemblies" in the Civil Code of Belarus; expanding the list of methods of civil rights protection with such as invalidating the decision of the meeting and declaring the contract null and void; changing the concept of invalidity of transactions (transaction, which does not correspond to the requirements of the legislation, may be disputed if the legislative act does not establish that such a transaction is void); refusing to regulate the validity period of the power of attorney and legalizing the irrevocable power of attorney in the Civil Code of Belarus. The general and special rules of law of obligations were seriously revised, in particular, the following was proposed: legalization of the design of an optional obligation, security payment, permissibility of a security of a preliminary agreement with an advance, legalization of a framework agreement, option to conclude an agreement, option agreement, subscription agreement, convertible loan as universal legal categories, expansion of the scope of the factoring agreement (taking it beyond banking transactions), introduction to the Civil Code of Belarus of a legal regulation for the escrow account agreement, a significant change in approach to the partnership agreement, which, in fact, gives grounds to talk about the legalization of investment partnerships, etc. Section V of the Civil Code on "Intellectual Property" was radically redesigned. Many conflict rules of Section VII on "Private international law" were conceptually changed [27]. In general, we can talk about a comprehensive revision of the architectonics and provisions of the Civil Code of Belarus, which, nevertheless, is not devoid of inaccuracies, conflicts and inconsistencies, the elimination of which is possible by referring to law enforcement practice and international standards for the regulation of civil law relations. The above indicates the necessity of a unified, logically consistent, comprehensively justified Concept of reforming the civil legislation of the Republic of Belarus, the search for its possible optimal forms, which will be based on factors of civil law doctrine. It is worth noting that in conditions of modernization of the legal regulation of the republic, legal concepts and categories that are traditional for the Soviet theory of state and law continue to be used, although they require rethinking, clarification, enrichment of their substance and content, factoring in new historical realities and the social conditionality of the reform of civil legislation, which is determined by factors of various significance, the establishment and disclosure of which will provide an opportunity: a) to justify the prudence of its improvement, define clear directions for the further rule-making process; b) to predict further development and formation of new institutions of civil legislation and law; c) to contribute to raising the level of legal awareness, etc.

In turn, the scientific analysis of the concept, goals and objectives of the reform of the Civil Code of the Republic of Belarus is a necessary tool for the practical solution of the main objectives of the legal regulation of public relations, including the creation

of opportunities for improving national policy, which in the process of law-making develop, consolidate, concretize and acquire the objective property of law – consistency. Thus, the modern civil legislation of the republic is a set of legal provisions, a certain part of which meets the requirements of the time, although its other part is outdated and cannot regulate the corresponding legal relations, and does not meet the challenges of our time, indicating the necessity of reforming the entire system of national civil legislation, the development of which takes place in conditions of significant influence of international legal obligations and intensification of international cooperation.

CONCLUSIONS

The level of legal and technical perfection of legislation in a particular country is largely determined by specific historical tendencies and the issues of its functioning, which, in turn, is due to objective laws of the development of society, real conditions and needs of public life. The presence of a large number of disparate, inconsistent, declarative and overlapping provisions of regulatory legal acts regulating public relations complicates the process of their reform. The research of the shortcomings and contradictions of statutory instruments allows us to identify gaps in the very process of reforming civil legislation. The discrepancy between the results obtained and the planned ones testifies to the urgent need for the scientific development of modern approaches to reforming civil legislation in the context of modern tendencies in the development of society, which will facilitate the development of a promising systematic approach to the corresponding legal relations in the future. All this conditions the necessity of establishing a coherent system of legal acts that, in terms of their meaningful content and the effectiveness of implementation mechanisms, will be able to meet international standards.

The declaration of independence of the Republic of Belarus opened up new prospects for the development of domestic civil law science and civil legislation, which over time formed the legal regulation of civil relations in the context of various historical periods of the development of the state. Proceeding from the conceptual provisions of a systematic approach to solving the issues of law enforcement and regulation of legal relations in modern conditions, it can be argued that currently the main innovative dominant for the Republic of Belarus is the formation of a system of reformed civil law that is adequate to state interests and balanced, with consideration of the national factors of society evolution. In turn, the Civil Code of the Republic of Belarus, of course, is a significant achievement of domestic civilists, both scientists and practitioners, and lawmakers. However, like any law, it raises some issues and difficulties in its application. The negative and positive features of the current legal regulation of civil law relations in the republic, which are covered in the paper, in aggregate negatively affect both individuals and the state in general, moreover, the situation is aggravated by the unsystematic implementation of amendments to this statutory instrument,

as well as by levelling its fundamental importance in the system of civil legislation of the Republic of Belarus.

In fact, currently we can observe the chaotic implementation of changes to the Civil Code of the Republic of Belarus, however, the research provides grounds for stating the actualization of the development and adoption of the Concept of reforming the civil legislation of the Republic of Belarus on the basis of a single set of backbone reform factors. The implementation of such a Concept will facilitate the formation of an optimal, efficient, functional and effective system of reformed civil legislation; will ensure the implementation of international legal obligations of the Republic of Belarus; will contribute to the creation and development of qualitatively uniform measures for reforming the system of national civil legislation and its approximation to international standards; will provide an opportunity to gradually, but comprehensively improve the current Civil Code of the Republic of Belarus; will allow to unify the conceptual and categorical apparatus of civil legislation – thereby increasing the efficiency of legal regulation of the relevant legal relations.

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ДОКАЗИ В КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ: ПРОБЛЕМИ ДОПУСТИМОСТІ У СУЧАСНИХ РЕЛІЯХ

Анотація. *У сучасних умовах докази в інформаційно-пізнавальному контексті можна розглядати як своєрідний місток між юристами-дослідниками (слідчий, прокурор) і досліджуваною в контексті вимог статті 91 Кримінального процесуального кодексу України подією минулого. Це пов'язано з тим, що за допомогою доказів сторони зі змісту ідеальних і матеріальних слідів події минулого видобувають потрібну їм інформацію, з якої формують під позиційний інтерес процесуальне знання. Тому основна мета роботи полягає у проведенні комплексного аналізу інституту допустимості доказів у кримінальному провадженні на території України з урахуванням реформування вітчизняного законодавства та правозастосовчої практики. Для досягнення поставленої мети використані загальнонаукові методи та прийоми зокрема такі як: метод діалектичного пізнання; метод моделювання; порівняльно-правовий метод; формально-логічний метод; статистичний метод; метод юридико-технічного аналізу. Автором констатовано, що норми чинного законодавства, якими врегульовано допустимість доказів, об'єктивно детермінують інші процесуальні інститути досудового провадження. У зв'язку з цим, оцінюючи інтегративний вплив інституту допустимості на процес доказування, слід констатувати його невідповідність сучасному рівню загроз економічній, національній безпеці у вигляді кіберзлочинності, організованих форм економічної злочинності та елітарної корупції. У статті аргументовано, що сучасний кримінальний процес з властивим йому інститутом допустимості не дозволяє ефективно захищати національні інтереси України та права людини, закріплені у міжнародно-правових зобов'язаннях, взятих на себе нашою державою. Відтак, сучасна геополітична обстановка та євроінтеграційні прагнення нашої держави вимагають зміни кримінальної, кримінально-процесуальної політики та відповідного правового регулювання, які повинні стати правовим інструментарієм на шляху до подолання проблем у сфері допустимості доказів та забезпеченні ефективного захисту прав людини та громадянина.*

Ключові слова: захист прав людини, євроінтеграція, реформування законодавства, досудове розслідування, судочинство.

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EVIDENCE IN CRIMINAL PROCEEDINGS: ADMISSIBILITY ISSUES IN MODERN REALITIES

Abstract. *In modern realities, evidence in an information and cognitive context can be regarded as a kind of bridge between investigating lawyers (investigator, prosecutor) and the event of the past, investigated in the context of the requirements of Article 91 of the Criminal Procedure Code of Ukraine. This is connected with the fact that, with help of the evidence, the parties, judging from the content of the ideal and material traces of the event of the past, can obtain the information they need, from which they form the procedural knowledge according to their positional interest. Therefore, the main purpose of the paper is to conduct a comprehensive analysis of the institution of admissibility of evidence in criminal proceedings in the territory of Ukraine, with consideration of the reform of national legislation and law enforcement practice. To achieve this purpose, common scientific methods and techniques are applied, namely: the method of dialectical cognition; modelling method; comparative law method; Aristotelian method; statistical method; method of legal and technical analysis. The author states that provisions of the current legislation, which regulate the admissibility of evidence, objectively determine other procedural institutes of pre-trial proceedings. In this regard, while assessing the integrative impact of the institution of admissibility on the process of proof, it should be noted that it does not correspond to the current level of threats to economic, national security in the form of cybercrime, organized forms of economic crime and elitist corruption. The article argues that the modern criminal process with its inherent institution of admissibility does not effectively protect the national interests of Ukraine and human rights enshrined in the international legal obligations undertaken by our state. Therefore, the current geopolitical situation and European integration aspirations of our country demand changes in criminal offense, criminal procedure policy and appropriate legal regulation, which should become a legal toolkit on the way to overcoming the issues of the admissibility of evidence and ensuring the effective protection of human and citizen rights.*

Keywords: protection of human rights, European integration, reform of legislation, pre-trial investigation, proceedings.

INTRODUCTION

In conditions of the development of legal democratic state institutions in Ukraine, the basic rules governing the inadmissibility of the use of evidence in criminal proceedings, which was obtained in violation of the law, are the rules enshrined in the provisions of the Criminal Procedure Code of Ukraine. It should be emphasized that such evidence refers to materials – verbal and written messages from persons, as well as things (objects and documents) obtained by the court and parties with

application of the proper legal procedure, the use of which is necessary to establish the facts and substantiate procedural decisions in criminal proceedings[1].

In the territory of our country, the current criminal procedure law, despite the establishment of specific grounds for rendering the evidence as inadmissible, provides rather vague guiding criteria for decisions regarding the exclusion of inadmissible evidence [1]. Such an approach, by its essential content, does not provide for an appropriate assessment of the violations of criminal procedure law upon collecting evidence in terms of its materiality (fundamentality), thereby allowing the exclusion of the evidence obtained on formal grounds of inadmissibility, thereby minimizing the possibility of protection of the rights and legitimate interests of the victims of crime [2]. In addition, the current legislation contains no rules that would establish the forms of reaction to a decision on rendering the evidence as inadmissible, which gives rise to a rather contradictory investigative and judicial practice.

With regard to the theory of criminal proceedings, the subject matter selected for the article is considered to be one of the most relevant, proceeding from the fact that the evidence is directly related to the exercise of the rights and freedoms of the individual. It should be highlighted that the institution of admissibility of evidence is not its formal regulation, the features of consolidation in the legislation produce a significant impact on justice in general, and the admissibility provisions are an indicator of the democratization of the judicial procedure and society, the attitude of the state towards the rights and freedoms of the individual.

In the context of intensification of the processes of scientific and technological progress and evolution of crime, the notion of admissibility of evidence is of particular theoretical and practical importance. To solve a crime, to justly punish a guilty person in the course of the investigation of each criminal case, it is crucial to correctly establish all the circumstances required to solve the case [3]. Furthermore, the legally established objectives of a criminal trial can only be ensured when law enforcement agencies establish the truth in a criminal case [4]. In turn, the property of admissibility of evidence is crucial, provided that the immediate task of the said attribute is to protect the rights and legitimate interests of citizens. Admissibility is the most important guarantee against the unjustified criminal prosecution of citizens.

The theoretical issues relating to the subject matter of the research are considerably addressed in the criminal process, but at the same time many variations in doctrinal approaches to the same issues arise, demanding their mutual agreement. A specific stance on the research of issues of the theory of evidence in the science of criminal process is explained by the fact that among scientists there is a universally accepted postulate – knowledge of issues of evidence and proof in the criminal process provides knowledge of the criminal process itself [5]. This fact gives rise to a constant increased

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

interest in this issue among many authors who consider various aspects of the theory of evidence in their work. At the same time, scientific developments connected with the admissibility of evidence in criminal proceedings appear to be some of the most relevant [6–8]. The main problematics of the doctrine of evidence at the modern stage of qualitative reform of national legislation and European integration are issues of admissibility of evidence, criteria for the use of evidence, in the presence of which violations of the law of evidence can be applied, and which violations require its obligatory exclusion from the collected material base [9].

