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# ІННОВАЦІЙНІ ФОРМИ РЕАЛІЗАЦІЇ ЦИВІЛЬНИХ ПРАВОВІДНОСИН В СТРУКТУРІ ЗАХИСТУ ПРАВ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

**Анотація.** *Цивільні правовідносини за своєю суттю є основою розвитку суспільства. У зв'язку з цим необхідність більш ретельного регулювання відносин між суб'єктами правового поля призводить до необхідності розгляду більш чітко визначеної галузі права. Регулювання права в міжнародній структурі визначається тим, що правові аспекти цивільних правовідносин все частіше проявляються на міжнародному рівні. Тому аналіз міжнародної галузі цивільних правовідносин і становить актуальність проведеного дослідження. Новизна роботи визначається тим, що в більшості випадків основу для розвитку громадянського законодавства складають норми майнового і господарського права. В роботі основною ідеєю є те, що основу цивільних правовідносин в сучасному постіндустріальному суспільстві становлять суб'єкти інформаційної безпеки. Автори до них відносять галузь захисту прав на інтелектуальну власність. У статті показана основа для імплементації законодавчого регулювання в національні законодавства розвинених країн на основі права ЄС і США. Практична реалізація дослідження полягає в гармонізації законодавства та формуванні нової практичної парадигми охорони прав і захисту цивільних правовідносин на основі непорушності захисту інтелектуальної власності.*

**Keywords:** цивільні правовідносини, регламентація, власність, захист, права.

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# INNOVATIVE FORMS OF THE CIVIL LAW RELATIONS' IMPLEMENTATION IN THE STRUCTURE OF THE INTELLECTUAL PROPERTY RIGHT PROTECTION

**Abstract.** *Civil law relations are essentially becoming the base for social development. In this regard, the necessity of more precise regulation of the relations between the legal field subjects causes the need in considering a more precisely defined legal branch. The legal regulation in the international structure is defined by the fact that the legal aspects of civil law relations are more often manifested at the international level. In this regard, the analysis of the international branch of civil law relations exactly presents the relevance of the conducted research. The novelty of the*

*paper is defined by the fact that in the majority of the cases, the base for the development of civil legislation consists of the norms of property and economic law. The basic idea of the paper is in the fact that the base for the civil law relations in the modern postindustrial society is laid by the subjects of informational safety. The authors assign to them the branch of intellectual property protection. The paper shows the base for the implementation of the legal regulation in the national legislation of the developed countries based on the UE and USA legislation. The practical implementation of the research is in the harmonization of the legislation and the formation of the new practical paradigm for the protection of the intellectual property and other civil law relations based on the inviolability of the intellectual property protection.*

**Keywords:** Civil law relations, regulation, property, protection, rights.

## INTRODUCTION

The embodiment of the progressive legal standards should be ensured not only by the national legislation but directly in the law-enforcement and judicial practice. Thus, at the implementation of the global integral reform in the sphere of the intellectual property, special attention should be paid to the consideration of the European approaches regarding the intellectual property protection, including in the part of the reflection of the private law principles in the legislation.

Notably, the problem in this perspective is understudied, although this issue is relevant for the intellectual property reformation process. Special studies in the sphere of the European legislation, including in the aspect of intellectual property protection, were conducted very seldom. Much more attention in the civility studies is paid to the concept and essence of the principles but predominantly in the context of the analysis of the national legal schools and legislation.

The issues regarding the implementation of the legal principles are the subject of both practical and theoretical studies and are reflected in the legal doctrine [1]. Particular attention though insufficient from the perspective of legal enforcement and judicial practice is paid to these issues at the level of the scientific events and measures [2]. Unfortunately, the multiple themes raised at the scientific discussions are usually devoted to the theoretical approaches to the understanding of the legal principles applicably to their implementation as part of the branch studies beyond the civil law (if only from the civil process) [3]. As for the sphere of intellectual property, then the issues of its exposure to the civil law principles (both for civil law and civil legislation) has not been yet raised at the level of the theoretical constructions. At the same time, as for the law implementation, first of all, for the judicial practice in the sphere of consideration of the discussions on the violation of the intellectual property right, the role of principles is extremely important [4].

In general, the theory of law considers the law implementation as a complicated process including the mechanism of the law implementation and the form of the law implementation; the implementation is considered as the embodiment of the legal norm in the activities of the law subject [5]. The main forms of implementation include as follows:

1) use – the form of implementation of the norms, the contents of which is the active behavior of the subjects by their own consent;

2) execution – the form of implementation of the mandatory norms, the contents of which is the commission of actions required by the legal prescriptions, i.e. execution of the imposed obligations;

3) observance – the form of implementation of the protection norms, the contents of which is the restraint of the subject from the violation of the legal norms [6].

In the 19th century, they highlighted the category of interest, speaking about the contents of the subjective law [7]. The subjective law usually combines two aspects: formal, i.e. the opportunity to act for the implementation of a known will, and material, i.e. an opportunity to act for the implementation of the known interest, and both these opportunities are not just factual, but legal, i.e. based on objective law [8]. The modern civil law scientists define that the civil legislation notes that only the interest may be protected that does not contradict to the general bases of the civil legislation [9]. The correlation of the subjective law and private interest is concluded in the fact that private interest reflecting in the consciousness of the legal subject is a sense-generating factor of the will behavior of the subject of civil relations, while subjective civil law is a special legal means for the implementation of private goals, and finally – private interest of the subject [10]. The stated positions, the same as the opinions of other scientists allow firmly speaking about the lack of equality between the concepts of law and interest.

Generally, judicial protection is perceived as one of the fundamental principles of civil law [11]. It is often defined as a basic principle, without the implementation of which the effectiveness of achievement of the contractual legal goal would be challenging [12]. The declaration of the judicial protection of civil law and interest as a legal base for civil legislation is difficult to overestimate but for the influence of the court on the counteragents violating the obligations, the mechanism of the measures taken by the court to the violator is also important [13]. Such