In consideration of the foregoing, the purpose of the paper is to conduct a comprehensive analysis of the institution of admissibility of evidence in criminal proceedings in the territory of Ukraine, factoring in the reform of national legislation and law enforcement practice. In accordance with the stated purpose, the following research objectives were outlined: 1) to disclose the concept of procedural evidence and their meaning; 2) to analyse the admissibility of evidence in criminal proceedings; 3) to identify the main issues connected with the admissibility of evidence in criminal procedural law and develop proposals for its improvement.

1. MATERIALS AND METHODS

The methodology of the research is based on a set of general scientific methods and techniques applied in legal science. Upon the research, the method of dialectical cognition facilitated the proper analysis of the nature, concept and significance of the admissibility of evidence in criminal proceedings. With help of the simulation method, the rules of admissibility of evidence in criminal proceedings were examined, their issues were identified. Substantial features of admissible evidence that distinguish them from other admissible evidence were identified with help of the comparative law method. The Aristotelian method ensured the analysis of the legislation, which defines the theoretical and legal grounds of admissible evidence procurement in criminal cases. The statistical method and the method of legal and technical analysis enabled the formulation and submission of proposals for improving the provisions of criminal procedure legislation governing the legal relations in the field of evidence and proof.

The theoretical basis of the research consists of scientific works in the field of national science of criminal process, criminal law, other branches of law, criminalistics, philosophy, logic, other sciences, as well as monographs, abstracts and thesis, scientific articles and other theoretical materials covering certain aspects of the object and subject of research.

The method of analysis allowed to determine that the institution of admissibility of evidence takes a special place in the structure of criminal procedure law and theory of evidence. In fact, it acts as the quintessential form of criminal justice, moreover, the admissibility of evidence in the domestic scientific paradigm is reasonably identified with the legitimacy of the entire procedure of proof. Admissibility determines the ef-

fectiveness of the prosecution and the level of protection of the rights and freedoms of participants in the trial, delineates the legitimate and illegal actions of the participants in the proof, establishes a balance of public and private interests during the pre-trial and judicial proceedings.

Despite the considerable number of scientific works and the increased interest in the problematics of the law of evidence in criminal proceedings, many matters concerning the admissible evidence in criminal proceedings, both doctrinal and purely applied, remain debatable or completely unsettled. In addition, the vast majority of scientific research is based on pre-existing legislation, and consequently, they have not and could not have taken into account the changes related to the new paradigm of criminal proceedings.

2. RESULTS AND DISCUSSION

In modern realities, evidence, in an information and cognitive context, can be regarded as a kind of bridge between investigating lawyers (investigator, prosecutor) and the investigated event of the past in the context of the requirements of Article 91 of the Criminal Procedure Code[1]. This is connected with the fact that through evidence, the parties, from the content of the ideal and material traces of the events of the past, procure the necessary information, which is further formed into procedural knowledge according to positional interests – *factum probans* and *factum probandum*.

Contextually, the legal concept of "procedural proof", if it is to be considered as a single whole, is justifiably correlated, both in everyday life and in doctrine, first of all, with such concepts as: “argumentation”, “information”, “data” (factual data), “procedural steps of evidence procurement”, “proof”, “argument”, “document”, “means of persuasion”, “knowledge”, “interpretation”, “information”, “objects”, “things”, “investigative actions”, “facts” and more. All of them are quite prudently and justifiably applied by the interested disputants in various practical situations of human activity as a means of justifying (proving) a certain statement. Therefore, it is also prudent to assume that the meaning of the term “procedural (legal) evidence” cannot be reduced to any of the above, as, for example, this was done by the legislator in paragraph 1 of Article 84 of the Criminal Procedure Code of Ukraine[2], where its definition is built on the use of a single concept of "actual data".

To clarify the content of doctrinal approaches to the interpretation of the concept of “procedural proof”, it would be appropriate to refer to the most generalized, proposed by V.P. Hmyrko, procedural wording – “the composition of criminal and judicial proof”, within which, according to the methodological scheme of “many knowledge”, the knowledge on the “proof”, accumulated in modern procedural science and practice, is

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

[2] *Ibidem*

configured. The above wording, as a purely practical and methodical means of proof, may consist of the following four interconnected segments (blocks), each of which having its own inherent functionality in its composition.

The regulatory and procedural block covers the function of a regulatory filter designed to ensure that materials meet the requirements of legislative standards relating to the conditions, means and procedures of forming materials and putting them into circulation of evidence.

The information block covers the implementation of its function of providing the court and the parties with information as the starting material for the formation of procedural knowledge – facts of evidence. The information block consists of two elements: 1) information, as the composition of records, actual data obtained as a result of investigative (search) actions; 2) sources of information – persons, as well as various things, as the results of their activity, which become necessary for the court and parties due to their properties, condition, characteristics, time and place of their production (occurrence).

The judicial interpretation block deals with the possibility of using material produced in court as criminal judicial evidence for the purpose of proof. In particular, materials collected (generated) by the parties in the context of a pre-trial investigation as an independent legal activity should only be transformed into judicial materials following the results of their critical examination. As the court determines the admissibility of materials as their sole legal characteristic, it must proceed to the interpretative part of handling them, addressing the issues of pragmatic nature – their belonging, reliability, weight, persuasiveness and importance of materials for the parties, as a result of which is the information transforms into knowledge and the materials – into court evidence. It is worth agreeing that all evidence constitutes proceedings materials, but not all materials can be accepted as evidence.

The fact-finding block establishes the sought subject matter facts of proving a particular procedural decision, such as a sentence, through criminal judicial evidence by applying the logical proof procedure, and its components are: 1) *factum probandum as a logical thesis; 2) factum probans* as a logical argument; 3) a legal conclusion on the nature of the relationship between them (the basis for the legal question of the adherence of evidence); 4) demonstration as confirmation by the parties of the logical sequence of the transition from the arguments to the thesis being proved in the context of this connection [10].

Thus, the wording "composition of evidence" enables lawyers to view the evidence as a coherent structure, while avoiding the "*pars pro toto*" logical error committed by the legislator in paragraph 1 of Article 84 of the Criminal Procedure Code[1] by declaring

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

the evidence to be "factual data" – only one of the many possible interpretations of this inexhaustible procedural phenomenon.

It can be concluded that, firstly, the theoretical concept of "procedural proof", constructed by the doctrine, should cover with its content legal, linguistic, cognitive, psychological, logical, informational and other possible aspects (parties), and, secondly, in the purely practical plan, evidence must be considered as activity-related, that is, as the fruits of the efforts of the parties and the court in its production (formation), rather than naturalistic, that is, as ready factual data that need timely collection, verification and evaluation for further use in proof.

The specified naturalistic approach to understanding procedural evidence, being dominant in the Soviet doctrine of law of evidence, still retains a great ideological influence on the doctrines of post-Soviet countries. As S.A. Pashyn rightly points out in this context, "... evidence cannot be considered in a naturalistic way: as a natural object, as a thing in itself that has "properties" to be revealed only by the subject. Appropriateness, admissibility, reliability, and sufficiency of evidence do not reflect the properties inherent in the materials, but serve as the characteristics of the operations performed with them and the reasons for their choice" [11]. Note that the outlined theoretical model became the basis for the statutory definition of the concept of evidence in the "Fundamentals of criminal justice of the USSR and Union Republics"[1], and subsequently became consolidated in the Criminal Procedure Code of the USSR[2] (Article 65), where they were interpreted as any factual data on the basis of which, in accordance with the legally established procedure, the investigating authority, the investigator, the prosecutor and the court establish the existence or absence of a socially dangerous act, the guilt of the person who committed the act, and other circumstances relevant for the resolution of the case. Such data is established by: the testimony of a witness, the testimony of the victim, the testimony of the suspect, the testimony of the accused, expert's findings, physical evidence, records of investigative and judicial actions and other documents (Article 16). In paying tribute to tradition, Article 84 of the Criminal Procedure Code of Ukraine[3] defines the concept of evidence as follows: "Evidence in criminal proceedings is the factual data obtained in accordance with the procedure established by this Code, on the basis of which the investigator, prosecutor, investigating judge and court establish the presence or lack of facts and circumstances that are relevant to the criminal proceedings and are subject to proof. Procedural sources of evidence are testimony, physical evidence, documents, expert opinions".

The interpretation of the definition of the concept of evidence based on the provisions of the specified article provokes much debate, proceeding from the fact that it

[1] Basics of criminal proceedings of the USSR and the Union Republics. Retrieved from http://base.garant.ru/6321209/.

[2] Criminal Procedure Code of Ukraine: Law of the Ukrainian Soviet Socialist Republic (1960, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1001-05.

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

cannot cover all the essential aspects of this complex legal phenomenon [12–14]. Furthermore, the legislator fails to acknowledge the fact that evidence is, above all, a product of legal activity in its formation, where logic, psychology, interpretation, and critical reflection of the content of materials by lawyers come first. Therefore, V.D. Spasovych was right in claiming that "… the issue of judicial evidence is not legal. It belongs to the field of logic and anthropology ... it is rooted in philosophy, and must be studied in a separate individual" [15].

The analysis of the content of paragraph 1 of Article 84 of the Criminal Procedure Code of Ukraine also allows to conclude that the "investigative method of producing evidence" is maintained in the law, as the investigators and the prosecutor are the first ones to be mentioned among the participants in the formation of evidence. This implies that, in accordance with the requirements of competitiveness (Article 22 of the Criminal Procedure Code of Ukraine), the materials produced by them are intended, first and foremost, to provide the evidential needs of the accusative authorities, "*volens-nolens*", moving to the "evidentiary curb" the requirement of finding justificatory materials provided for in Article 2 of the Criminal Procedure Code of Ukraine. Therefore, the procedural law through the procedures of disclosure of materials by the parties to the pre-trial proceedings (Article 290 of the Criminal Procedure Code of Ukraine), as well as of the judicial review (Articles 342-364 of the Criminal Procedure Code of Ukraine) compels the prosecution to enter into legal communication with the defence (the defence counsel, the suspect, the accused, the victim, etc.), prompting them to mutually criticize the materials they submit before the court[1].

As a result of such procedural transactions, the evidence of the parties, having gone through the procedural furnace of litigation, becomes full-fledged judicial evidence as a basis for the court to make legitimate and substantiated decisions on the merits of the issues under consideration. Proceeding from this reasoning, Article 23 of the Criminal Procedure Code of Ukraine, at the level of the criminal procedure fundamentals, establishes the requirement of direct examination of testimony, things and documents by the court, and in part 2 of the same rule expressly states that "there can be no evidence in information contained in testimony, things and documents that have not been the subject of a direct court examination, except the cases provided for in this Code". The legislator specifically emphasized the unconditional priority of the judicial method of producing evidence over the investigator, establishing in part 4 of Article 95 of the Criminal Procedure Code of Ukraine the rule that "a court may base its findings only on testimony which it directly perceived during a court hearing. The court shall not have the right to justify the court decisions or to refer to the testimony given to the investigator, the prosecutor". Such emphasis is specifically placed on such an important type of evidence as testimony so as to prevent, in the first place, the use of unlawful interrogation methods at pre-trial proceedings.

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

Thus, in this matter, the legislator in the current Criminal Procedure Code of Ukraine positioned itself very clearly and consistently, as the criminal process is not a mono-activity, but consists of two independent and fundamentally different proceedings – pre-trial investigation and judicial proceedings, which, despite the significant differences in purposes and methods of organization, also have an inherent common feature – the necessity to rely primarily on evidence upon rendering appropriate procedural decisions. Therefore, the presence of the concept of "proof" in these legal activities is quite justified.

However, the fundamental difference between these two specifications of the generic concept of "proof" lies in the fact that in the pre-trial investigation, the proof is presented by the materials individually obtained by the prosecution within the framework of the inquisitorial way of their formation, and in the judicial proceedings, the proof already constitutes the substantive content of the judicial means of its production, conditioning the need for a competitive procedure of judicial examination of the materials provided by the parties. Furthermore, an analysis of the provisions of domestic law of evidence suggests that there is a significant difference in the procedures for the production of evidence. For example, in a pre-trial investigation, a certain part of the materials may be formed on the basis of the results of the public (investigative) search actions, and the rest – of the non-public (investigative) search actions, at the same time, the law equates them. In particular, part 1 of Article 256 of the Criminal Procedure Code of Ukraine states: "protocols for conducting non-public (investigative) search activities, audio or video recordings, photographs, other results obtained through the use of technical means, things and documents seized in the process, or copies thereof may be used to prove them on the same grounds as the results of other (investigative) search activities during the pre-trial investigation".

With regard to the judicial proceedings, it can be stated that the Criminal Procedure Code of Ukraine stipulates a special procedure for the formation of materials. For example, Article 352 of the Criminal Procedure Code of Ukraine establishes the procedure for questioning a witness in court (in particular, wearing them in, the order of interrogation of prosecution witnesses and defence witnesses, rules of direct and cross-examination, participation in the interrogation of the victim, the civil plaintiff, the civil defendant, their representatives and legal representatives, etc.). The mentioned plan also refers to the existence of differences in the procedures of conducting such investigative and judicial actions as the interrogation of the victim (Art. 353 of the Criminal Procedure Code of Ukraine), investigation of material evidence (Art. 357 of the Criminal Procedure Code of Ukraine), documents (Art. 358 of the Criminal Procedure Code of Ukraine), audio and video recording (Art. 359 of the Criminal Procedure Code of Ukraine). At the same time, in order to prevent possible loss of the probative value of the testimony of the witness and the victim in view of the existence of a real threat to their life and health, the law provides for a procedure of interrogation by the investigating judge in court (depositing evidence). Thus, Article 225 of the Criminal Procedure Code of

Ukraine establishes the order and procedure for interrogation of a witness, a victim during a pre-trial investigation at the request of the prosecution (with provision to the defence party of the right to be present at such interrogation) in situations of danger to the life and health of the witness or victim, their grave illness, other circumstances that may render their interrogation in court impossible or affect the completeness or accuracy of their testimony.

At the same time, we should factor in that not all the material collected by the parties in the course of a pre-trial investigation can be recognized as judicial evidence based on the findings of their investigation in court. This conclusion follows from the content of paragraph 2 of part 3 of Article 374 of the Criminal Procedure Code of Ukraine, which states that the sentencing analysis contains evidence to confirm the circumstances established by the court, as well as the motives for disregarding particular evidence. This is conditioned by the fact that the materials obtained in the pre-trial investigation are intended to be used only for adjudication during pre-trial proceedings, so they will only be credible and convincing to the parties but remain plausible and unpersuasive to the court. Such an interpretation allows to draw attention to the procedural dynamism of proof as a purely legal phenomenon, the formation of which as a material begins upon pre-trial investigation and ends in a court hearing involving the parties to the prosecution and defence before an impartial court, where it is transformed from a material to a criminal judicial proof.

In this context, particular attention should be paid to such aforementioned attribute of evidence in criminal proceedings, as its admissibility. Admissible evidence used in a criminal case is one of the key points in the court's proper determination of the legally relevant circumstances of the case, and in the end, the achievement of the objectives of justice [16]. In each criminal case, the court investigates and evaluates the evidence and concludes that it is admissible [17]. It is noteworthy that during the pre-trial investigation it is possible to refer to admissibility only as a means of self-control of the parties over the collection of their factual material. Extracurricular activities of persons who are future participants in a criminal case are unilaterally conducted and are only a preparation for bringing to court and ensuring the standard of admissibility.

The admissibility standard is a legalized and validated set of requirements for a form of evidence that substantiates its content [18]. Compliance with the admissibility standard makes information and its medium a "means of proof" suitable for use by a court to establish legal facts in a criminal case. This standard is formed by the requirements for the admissibility of actions of the parties (to court and out of court) to procure information that is derived from prohibitions expressly enshrined in law. There are two elements to be distinguished in the admissibility standard: a) positive, which is associated with the formation of factual evidence; b) negative, which renders the material obtained by the party in the case as inadmissible. This standard is considered by scientists from two standpoints. According to the first, the standard of admissibility is the driver of competition, competitiveness, equality in proving the truth [19]. Proponents

of the other approach believe that such a standard is a means of preserving the monopoly of the state in the face of the judicial and investigative power to establish an "objective truth" [20]. Proceeding from the foregoing, it is advisable to propose an original interpretation of the term "admissibility", under which it is necessary to understand the form of the existence of evidence (information) in criminal proceedings.

It is also prudent to address the problematic issues connected with the theoretical, legislative and enforcement aspects of determining the admissibility of evidence and their relevance in criminal proceedings. An analysis of judicial and investigative material indicates that a substantial part of complaints on violations of lawfulness during investigations, including unilateralism, incompleteness of proof, are not properly perceived by public prosecutors and judicial review officials. As a consequence, complaints are resolved with delay in the judicial and control stages, with a considerable part of them reaching the European Court of Human Rights. The need for a comprehensive analysis of the nature and content of the set of regulations that form the procedural form of "admissibility" and synthesis based on the results of the research, the modern concept of admissibility of evidence in criminal proceedings is conditioned not only by the issues of judicial practice, but is also reasoned by the stagnation of legal science in this aspect [21]. One of the reasons for the problematic situation is the insufficient development of the fundamentals of attributes of admissibility of criminal procedure evidence at the level of theory and methodology of cognition.

In the science of criminal proceedings, there are various interpretations of the admissibility of evidence, which often do not contribute to the correct and proper clarification of the essence of this category. Equally ambiguous are the provisions of the current Criminal Procedure Code of Ukraine regarding the admissibility of evidence. Particularly critical are the rules of criminal procedure legislation that use the term "inadmissible evidence". In our view, the designation of evidence as "inadmissible" contradicts the methodological basis for understanding the essence of the category of "proof" itself. The appearance and existence of evidence in criminal proceedings is possible due to the actual result of the establishment of the special features that characterize the evidence. Evidence cannot be combined with terms such as "inadmissibility" or "inaccuracy". The above indicates the need to improve the rules of the current Criminal Procedure Code of Ukraine, which are related to the admissibility of evidence.

Apart from the legal issues of admissibility of evidence (uncertainty of the regulatory mechanism for regulating the attribute of admissibility of criminal procedural evidence, its verification and evaluation, inconsistency of the applied standard of this procedural institution of legal reality), the reasons of methodological and ethical nature should be outlined. Today, the urgency of the researched subject matter is exacerbated due to the context shift: the tendency for its transfer from the legal plane to the political and economic one has emerged. The conceptual organization of the admissibility insti-

tution ultimately has ethnosocial, religious determination. In this regard, it should be noted that the role and significance of the doctrine of human rights and freedoms, as a more important part of the ethical paradigm of the West for the admissibility of criminal procedural evidence in the domestic science of criminal proceedings, remain understudied. At the same time, according to some domestic experts, such aforementioned phenomenon is negative for criminal justice reform in general [22]. It is necessary to agree with this thesis, moreover, archaic approaches to pre-trial investigation, gathering of evidence – must be eradicated on the way towards the European integration of our country and ensuring the proper protection of human rights.

CONCLUSIONS

Evidence is the core of all criminal procedural law, it defines the type of process. Fair trial standards are a general legal framework for formulation of legal requirements for the proper procedure for the production of judicial evidence. In the structure of the law of evidence itself, a special place is taken by the institution of admissibility of evidence – a system of requirements for the form of evidence that determines its procedural suitability for proof. In a certain way, the level of development of the institution of admissibility of evidence is a measure of the development of the entire criminal process of the state.

The controversy over the legal significance and possible limits of the use of the results of procedural, operational and search, and similar cognitive activity in criminal proceedings does not lose its relevance. Borderline and dogmatic attitude of a considerable part of processualists towards the concept of admissibility of evidence (partially embraced by the legislator as well) equally impedes the effective application of results of criminal intelligence, administrative and "other procedural" activity (including the activity realized by the defence counsel) in criminal proceedings to establish the truth of the case. Within the framework of the research, inter alia, the block structure of the "composition of criminal and judicial proof" proposed by V.P. Hmyrko was supported, and the substance of the procedural evidence in the criminal proceedings was determined. The author's definition of admissibility of evidence in criminal proceedings was also proposed.

An analysis of the provisions of current legislation governing the admissibility of evidence provides grounds for concluding that they objectively determine other procedural institutes for pre-trial proceedings. In this regard, assessing the integrative impact of the admissibility institute on the process of proof, it should be noted that it does not correspond to the current level of threats to economic, national security in the form of cybercrime, organized forms of economic crime and elitist corruption. Thus, the modern criminal process with its inherent instability of admissibility does not effectively protect the national interests of Ukraine and human rights enshrined in the international legal obligations undertaken by our state. Therefore, the current geopolitical

situation and European integration aspirations of our country demand changes in criminal offense, criminal procedure policy and corresponding legal regulation, which should become a legal toolkit on the way to overcoming the issues in the admissibility of evidence and ensuring the effective protection of human and citizen rights.

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ДИСКРИМІНАЦІЯ У СФЕРІ ПРАЦІ: ПИТАННЯ ЕФЕКТИВНОСТІ НАЦІОНАЛЬНИХ І МІЖНАРОДНИХ СТАНДАРТІВ

Анотація. *Дискримінація суперечить одвічним прагненням людини до свободи, рівності, справедливості. Особливою проблемою вона стає в сфері трудових відносин, оскільки стосується найважливіших, з точки зору задоволення фізичних і духовних потреб, прав, в тому числі: права на рівний доступ до праці, на рівну винагороду за працю, на рівні шанси в кар'єрному зростанні, на захист від безробіття та інші. Тому основною метою даного дослідження є аналіз правового регулювання забезпечення рівності прав працівників і недопущення дискримінації у сфері праці, як на міжнародному, так і на національному рівні, визначення поняття дискримінації в трудових відносинах, аналіз найбільш поширених різновидів дискримінації, їх проявів і внесення пропозицій щодо їх подолання і посилення ефективності національних і міжнародних стандартів. Для виконання завдань дослідження та досягнення поставленої мети використані: діалектичний метод наукового пізнання, системний і логічний підходи, абстрактно-логічний метод, метод системного аналізу, історико-правовий метод, порівняльно-правовий метод та інші. Автором, в результаті проведеного дослідження, вирішені нижчевикладені завдання і сформовані такі концептуальні положення: проаналізовано гендерний розрив у сфері праці на території Республіки Казахстан і акцентовано увагу на необхідності боротьби з такою дискримінацією; розкрито недосконалість судової системи та механізмів захисту прав громадян у зазначеній сфері, підкреслено їх низьку ефективність; досліджено понятійно-категоріальний апарат досліджуваних правовідносин і виявлена варіативність підходів до дефініції терміна «дискримінація», як на доктринальному, так і на законодавчому рівні; розглянуті випадки дискримінації за різними підставами; обґрунтовано необхідність внесення змін в чинне правове регулювання досліджуваних правовідносин, особливо в сфері посилення юридичної відповідальності за порушення; акцентовано увагу на послідовності і необхідності інтенсифікації імплементації міжнародних стандартів у сфері недопущення дискримінації в національне законодавство Республіки Казахстан.*

Ключові слова: дискримінація, найману працю, зайнятість, імплементація, нерівність, гендер.

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EMPLOYMENT DISCRIMINATION: ISSUES OF EFFICIENCY OF NATIONAL AND INTERNATIONAL STANDARDS

Abstract. *Discrimination is contrary to the eternal aspirations of human to freedom, equality, justice. It becomes a particular problem in the field of labour relations, as it concerns the most important rights from the point of view of satisfying physical and spiritual needs, including: the right to equal access to work, to equal remuneration for work, to equal chances in career growth, to protection from unemployment and others. Therefore, the main goal of this study is to analyse the legal regulation of ensuring equality of rights for workers and non-discrimination in the labour, both internationally and nationally, to define the concept of discrimination in labour relations, to analyse the most common types of discrimination, their manifestations and to make proposals for their overcoming and enhancing the effectiveness of national and international standards. To complete the research tasks and achieve the goal, the following were used: the dialectical method of scientific knowledge, systemic and logical approaches, the abstract-logical method, the system analysis method, the historical and legal method, the comparative legal method and others. The author, as a result of the study, solved the following tasks and formed the following conceptual provisions: he has analysed the gender gap in the world of work in the Republic of Kazakhstan and focused on the need to combat such discrimination; the imperfection of the judicial system and mechanisms for protecting the rights of citizens in this area has been revealed, their low efficiency has been emphasised; the conceptual and categorical apparatus of the investigated legal relations has been researched, and the variability of approaches to the definition of the term "discrimination" has been revealed, both at the doctrinal and legislative levels; cases of discrimination on various grounds have been examined; the necessity of making changes to the current legal regulation of the investigated legal relations, especially in the field of strengthening legal liability for violations, has been justified; the attention is focused on the sequence and the need to intensify the implementation of international standards in the field of non-discrimination in the national legislation of the Republic of Kazakhstan.*

Keywords: discrimination, wage labour, employment, implementation, inequality, gender.

INTRODUCTION

The Concept of Social Development of the Republic of Kazakhstan until 2030 (approved by Decree of the Government of the Republic of Kazakhstan dated April 24, 2014, No. 396)[1] states that the labour and employment policy will include measures for the coming period to switch to the standards of the Organisation for Economic Cooperation and Development on measuring labour market indicators, the develop-

[1] Decree of the Government of the Republic of Kazakhstan "On approval of the concept of social development of the Republic of Kazakhstan until 2030 and a plan for social modernization for the period until 2016". (2014, April). Retrieved from https://online.zakon.kz/document/?doc_id=31546675#pos=2;-55

ment of new additional measures to promote employment, the introduction of new mechanisms of social support. According to the tasks set in the Strategic Plan for the Development of the Republic of Kazakhstan until 2025 (approved by Decree of the President of the Republic of Kazakhstan dated February 15, 2018, No. 636), the main goal until 2025 is to achieve a qualitative and sustainable recovery of the economy, leading to an increase in the well-being of people to the level of the Organisation's countries Economic Cooperation and Development (OECD).

In accordance with the Concept of Family and Gender Policy in the Republic of Kazakhstan until 2030[1], in order to achieve the goal of state gender policy, it is necessary to solve the problem of improving legislation in the field of gender policy, as well as bringing it into the line with international standards, UN recommendations, Sustainable Development Goals (SDGs), and OECD. It is fixed that for the coming period, legislative acts in the field of inadmissibility and suppression of all forms of discrimination and gender-based violence will be improved in accordance with international requirements of the UN, SDGs and OECD.

In the process of implementing the strategy of joining the Organisation for Economic Cooperation and Development in Kazakhstan for the first time in many years, the issue of reforming the system of labour relations and creating its rational model, which allows satisfying the interests of the individual and the state, has become acute [1]. Developed OECD countries, especially European ones, have centuries of experience in the formation and reform of the employment system, the practice of using it as a regulator of macro- and microeconomic and social processes. In Kazakhstan, it is advisable to use the experience of the global civilisation process in legal transformations, which reduces the period of searches for a rational system of legislation that fully meets the interests of citizens, legal entities, and society as a whole [2–5].

These proposals take into account the standards of the OECD universal acts: Recommendations on Gender Equality in Education, Employment and Entrepreneurship 2013, Recommendations on Gender Equality in Public Life 2015, Recommendations of the Council on Aging and Employment Policy 2015, Recommendations of the Council on Comprehensive Mental Health, Skills and Work Policy 2015.

On January 22, 2015, a Memorandum of Understanding was signed between the Government of the Republic of Kazakhstan and the OECD in relation to the Country Program aimed at assisting Kazakhstan in the implementation of national reforms. The recommendations presented are aimed at the implementation of individual conclusions, findings and proposals set out in: reports, reviews prepared as part of the Country Program (2015-2017) "Reforms in Kazakhstan: progress, challenges and prospects", "Implementation of gender policy in Kazakhstan", "Overview of the implementation of gender policy in Kazakhstan", "Overview of policies targeted at three groups: youth,

[1] Concept of family and gender policy in the Republic of Kazakhstan until 2030. Retrieved from https://egov.kz/cms/ru/law/list/U1600000384

older workers and the protection of vulnerable groups" [6], as well as the findings and conclusions presented in the OECD Gender Policy Delivery in Kazakhstan [7].

It should be borne in mind that, in general, OECD estimates of women's involvement in the labour market are satisfactory. It is noted that an older woman in Kazakhstan more often belongs to the category of economically inactive population and is much less likely to be employed compared to the population in other OECD countries. Women often do not participate in the labour market, which is a reflection of the fact that childcare in most cases remains the responsibility of mothers. The employment rate of women is lower than the employment rate of men by more than 10 percentage points, and the employment rate of the economically inactive population is 10 percentage points higher. However, it should be noted that these gender differences are a matter of concern and should be reduced; they are still below the average in OECD countries, where the gender differences in employment and economically inactive people are on average 15.6 and 16.7 percentage points respectively [6].

In addition, this review is based on the study of the implementation in the legislation of Kazakhstan of the requirements of the Republic of the Convention of the International Labour Organisation (ILO) No. 100 "On Equal Remuneration for Men and Women Workers for Work of Equal Value" (Geneva, June 6, 1951)[1], as well as ILO Convention No. 111 "On Discrimination in respect of Employment and Occupation" (Geneva, June 25, 1958)[2].

1. MATERIALS AND METHODS

The methodological basis of the article is the general provisions of existing national and international legislation in the field of preventing discrimination in the world of work, as well as the work of domestic and foreign legal scholars.

To accomplish the tasks of research and to achieve the goal, we used the dialectical method of scientific knowledge, systemic and logical approaches. In the research process, general scientific methods were applied: abstract-logical – to generalise scientific and methodological approaches to the study of the process of regulating the prevention of discrimination in the world of work in the Republic of Kazakhstan, and to draw conclusions. Methods of theoretical generalisation, comparison, analysis and synthesis were used to clarify the conceptual-categorical apparatus and the multivariance of the definition of "discrimination". The statistical method was used to characterise changes, assess the status and development trends of discrimination in the world of work; system analysis – to develop a model for updating legal regulation in the field of research and

[1] The Convention was ratified by the Republic of Kazakhstan in accordance with the Law of the Republic of Kazakhstan. (2000, December). Retrieved from https://online.zakon.kz/m/document/?doc_id=1018240

[2] The Convention was ratified by the Republic of Kazakhstan in accordance with the Law of the Republic of Kazakhstan. (1999, July). Retrieved from https://online.zakon.kz/document/?doc_id=1011035#pos=0;0

the implementation of international standards and requirements. The historical and legal method was reflected in the process of studying the genesis of discriminatory currents in the world of work on the territory of the Republic of Kazakhstan.

The comparative legal method made it possible to conduct a comparative analysis of legal regulation and leading trends in the further development of the phenomenon of labour discrimination in the Republic of Kazakhstan and the countries of the Organisation for Economic Cooperation and Development. The method of legal regulation provided an opportunity to propose copyright developments aimed at: implementing OECD, ILO standards in the field of discrimination of employment in the legal system of Kazakhstan; development of labour legislation in accordance with recommendations based on a synthesis of best practices of advanced states; use of indicators proposed by the OECD to assess the level of guarantees of social and employment human rights; implementation of recommendations related to the creation of an inclusive labour market.

The theoretical basis of the study was the work of such scientists as: H. Cheng [8], N. Lyutov [9], A.B. Long [10], N. Kucharczyk [11], D.K. Bekyashev [12], J. Lain [13], S.Yu. Golovin [14], A.L. Jones [15], J. Roberts [16], E.A. Ershova [17], G. Pierné [18], A.F. Nurtdinova [19], P. Combes [20], R. Gómez Gordillo [21], M. Brussig [22], M. Mercat-Bruns [23] and others.

Undoubtedly, a significant role for this study was played by the work of the following scientists in the field of general theory of law: A.V. Malko [24], V.S. Nersesyants [25], P. Siegelman [26], as well as the work of representatives of international law schools: L.P. Anufrieva [27], J.H. Jung [28], R.Sh. Davletgildeev [29] and others. The works of foreign scientists in the studied field of labour law were also analysed.

The research information base is the Constitution of the Republic of Kazakhstan, labour and social legislation, international norms and standards, data from ministries and sociological services, monographic and periodical literature, and the results of the author's own research.

2. RESULTS AND DISCUSSION

In most OECD countries, the vision and strategy for establishing gender equality are typically characterised by the following factors: empowerment of women in the economy; combating gender-based violence; assistance in achieving a balance of professional activity and personal life; prevention of gender discrimination; enhancing diversity and compliance with laws and policies regarding gender equality.

According to the 2015 Gender Gap Report compiled by the World Economic Forum in Kazakhstan, there is a fairly slight gender imbalance in labour force (36th out of 145 countries). However, labour market indicators show a difference in the representation of women and men. The Kazakhstan labour market is characterised by high female employment, the availability of skilled workers and low unemployment. Women make

up 61% of the total employed population, which is slightly lower than the OECD average of 62%. However, women, as a rule, are self-employed, which means that they have fewer opportunities to have formal employment, decent working conditions and adequate social security, including a pension. Women also represent more than 70% of employees in sectors considered traditionally female, such as health and education. These two sectors, as well as nutrition, finance and insurance, represent a large proportion of female employees. However, all these are low-wage sectors, which account for only 2% of Kazakhstan's GDP.

The share of women in innovation, infrastructure and high technology is very small. For example, only 1998 women are involved in the implementation of the Nurly Zhol State Infrastructure Development Program (11% of the total number of employees under the Program). Despite the persisting gender wage gap, from 2006 to 2016, it has decreased slightly from 38% to 33%. The average salary of women is only 67% of the salary of men. One in three women in rural areas is self-employed, including those living on income from agriculture. The bulk of this income is non-monetary self-consumption. Consequently, women are not able to invest. These figures indicate lost opportunities for using vast human potential, regardless of gender [30].

OECD authorities note that the urgent issue for Kazakhstan is strengthening the fight against gender discrimination, as well as discrimination against older workers, with any inequalities in labour relations. According to OECD recommendations, Kazakhstan should consider more specific measures to apply the provisions of the law and prevent unjustified discrimination against older workers in the search and employment of workers, as well as age discrimination in relation to working conditions. While anti-discrimination provisions are already an integral part of Kazakhstani legislation, as in most OECD countries, ensuring proper enforcement remains problematic [6].

This conclusion was made, despite the seemingly relative prosperity with the legislative provision of equality, non-discrimination in Kazakhstan. The Law of December 8, 2009, No. 223-IV "On State Guarantees of Equal Rights and Equal Opportunities for Men and Women"[1] was adopted, and the fundamental ILO Conventions No. 100[2] and No. 111[3] were ratified in the last century. In the authors' view, the obvious problem for Kazakhstani legislation is the neglect of two important issues: legislation on issues of equality and non-discrimination does not cover a significant group of signs of dis-

[1] Law of the Republic of Kazakhstan "On State Guarantees of Equal Rights and Equal Opportunities for Men and Women". (2009, December). Retrieved from https://online.zakon.kz/document/?doc_id=30526983

[2] The Convention was ratified by the Republic of Kazakhstan in accordance with the Law of the Republic of Kazakhstan. (2000, December). Retrieved from https://online.zakon.kz/m/document/?doc_id=1018240

[3] The Convention was ratified by the Republic of Kazakhstan in accordance with the Law of the Republic of Kazakhstan. (1999, July). Retrieved from https://online.zakon.kz/document/?doc_id=1011035#pos=0;0

crimination; and they provide better protection in the field of employment and occupation. These two trends imply widespread national recognition of the importance of a more effective response through legislative measures.

It should be noted that in Kazakhstan, there is virtually no judicial practice for considering claims for recognition of discrimination in labour relations. In general, court cases of discrimination are very difficult or even impossible due to inadequate complaint procedures. The continued existence of unrealistic claims for reliable evidence is particularly detrimental to successful discrimination lawsuit. In our opinion, in such claims, the burden of proof should be shifted to an employer.

Victims of discrimination can be dissuaded of the need to exercise their rights out of fear of persecution, due to undeveloped legislation, disbelief in court proceedings, or complexity of procedures. However, there is no substitute for the role of the courts in the enforcement process. Initiation of lawsuits in courts on grounds of discrimination seems futile in Kazakhstan, when procedures are expensive, time consuming and remedies are vague. Provisions with a traditional approach, shifting the burden of proof to the plaintiff when considering cases of discrimination, limit the effectiveness of the defence during the trial, as well as the ability to seek remedies for the damage caused. Shifting the burden of proof to an employer is one of the requirements of European Council Directive 2000/78 / EC, which most member states are now transposing into national laws and practice.

The proof of discrimination in labour relations is an undeveloped procedure; there is no direct method for establishing inequality. Determining that two jobs that differ in content are equivalent, requires the use of a matching method. Job appraisal methods are instrumental in determining the relative value of a job and thus determine whether the payment is fair. The process of developing methods for evaluating work and methods for their application are as important as the technical content of these methods. Inadvertent gender discrimination can occur at any stage of their development and use. In 2008, the ILO published a step-by-step guide for conducting gender-neutral assessment of work, describing the stages of an objective and fair assessment of work that is not subject to gender discrimination, including the following sequence of operations: development of a measuring grid that is not subject to gender discrimination; assignment of elements in the work based on the levels of sub-factors and the definition of work of equal value; counting the total number of elements assigned in each work; grouping of works into intervals of elements [31]. However, Kazakhstan lacks awareness and enforcement of such methods. Moreover, the studies justifiably determine the need for theoretical development of a specific methodological test for non-discrimination. "A reference to the objective validity of the differences as a basis for concluding that they are non-discriminatory can be considered a sufficient argument only provided that the concept of objective conditioning of differences would also cover social justice and proportionality. Without the application of the proportionality test, material constitutional control over the compliance with the principles of equality and non-discrim-

ination seems impossible" [32]. For the sake of objectivity, it should be noted that the lack of sufficient and complete anti-discrimination legislation is an urgent problem for many OECD countries, studies show the existence of problems of ensuring equality in employment [33–37].

However, the inadequacy of the definition of "discrimination" in labour relations is of paramount importance. In legislation, the corresponding definition of inequality is extremely limited and does not cover all possible forms of discrimination.

Certainly, female discrimination remains the most common form of inequality. Women continue to suffer because of discrimination in almost all aspects of employment, including the work they can get, their pay, benefits and working conditions, and access to leadership positions. The data of official documents[1] show that gender differentiated differences in wages, occupational and vertical segregation, difficulties associated with the combination of production and family responsibilities, the disproportionate prevalence of women in part-time, informal temporary employment and discrimination due to maternity or marital status continue persist despite legislative and programmatic initiatives[38].

In many cases, women's access to certain types of work is limited due to their reproductive role or the fact that women still have the main responsibility for caring for children and other dependents [39–42]. This does not mean that no progress has been made in this area, but only indicates that women still have a long way to go to achieve gender equality in the labour market.

The authors are fully aware that discrimination between men and women in Kazakhstan has deep social roots that cannot be removed simply by adopting legislation or any specific measure. More effective is gender mainstreaming and non-discrimination in the implementation of a range of national measures and programs. This is a strategy for taking into account the problems and experiences of women and men, as an integral part of the process of developing, implementing, monitoring and evaluating measures and programs in all areas of political, economic and public life.

At the same time, in our opinion, cases of discrimination on the grounds of nationality and position of labour migrants, political opinion, HIV status, age, sexual orientation, and image remain beyond the scope of legislative discretion and without enforcement of life. The listed forms of discrimination are not reflected in national legislation, or the rule of law contains direct discriminatory rules on the listed grounds. So out of sight are manifestations of discrimination in employment due to smoking and obesity. A study in Sweden based on fictitious job applications with photographs showed that overweight candidates receive 20% less job invitations than candidates with normal weight, which corresponds to the level experienced by a minority of Middle Eastern descent in Sweden [43]. If obesity is considered to be dangerous for one's own health,

[1] Concept of family and gender policy in the Republic of Kazakhstan until 2030. Retrieved from https://egov.kz/cms/ru/law/list/U1600000384

the potential smoking hazard for colleagues is clearly documented, and therefore, smoking in the workplace is prohibited in many countries. Some researchers, however, highlight the so-called shift from "smoke-free jobs" to "smoke-free jobs," noting the risk of discrimination against smokers.

Age discrimination in the Labour Code is paradoxically elevated to the standard of labour relations. In addition to the stereotype of older workers existing in society, the possibility of realising the reluctance of employers to retain and hire older workers are legislatively enshrined. The Labour Code contains rules on the termination of an employment contract with employees who have reached retirement age, as well as the conclusion, extension of contracts with discriminatory clauses regarding special qualifications, as well as the possibility of causeless and long-term temporary employment.

In our opinion, the strengthening of legislation on non-discrimination on any grounds in hiring, promotion, training, and advanced training is in demand. In order to ensure strong implementation mechanisms for the application of legal provisions, administrative responsibility should be increased and civil liability compensation options should be established.

It is proposed to adopt a new definition of discrimination in the field of employment, including taking into account the recent positive experience of Ukraine in the field of updating labour anti-discrimination legislation, setting out paragraphs 2, 4 of Article 6 of the Labour Code as follows:

"2. Any discrimination in the employment is prohibited, in particular a violation of the principle of equal rights and opportunities, direct or indirect restriction of the rights of workers depending on race, colour, political, religious and other beliefs, gender, gender identity, sexual orientation, ethnic, social and foreign origin, age, state of health, disability, suspicion or presence of HIV/AIDS, marital and property status, family responsibilities, place of residence, professional membership n union or other association of citizens, participating in a strike, applying or intending to appeal to a court or other bodies for the protection of their rights or providing support to other employees in protecting their rights, on linguistic or other grounds not related to the nature of the job or the conditions for its implementation.";

"4. Persons who believe that they have been discriminated against at work have the right to apply to the court for the restoration of violated rights, compensation for pecuniary damage, and compensation for non-pecuniary damage".

To assist in the development of effective legislation, authors consider it necessary to introduce, as one of the parameters for the examination of draft regulatory legal acts submitted to Parliament, a study of the project for discriminatory norms and gender inequality. Such expert opinions, technical comments on the proposed draft labour legislation will contribute not only to the main goal – to achieve genuine equality in employment, but also to promote the dissemination of best practices of the ILO and OECD countries.

The development of training materials for labour inspection, on ensuring gender equality and non-discrimination in the workplace is in demand. The following problems can be identified as typical for Kazakhstan: low level of law enforcement; insufficient sanctions; and lack of resources for labour inspection bodies; limited awareness of rights among workers; low potential of social partners in ensuring equality, prohibition of discrimination; limited legislative set of grounds for discrimination; limited private-sector employer awareness of anti-discrimination obligations.

As measures to neutralise these factors, the following set of tools is proposed: strengthening the legal framework; capacity building among labour inspectors, social partners, judges; creation of a coordination framework for all activities related to equality issues in the public and private sectors. Revision of national legislation, including the Labour Code; advocacy; increased sanctions and liability.

A problem that significantly affects the stability of labour relations and ensuring productive employment is a low level of practical implementation of labour law requirements. In practice, the phenomena of not concluding labour contracts, illegal substitution of permanent fixed-term contracts, concealment of actual wages, and evasion by employers of social obligations are still common.

In this aspect, a review of existing legal liability for non-compliance with labour laws is required. In the Labour Code, a system of guarantees has been enshrined for female workers, persons with family responsibilities, which are backed up by real mechanisms for their legal support, namely responsibility for their violations. In a number of cases, the LC proclaims the existence of liability for violation of the norms of the code, but in fact there is no corresponding legal liability. So, paragraph 4 of Article 6 of the Labour Code secured the right of persons who consider that they have been discriminated against in the workplace to apply to a court or other instances in the manner established by laws. However, the legislation does not determine the procedure for applying for judicial protection on the basis of discrimination in the workplace, the procedure for limiting from discriminatory actions (inaction) is not legally defined, moreover, acts of a discriminatory nature, as a rule, cause both material and moral damage to a person. The above indicates a defect in the procedures for judicial protection of violated rights, which is in the nature of a factor of corruption, as a defect in administrative procedures.

In addition, since 2020, the employer's expenses have significantly increased due to the introduction of compulsory health insurance (maintaining additional pension contributions from the employer's funds has been postponed until 2023). An increase in employers' expenses will inevitably lead not only to a slowdown in wage growth, a reduction in workers, but also to a concealment of both the actual number of workers and their real wages. In this direction, increased responsibility of employers is in demand. It is necessary to introduce the general composition of an administrative offence, which defines liability for any violation of labour law requirements.

Article 90 of the Code of July 5, 2014, No. 235-V of the ZRK "On Administrative Offences"[1], establishes a limited concept of employment discrimination, which has signs of an administrative offence. Two types of misconduct include: employer discrimination in employment, expressed in violation of an employee's right to equal pay for equal work. Placement by the employment centre, a private employment agency providing labour mediation, and also an employer of information on job vacancies containing discriminatory requirements in the field of labour. All other possible manifestations of discrimination are not covered by legal liability measures.

It is necessary to eliminate low-quality consolidation of legal liability for misconduct in the sphere of wage labour. To make additions to the Code of Administrative Offences, establishing new compositions and supplementing the existing ones in order to implement the fulfilment by the parties of the labour contract of labour standards, guarantees of social and labour rights.

The authors offer the Code of the Republic of Kazakhstan on Administrative Offences of July 5, 2014, No. 235-V[2] to supplement with articles, to amend, providing for liability for:

violation of labour legislation and other regulatory legal acts containing labour law, unless otherwise provided by other articles of the code:

the admission by an employer a person to work without concluding an employment contract; or the actual admission to work by a person not authorised by an employer, if an employer or his representative authorised to this refuses to recognise the relationship that arose between a person actually admitted to work and a given employer, the labour relationship (does not conclude with a person admitted to work, employment contract); or evasion of registration or improper execution of an employment contract or the conclusion of a civil law contract that actually regulates labour relations between the employee and the employer;

non-payment or incomplete payment of wages and other payments made within the framework of the employment relationship if the actions do not contain a criminal offence, as well as non-payment and non-payment of a penalty for the period of delay in payment due to the fault of the employer, or the establishment of a salary of less than the size stipulated by labour legislation;

non-fulfilment by an employer of a obligation to create or allocate jobs for the employment of persons with disabilities in accordance with the established quota for hiring disabled people, as well as an employer's refusal to hire a disabled person within the established quota.

Despite Kazakhstan's ratification of the two main ILO conventions on equality, namely Conventions 100 and 111, problems remain even with their full application. So, means for measuring and comparing different types of work on the basis of objec-

[1] Code of the Republic of Kazakhstan on Administrative Offenses. (2014, July 5). Retrieved from https://online.zakon.kz/document/?doc_id=31577399

[2] *Ibidem*

tive criteria, such as qualifications, working conditions, remain undeveloped. If, as a result of labour assessment based on objective criteria, free from stereotypical ideas about the value of labour that women or men usually perform, the value of some types of labour differs from others, these differences should be reflected in the level of wages.

According to Article 1 of ILO Convention No. 111[1], discrimination is any distinction, exclusion or preference based on race, skin colour, sex, religion, political opinion, foreign origin or social origin, leading to the destruction or violation of equality of opportunity or treatment in the employment and occupation. However, article 6 of the Labour Code uses a different definition of discrimination – it is defined as "a restriction on the exercise of labour rights based on origin, social, official and property status, gender, race, nationality, language, religion, beliefs, place of residence, age or physical shortcomings, as well as belonging to public associations".

Legislative prohibition of employment discrimination and the provision of legal remedies is insufficient; ensuring their effective functioning is a problem, especially during periods of economic downturn. It should be noted that the most difficult problem associated with the effective implementation of equal rights in labour relations and employment is undoubtedly caused by economic and social conditions. The prospects for future activities in the field of ensuring the prohibition of discrimination include: the formation, development and sharing of a knowledge base on the measurement, fixing and elimination of discrimination in the field of work and occupation; development of the institutional capacity of constituents of social partnership with regard to more effective implementation of the fundamental right to non-discrimination in the world of work; Strengthening research and international partnerships with key stakeholders for equality.

In our opinion, an important aspect in this direction is the beginning of transformations from legal reforms and the transformation of gender policy. In this direction, the OECD recommends:

Governments must translate international conventions into their national legal framework and repeal discriminatory laws. In fact, this refers to discriminatory legal provisions regarding the rights of women in the workplace and reproductive autonomy. This also includes addressing legal loopholes that allow for continued negative practices, such as early marriage or unequal sharing of household responsibilities. A more comprehensive legal framework should cover all forms of violence against women, without exception.

Public policy should address the root causes of gender inequality and include advocacy campaigns and/or educational programs to address negative gender stereotypes. This is especially true when the focus is on empowering women and the unequal dis-

[1] The Convention was ratified by the Republic of Kazakhstan in accordance with the Law of the Republic of Kazakhstan. (1999, July). Retrieved from https://online.zakon.kz/document/?doc_id=1011035#pos=0;0

tribution of family care responsibilities. Quotas and parental leave schemes are clearly not enough to challenge the widespread stigmatisation of women in politics and as working mothers.

Protection of women's rights requires improving both the gender sensitivity of the judiciary and women's legal literacy. An inclusive and comprehensive legal framework should include legal training, legal services for more vulnerable women and/or awareness-raising and legal literacy programs.

The elimination of discriminatory laws, social norms and practices should be a common concern and obligation. Every citizen and all institutions have a role to play, including governments, stakeholders in development cooperation, local civil society, community and religious leaders, teachers, health workers, justice and police, media, foundations, private sector and others. Legal reforms can promote social transformations, but it also requires local changes. Decisions developed at the local level, combined with adequate legislation, are necessary for social change [44].

CONLUSIONS

Thus, it follows from a literal interpretation of legal norms that a different attitude towards a person in the formal observance of his rights is not a violation, and discrimination can be established only in case of a direct violation of any other legal norm. At the same time, it is extremely difficult to establish the fact of discrimination and restore their rights to the discriminated employee, since in a situation where no other violation (apart from discrimination) is committed, discrimination is not established by the prescription of the law, and when another violation is committed, the punishment follows it not for discriminatory actions. The lack of a clear legislative definition of the term “discrimination” and a detailed regulation of the procedural specifics of considering cases of discrimination disputes create additional difficulties both for the emergence of anti-discrimination judicial practice and for the process of creating a public understanding of what discrimination is.

As a conclusion, it is needed to note that the adoption of the recommendations and proposals set forth will ensure the following legal and socio-economic consequences:

– the progressive development of Kazakhstani national labour law in the direction of its compliance with the best examples of the system of labour relations inherent in leading states;

– creation of legal conditions for active employment, participation in labour relations for persons of retirement age, the removal of existing legal and organisational obstacles to hiring and retaining older workers in the workplace;

– strengthening mechanisms to combat gender and other types of discrimination; toughening legislation on non-discrimination on any grounds in hiring, promotion and training;

– solving the problem of the low level of practical implementation of the requirements of labour legislation, eliminating low-quality consolidation of legal liability for misconduct in the field of employment.

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МІЖНАРОДНО-ПРАВОВІ МЕХАНІЗМИ ЗАБЕЗПЕЧЕННЯ СОЦІАЛЬНИХ ТА ТРУДОВИХ ПРАВ ЛЮДИНИ

Анотація. *Формування сучасної наукової концепції про значення і роль міжнародно-правових основ забезпечення соціально-трудових прав людини є актуальною правовою проблемою, вирішення якої сприяє формуванню в Казахстані правової і соціальної держави, реформуванню національного правового регулювання в контексті міжнародно-правових зобов'язань країни. Метою статті є проведення комплексного аналізу системи міжнародно-правових основ забезпечення соціально-трудових прав людини в Казахстані на сучасному етапі. Специфіка та складність тематики дослідження зумовили використання цілого комплексу загальнонаукових та спеціальних наукових методів пізнання, таких, як: діалектичного, структурно-функціонального аналізу, системного аналізу, формально-догматичного тощо. В результаті проведеного дослідження автором встановлено, що інституційний аспект міжнародно-правової бази виступає в якості «ядра» взаємодії між міжнародним і національним правом у сфері забезпечення соціальних і трудових прав людини. Обґрунтовано, що міжнародні стандарти в досліджуваній сфері відіграють роль детермінант уніфікації і консолідації внутрішнього законодавства, визначають рівень гарантій в соціально-трудовій сфері, а також виконують функцію розробки національного законодавства, стають найважливішими параметрами його реформування. Проведено аналіз процесів реформування національного законодавства Республіки Казахстан в соціально-трудовій сфері в контексті впливу міжнародно-правових зобов'язань, взятих на себе цією державою. Автором також констатовано, що головним напрямком законодавчого процесу в соціально-трудовій сфері публічних правовідносин на короткострокову перспективу стане послідовна імплементація в національне законодавство Республіки Казахстан європейських стандартів з урахуванням їх прогресивного характеру, орієнтації на побудову соціальної держави та необхідності збереження національної ідентичності.*

Ключові слова: регіональні стандарти, міжнародні зобов'язання, конституційне право, гармонізація міжнародних норм, національна правова система.

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INTERNATIONAL LEGAL MECHANISMS OF ENSURING SOCIAL AND LABOR HUMAN RIGHTS

Abstract. *The formation of a modern scientific concept on the significance and role of international legal fundamentals for ensuring social and labour rights is a pressing legal issue, the solution of which contributes to the formation of a legal and social state in Kazakhstan, the reform of national legal regulation in the context of the country's international legal obligations. The purpose of the article is to perform a comprehensive analysis of the system of international legal framework for ensuring social and labour human rights in Kazakhstan at the present stage. The specificity and complexity of the research subject conditioned the use of an entire complex of general scientific and special scientific methods of cognition, such as: dialectical, structural-functional analysis, system analysis, formal-dogmatic and others. As a result of the research, the author established that the institutional aspect of the international legal framework acts as the "core" of the interaction between international and national law in the field of ensuring social and labour human rights. The reasoning is provided that, in the researched field, the international standards play the role of determinants of unification and consolidation of domestic legislation, determine the level of guarantees in the social and labour sphere, and also perform the function of developing national legislation and become the most important parameters for its reform. The processes of reforming the national legislation of the Republic of Kazakhstan in the social and labour sphere in the context of the influence of international legal obligations undertaken by this state are analysed. The author also states that the leading direction of the legislative process in the social and labour sphere of public relations for the short term will be the consistent implementation of European standards in the national legislation of the Republic of Kazakhstan, with consideration of their progressive nature, orientation towards development of a social state and the need to preserve national identity.*

Keywords: regional standards, international obligations, constitutional law, harmonization of international norms, national legal system.

INTRODUCTION

The relevance is due to the interests of the state and society in the qualitative consolidation and regulation of social and labor human rights in the modern legal system and social relations. The timeliness of the research is due to the theoretical lack of development of the system of international legal foundations for ensuring social and

labor human rights in Kazakhstan, the relevance of the practice of forming and developing social and labor legislation as the fundamental basis of generally accepted norms and standards in this field.

In recent years, the field of social and labor legislation of Kazakhstan has undergone fundamental changes, the system of relevant regulatory legal acts has become more qualitative and effective due to codification and unification, the implementation of organizational reform to ensure guaranteed social protection measures for the population [1]. At the same time, despite a significant improvement in the quality of ensuring of social and labor rights of a person, Kazakhstan's legislation in this area does not sufficiently meet generally accepted standards, international obligations undertaken by the republic are not fully implemented. In addition, scientific interest in the topic of this study is due to the fact that legal support of social and labor human rights is carried out not only by domestic law, but also international, as a rule, more progressive, consolidating recognized standards and norms of realization of human rights in the social and labor sphere [2; 3]. However, the specifics of this area of public relations does not allow in most cases the direct impact of international rules in the realization of social or labor rights, implementation measures are needed to consolidate and introduce generally accepted standards in national legislation. This determines the complexity of the mechanism of execution by Kazakhstan of its international obligations to ensure social and labor human rights.

It should be noted that the international legal foundations of wage labor and social protection of the population were the objects of scientific research in legal science. So, in the thesis of E.M. Ametistov notes: "International labor regulation is one of the oldest and most developed areas in the international protection of human rights [4]. For many years of existence of this area, within its framework, a large number of international labor standards were established and an extensive system of multilateral and bilateral treaty obligations of states was established for the intra-legal implementation of these norms, and a great practical experience of such implementation was accumulated". At the same time, in Kazakhstan there were no comprehensive scientific studies of the problems of the international legal foundations of ensuring social and labor human rights [5; 6]. The statement of the problem in the proposed perspective of the scientific analysis of human rights in the social and labor sphere in Kazakhstan from the point of view of their provision through mechanisms of an international character is new and has not previously had a place in the domestic legal science.

The formation of a modern scientific concept of the significance and role of the international legal foundations for ensuring social and labor human rights is an urgent legal problem, the solution of which contributes to the formation in Kazakhstan of a legal and social state, the formation of national legislation and the social and labor sphere corresponding to generally accepted international standards.

Despite the fact that the problems of ensuring and content of human rights and freedoms, as well as issues of establishing the correlation of international and national

law, the implementation of generally accepted standards in the domestic legal system are some of the "popular" areas of theoretical research in constitutional law, comparative law science, international law, in the field of scientific research of international legal orientation there was not a single monograph specifically devoted to the international legal support of social labor rights, which seems to be a significant gap in this area of scientific research [7]. Existing studies of regional associations in the post-Soviet space are represented by works of scientists from various branches of knowledge: economic, historical, political, legal orientation. After the collapse of the USSR, enough scientific literature has been published, including monographs on the areas and aspects of this study [8].

These works and other works related to the countries of the former USSR, their formation in political, economic and social terms, their need for economic associations and steps in this direction, are of considerable scientific interest.

1. MATERIALS AND METHODS

The specificity and complexity of the topic of scientific research led to the use of a whole complex of general scientific and special scientific methods of cognition, such as: dialectical, analysis, synthesis, historical, comparison, analogy, deduction, induction, abstraction, as well as comparative legal, formal legal, method of political and legal modelling, structural and functional analysis, system analysis, logical, formal dogmatic and others. The general scientific dialectical method of cognition was the main one in this system of methods used and allowed to fulfil the scientific tasks defined in the article in the unity of their social content and legal form. In particular, the dialectical method of cognition of reality made it possible to analyse international legal mechanisms for ensuring social and labour human rights, which reflected Western European basic civilisational values, as well as to study the influence of European doctrine, politics, and international legal obligations in the field under study on national legal system of the Republic of Kazakhstan.

The use of analysis and synthesis methods contributed to the study of problems in the field of protecting social and labour human rights and directions for improving the relevant legislation. The historical method contributed to determining the role of interstate cooperation in the development of mechanisms for ensuring social and labour rights in a transboundary context. The formal legal method allowed revealing the peculiarities of law enforcement of the provisions of the national legislation of the Republic of Kazakhstan in the field of protection of social and labour human rights. The comparative legal method provided an opportunity to conduct a thorough analysis of the problems of protecting social and labour human rights, as well as outline the prospects for overcoming them. In addition, this method was used to identify similar and fundamentally opposite norms in the legal regulation of ensuring social and labour human rights in the Republic of Kazakhstan and other countries, international organisations, as well as when comparing scientific views on the indicated issues.

The methods of induction and deduction have provided a definition of the nature and effectiveness of the mechanism for protecting and ensuring social and labour rights as a priority area for adapting the national legislation of the Republic of Kazakhstan to international standards and requirements. Structural and functional analysis was used to comprehensively characterise social and labour rights of a person, to determine and study the structure of national legislation governing relations in this area. The method of system analysis provided the opportunity to highlight the relationship between the substantive nature of social and labour rights and the specific mechanism of their protection. The formal dogmatic method was used in the interpretation of legal categories, as a result of which the conceptual and categorical apparatus for protecting social and labour human rights in the international legal context was deepened and refined. The logical method was used as a universal means of argumentation of scientific conclusions in the indicated problems.

The theoretical basis of the article was the scientific works of domestic and foreign scientists, based on the key theories of interstate integration: federalism, neo-functionalism, intergovernmentalism (intergovernmental approach), neo-regionalism. The empirical base of the study is a wide range of regulatory legal acts and official documents adopted in the field of ensuring social and labour human rights both in the Republic of Kazakhstan and in other states and organisations. Based on the principle of comprehensiveness, the study takes into account both political and socio-economic aspects of the formation and development of international legal ensuring the standards of social and labor human rights, their relationship with legal regulation and practice of implementing of national social and labor relations. The study of the problems of international legal regulation of the research object is carried out in a systematic connection with the analysis of the problems of the organization and activities of the international institutional system.

Since the author's concept concerns the identification and understanding of the regularities of transformation of international standards for ensuring social and labor human rights in the national legislation of Kazakhstan, the main ones are the methods of describing and analyzing situations caused by socio-economic features of the geopolitical national space, methods of comparative analysis.

2. RESULTS AND DISCUSSION

The international legal framework for ensuring social and labor human rights is a combination of the most important fundamental international norms governing the basic foundations of international institutions operating in this field and international relations aimed at securing standards, ensuring, guaranteeing and realizing social and labor human rights that gives grounds for its separation into an independent international legal institution in the system of the branch of international human rights law. This institution is of a public legal nature, due to the specifics of social relations that are governed by the established international social and labor legal system –

these are relations of cooperation and interaction between states and international organizations in this field [9–11]. The public nature of the institution is determined by the particular subject composition of these social relations, which are states, international organizations, bodies; by special method of legal influence, characterized by the processes of harmonization of the will of the states; as well as the peculiarities of the formation and consolidation of the sources of the legal framework for ensuring social and labor human rights system of the international legal framework for ensuring social and labor human rights.

The leading role in creating and providing guarantees for the realization of social and labor human rights belongs to international organizations, whose goal of operation is to develop, consolidate and implement international human rights standards, which is aimed at creating stable security foundations throughout the world. The institutional aspect of the international legal framework for ensuring social and labor human rights acts as the "core" of interaction between international and national law in this area, which defines and establishes appropriate mechanisms for interpenetration and addition in the legal regulation process [12]. The institutional system of international law in the social and labor field of social relations includes a set of institutions that ensure, on the one hand, that states comply with international obligations in the social and labor sphere, and on the other, through lawmaking, create and consolidate relevant generally accepted standards [13; 14]. It is the factor of participation in institutional systems that obliges the state to join and use the generally accepted recognized tools and mechanisms for ensuring social and labor human rights.

The significance of international social and labor standards is to develop national law in the direction of its compliance with generally accepted and universal norms; standards play the role of determinants of unification and consolidation of domestic legislation, define the level of guarantees in the social and labor sphere, as well as carry out the function of developing national legislation, become the most important parameters of its development; act as parameters of domestic social policy; international tools and mechanisms for the protection of social and labor human rights are an integral part of the legal, economic and organizational security systems, the effectiveness of their application is ensured by the basic, fundamental nature of universal norms.

2.1 Universal tools and mechanisms for the protection of social and labor rights

Modern conditions for the development of international and interstate relations have proved the effectiveness of universal norms, provided by their basic, fundamental character in the system of international law. Scientific sources rightly point out that the priority of national regulation of human rights is giving way to international control. There is a need to develop common human standards in the field of human rights, as well as to create international mechanisms and procedures for their provision and protection. Distinctive features of universal norms can be reduced to the following provisions: global action, universal binding force, the creation and aboli-

tion of them by international community as a whole. Universal norms form general international law, in which law in the social and labor sphere can be distinguished.

Custom in international law has an immeasurably greater importance than in domestic law. It can be argued that the treaty has become the main source of international law relatively recently. For almost the entire history of the development of relations between states, custom has been one of the most important sources of international law. This statement is true not only for Asian countries, including the states of the Central Asian region, but also for all European states. And at present, custom continues to play an important role as a source of international law and a form of consolidation of universal norms. Customs can be modified, subsequently transferred in a contractual form or canceled by means of contracts of interested parties [15]. Treaty and custom are the main sources of modern international law and a form of consolidation of universal norms. And while at the first stages of development international law indirectly influenced the legislation of the states-participants of the international community, now the international treaty and international custom have become direct sources of national law. The treaty as a universal norm of international law is an explicit agreement between its subjects on the creation of internationally binding legal norms for them, defining their mutual rights and obligations.

In the process of creating international law, intergovernmental and international public organizations participate. The result of their activities are resolutions, that is, recommendations that have a significant impact on the creation of international legal norms both in a contractual and usual order. Since the resolutions of intergovernmental organizations are the result of the coordination of the interests of the member states of these international intergovernmental organizations, especially those relating to the behavior of states in the sphere of competence of this international organization, they serve as sources of modern universal norms of international law [16–18]. In any case, the resolution of an international organization adopted by a majority vote becomes binding on almost all members of this organization. And the more universal this organization is, the more states accept the resolution as a generally binding norm.

International labor and social law belong to the field of public international law as regulating the relations between subjects of international law regarding the consolidation, implementation of the standards of human rights in the social and labor sphere, and their implementation in national law. The inaccuracy of the term international labor law lies in the fact that the sphere of relations regulated by it is not a hiring relationship with an international element (not a relationship between an employer and an employee), but a relationship between the subjects of a small business regarding export-import of labor force, internal legal regimes, "Meeting" and "seeing off" labor migrants. In connection with this, a more accurate term would be the term international migration (labor resource) law. In international labor (migration) law, methods of bilateral and regional regulation are also actively used. Moreover, within the framework of integration associations, there is a tendency to replace the method of multilateral regulation

by the method of supranational regulation [19]. The public nature of international social and labor law, we believe, proceeds from the circle of social relations that are regulated by the existing international social and labor legal system – these are relations of cooperation, interaction between states, international organizations in this field. The subject composition, which includes states, international organizations, these public relations also determines the public legal nature of international social and labor law. As additional features, it is worth highlighting a specific method of legal impact, characterized by the processes of coordination of the will of states, as well as the particular sources of the legal system under consideration. International law in the social and labor sphere as a relatively new phenomenon of reality develops mainly in the form of international treaties, both multilateral and bilateral (agreement, pact, convention).

The Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948[1], secured the right of everyone to such a standard of living, including food, clothing, housing, medical care and the necessary social services, which is necessary to maintain the health and well-being of himself and his family, and the right to security in the event of unemployment, illness, disability, widowhood, old age or another loss of livelihood due to circumstances beyond its control. The International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on December 16, 1966, developed these provisions, securing the right of everyone to social security, including social insurance. In addition, UN acts are sources for the formation of acts of international law in the social and labor sphere, as they define basic ideas. These UN acts containing the basic principles of social protection of the population, the realization of human rights in labor are the Universal Declaration of Human Rights, the Declaration on Social Progress and Development, the Declaration of the Rights of the Child, the Declaration on the Elimination of All Forms of Racial Discrimination, the Declaration on the Elimination of Discrimination against Women, Convention on the Elimination of All Forms of Racial Discrimination, Declaration on the Rights of Mentally Retarded Persons, Declaration on the Rights of Disabled Persons, International Covenant on Economic, Social and cultural rights, International Covenant on Civil and Political Rights, Copenhagen Declaration on Social Development.

A special place in the international system of universal mechanisms for ensuring human rights is occupied by the Conventions of the International Labor Organization, as well as acts of a recommendatory nature – the ILO Recommendations, but with respect to these documents a universal scope has been established. Both the ILO Conventions and Recommendations are adopted at the ILO Conference. The ILO Convention usually requires ratification by the state that has accepted it. The provisions of the Convention shall take effect by the adoption of legislative or administrative measures, collective agreements or any other legislative means. Any state that has signed the ILO

[1] The Universal Declaration of Human Rights, adopted by the UN General Assembly. (1948, December). http://www.consultant.ru/document/cons_doc_LAW_120805/

Convention must translate its provisions into national law. But the norms of international labor and national labor law are interdependent. This means that the ILO has a significant impact on the labor laws of various states. An ILO recommendation can also be made into law. In addition to submitting a recommendation to the competent authority or authorities, the ILO member does not have any other obligations to the ILO, with the exception of the obligation to inform the Director-General of the International Labor Office, at appropriate times, when required by the Governing Body, about the status of legislation and existing practice in his country on that the recommendation relates to, what measures have been taken or planned to give effect to any provisions of the recommendation, as well as about such changes to these provisions, which are or may be necessary for the purpose of adopting or applying them. ILO recommendations detailing the fundamental principles of international labor law are binding on ILO member states based on their membership in the ILO.

Thus, the legal nature of ILO Conventions and Recommendations is significantly different. Since ratification of the Convention, as a rule, introduces it into the system of sources of national legislation. Regarding the Recommendation, its ratification is not required, which somewhat formally detracts from its legal force for states that have signed it. At the same time, membership in the ILO makes the Recommendations binding on participating states.

The ILO acts define the types of domestic sources of law and legislation, determine the form and content of national regulations. Article 2 of 1969 Convention No. 129[1] clarifies that the term "legislation" means, in addition to laws and regulations, arbitral awards and collective bargaining agreements. The ILO acts define the types of domestic sources of law and legislation, determine the form and content of national regulations. Other ILO acts characterize the structure of domestic sources of law, highlighting the usual norms, the views of prominent scholars, and common features. However, international acts do not establish an exhaustive list of legal sources, since the system is in constant development. Social partnerships, employment contracts, and social protection are highlighted as priority areas for the development of national law-making.

ILO activities in Kazakhstan are carried out through the operation of the ILO Subregional Office for Eastern Europe and Central Asia. The Office coordinates ILO activities in ten countries – Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, Turkmenistan and Uzbekistan. The main areas of activity of the Subregional Office are the promotion of national decent work programs in the countries of the region, the development of social dialogue, social protection, employment development, labor protection, gender equality in the world of work, HIV / AIDS in the workplace, the eradication of child labor and other areas. The interaction of the Republic of Kazakhstan and the Bureau is carried out in the framework of joint

[1] International Labor Organization Convention No. 129 of 1969 on Labor Inspection in Agriculture. (2004, September). Retrieved from https://zakon.rada.gov.ua/laws/show/993_114

programs in the field of labor and social protection of the population, the development of draft regulatory legal acts, their concepts, as well as program documents for the development of the social and labor sphere [20–22].

Universal mechanisms for the protection of social and labor human rights penetrate the legal systems of states through various international institutions of which the country is a party. It is the participation factor that obliges the state to join and use the developed universally recognized tools and mechanisms for ensuring social and labor human rights, which together can be defined as a universal system of international cooperation in the field of ensuring social and labor human rights. We considered universal tools and mechanisms for protecting social and labor human rights as an organic part of the legal and organizational security systems, the effectiveness of their application is ensured by the basic, fundamental nature of universal norms. The main forms of the existence of universal norms are custom, contract, acts of international organizations, which should be considered as sources of international and national law [23].

Universal norms are the most important mechanism for ensuring social and labor rights and freedoms of a person, in their totality they form the international legal basis for regulating this sphere of public relations. Universal norms set the bar for guarantees of the considered human rights, act as a determinant of national law-making, become the most important parameters of its development, and are determined by the standards of domestic social policy. The universal level of labor regulation and social protection is aimed at expanding the scope of public relations covered by legal mediation. Universal mechanisms penetrate the legal systems of states through the relevant international institutions to which the country is a party. It is the participation factor that obliges the state to join and use the developed universally recognized tools and mechanisms for ensuring social and labor human rights.

2.2 Regional mechanisms and standards for ensuring social and labor rights

Along with the existing system of universal cooperation of states in the field of social and labor human rights, such activities are carried out at the regional level, that is, on the basis of existing regional cooperation organizations, on the basis of interstate (multi-, bilateral) agreements. Regional cooperation cannot be opposed to universal cooperation and, in our opinion, should be considered from two perspectives: on the one hand, as a way to complement universal cooperation, to specify it towards the national conditions, and on the other, as a method of creating more effective and efficient mechanisms and ways to ensure fundamental human rights and freedoms, including in the social and labor sphere. The region created by states is, along with the states themselves and international governmental organizations, one of the most important factors conducive to solving modern global problems. It contributes to the formation of a community of interests, affects the security of the region, contributes to the emergence of new ways of mutual relations between states. It creates the need

for new international legal norms and new institutions. Regional norms historically preceded universal. The latter were created on the basis of the former, using their experience [24; 25]. This process continues to this day. At the same time, universal international law promotes the progress of regional systems by transferring to them the experience of both more developed regional systems and the universal system.

If universal international legal documents that enshrine personal human rights and freedoms form the UN international legal acts on human rights and freedoms, which are of a recommendatory nature and the UN conventions developed on their basis, then a system of regional international legal acts on human rights are formed by: European, American, African, Asian-Pacific systems, as well as systems of acts regulating human rights in Islamic society, the system of acts within the OSCE and the system of acts in CIS [26]. The acts adopted by the European regional associations of states: the Council of Europe (CE) and the European Union (EU), act as sources of international legal regulation of the social and labor sphere, together they form the so-called regional law in this area. Among the fundamental acts of inter-regional cooperation, the Convention on the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, should be highlighted at the level of the Council of Europe. The Charter not only proclaims the basic social and labor human rights as priorities of the social policy of states, but also establishes a set of measures to ensure the enumerated rights, measures to establish guarantees for their implementation.

Kazakhstan seeks an active partnership with the European Union. One of the promising, in our opinion, areas of the legislative process in the social and labor field of public relations is the implementation of European standards in national legislation, taking into account their progressive nature and focus on building a social state. In the analysis, regional cooperation was studied as a method of supplementing the universal level of international legal interaction of entities, a way of differentiation in relation to national conditions, which has more effective mechanisms for ensuring human rights and freedoms. One of such promising, in our opinion, directions of the legislative process in the social and labor field of public relations is the implementation of European standards of a regional character in national legislation, taking into account their progressive nature and focus on building a social state. The lack of a uniform approach to the legal regulation of social and labor rights of citizens in the EAEU states leads to an insecurity of mechanisms for their guarantees enshrined in relevant international obligations, this conclusion is based on the fact that the EAEU member countries have chosen individual ways of developing social systems, identified various sources of financing funds for their financial support [27].

In Kazakhstan, certain minimum requirements of the Charter of Social Rights and Guarantees of Citizens of Independent States of the EAEU remain unfulfilled, namely, the right guarantee for full social security regardless of place of residence, full pension provision in old age, in case of illness, disability, loss of a breadwinner, in other cases provided for by national legislation is not fully provided, regardless of the territory of

which state the right to pension provision is acquired, as well as the payment of government benefits to families with children; requirements for the social security system to provide material and other assistance to dependent family members of the unemployed, as well as to citizens who have lost the right to unemployment benefits due to the expiration of the specified period for its payment; the provision that the temporary disability benefit should be paid in the amount of at least 60 percent of the employee's earnings and its amount should not be lower than the minimum wage level prescribed by national legislation; provisions on determining the amount of cash benefits for child care not lower than the minimum wage established by national legislation [28].

In our opinion, one of the effective mechanisms for the EAEU member states to fulfill their regional standards of social and labor rights is the rapprochement and harmonization of national legislations in this area, which, in our opinion, provides for several aspects of the solution and requires an integrated approach. Firstly, we believe that the effectiveness of the regional level of cooperation can be achieved, along with other mechanisms, by establishing direct acts and applying them on the territory of states, taking into account the possibilities of national constitutional law. We believe that only fundamental and basic documents should possess such an action. Secondly, the adoption of legislative acts that facilitate the phased approximation of the regulatory framework of the EAEU member states in the social and labor sphere, which include model laws. Thirdly, the development and adoption of conceptual acts recommended for use in national legislation.

2.3 Coordination of Kazakhstan's international obligations in the social and labor sphere and domestic law

The process of real fulfillment by states of their international obligations is the logical result of participation in international relations, adherence to universally recognized norms and standards for ensuring social and labor human rights. This process of execution can be considered as a state-sanctioned direct enforcement of international norms in the internal legal system, as well as in the framework of the harmonization of international and national legal norms. Coordination is a form of convergence of international and national law and is expressed in the adoption of a set of measures to implement the norms of international law. The need for coordination is dictated by the following factors: awareness of the priority of universal values, respect for human rights and fundamental freedoms, the need to maintain international peace, security and justice, stability and democracy; secondly, the harmonization of domestic and international law is dictated by economic factors, in particular, the ever-increasing internationalization of production and exchange, technology and science. The above factors ensuring the significance of harmonization should be supplemented with the following provisions: firstly, the achievement of a common goal, which is the fulfillment by the state of its international obligations, and secondly, the approval of the status of the state in the international community, committed to universally

recognized values and principles, and thirdly , coordination provides real opportunities for state participation in international lawmaking, the formation and dynamics of the international legal system.

Not being categorical, in the question of the types, content and essence of the methods of coordination, we note that all available theories on this problem have a right to exist. In our opinion, the most effective in the approval process are sending, incorporation and legitimation, which allow creating the most harmonious conditions for the coexistence of international and national law. The prerequisites of the approval process under consideration are not only the above aspects of the status of the state as a subject of international law, but also the conflicts that take place. The so-called conflicts of norms of international and domestic law often arise not because of dishonesty in the execution of international treaties, but because of the technical inconsistency of the requirements of domestic laws and international law. The inconsistency of international and national legal norms is also explained by the fact that the state-subjects of international relations are often at different stages of socio-economic, political and cultural development. There are always conflicts between the norms of international and domestic law, they are overcome and reappear in order to be overcome. In addition, conflicts arise, as a rule, on the basis of a higher level of universally recognized principles and norms enshrined in international law and the norms of certain spheres of public relations relative to the internal legal system, which requires the implementation of a number of domestic measures. The Ministry of Foreign Affairs acts as the coordinating body for compliance with international obligations of the Republic of Kazakhstan, which is entrusted with the task of coordinating the international activities of other central government bodies of Kazakhstan in order to ensure a common foreign policy, foreign economic policy and investment policy in relations with foreign states and international organizations, as well as the organization conducting negotiations and concluding international treaties of Kazakhstan; preparation of proposals on the conclusion, implementation, amendment, suspension and termination of international treaties, their introduction in the prescribed manner for consideration by the President or the Government; participation in the development of measures to ensure the rights and freedoms of citizens, its defense and national security, law enforcement, the development and expansion of trade, economic, financial, scientific, scientific, technical, cultural, as well as other relations of Kazakhstan with foreign states and international organizations; the implementation of general monitoring and coordination of activities of state bodies in the implementation of international treaties to which Kazakhstan is a party. The judicial authorities in the field of legal support of international treaties, coordination of foreign legal assistance are vested with the functions of preparing, organizing the conclusion and execution in accordance with the legislation of international treaties on legal assistance and legal cooperation with foreign states; on the analysis of harmonization, unification of the legislation of Kazakhstan and foreign countries, as

well as the implementation of international standards recognized by Kazakhstan in the legislation, are endowed with the function of carrying out a legal examination of draft international treaties.

At the same time, our analysis of the existing conflicts of international and national law in the field under consideration allows us to conclude that the activities of these authorized bodies are not fully coordinated with other interested state bodies, there is no relationship between the MFA, MJ and MLSPP in the framework of ensuring social and labor rights. In our opinion, it is a demanded and reasoned practice to assign to the Ministry of Labor and Social Protection the functions of a special coordinating body that monitors and prepares proposals for legislative activities aimed at implementing and fulfilling Kazakhstan's obligations in the field of ensuring social and labor human rights.

The specifics of the harmonization of international norms and the internal legal system, which guarantee the existence and full realization of social and labor rights, is due to the fact that international guarantees cannot for the most part be applied directly, requiring a set of legislative, organizational, social, financial and economic measures in the relevant national public relations. Mandatory financial support for the implementation of social and labor rights determines the implementation of a set of measures to secure sources of financing rights in domestic law, as well as measures to ensure their functioning. Despite the determination by national law of the general order of the domestic application of international norms, in deciding on the applicability of a specific norm in the field in question, it all depends on the normative consolidation of guarantees of the necessary social and financial and economic conditions for its implementation.

CONCLUSIONS

The international law is considered in the study in two aspects: as an independent legal basis for consolidation and mechanisms for the implementation of social and labor human rights, as well as a structural element of the national law of Kazakhstan, which has specific levers of application and streamlining regulation. This point of view is based on the property of international norms, which consists in the fact that, on the one hand, international norms establish the basic parameters of social and labor human rights, which are an organic part of international law, on the other hand, acts of international law-making that establish a fundamental list and mechanisms the implementation of social and labor rights are an integral and most important element of the national legal system, the latter is determined by the constitutional directive on the inclusion of international treaties and other obligations of the republic in the system of existing law. At the same time, labor and social human rights have a constitutional level of guarantee and consolidation. The Constitution, by virtue of its specific quality, the main legislative act of the country, which defines the state's characteristics, goals and objectives in a legal form, establishes the forms by which

citizens exercise their abilities to work, as well as state guarantees of social protection upon the occurrence of socially significant legal facts.

The activities of the International Labor Organization and Kazakhstan in the processes of implementing universally recognized social and labor standards in the legal system of Kazakhstan are carried out in several areas: incorporation of ILO acts in the legislative system, by expressing Kazakhstan's consent to be bound by an international treaty by signing an agreement, exchanging documents, ratifying an agreement, its adoption, approval, accession to the contract or by any other means agreed upon by the contracting parties; implementation of guarantees of social and labor human rights, enshrined in the ILO Recommendations during the transformation of the relevant sphere of public relations, the legislative process; development and implementation of strategic cooperation programs between Kazakhstan and the ILO. Universal tools and mechanisms for the protection of social and labor rights are defined as an organic part of the legal and organizational security systems, the effectiveness of their application is ensured by the basic, fundamental nature of universal norms.

The universal level of labor regulation and social protection is aimed at expanding the scope of public relations covered by legal mediation. Universal mechanisms penetrate the legal systems of states through the relevant international institutions to which the country is a party. It is the participation factor that obliges the state to join and use the developed universally recognized tools and mechanisms for ensuring social and labor human rights.

In the analysis, regional cooperation was studied as a method of supplementing the universal level of international legal interaction of entities, a method of differentiation in relation to national conditions, which has more effective mechanisms for ensuring human rights and freedoms. One of such promising, in our opinion, directions of the legislative process in the social and labor field of public relations is the implementation of European standards of a regional character in national legislation, taking into account their progressive nature and focus on building a social state.

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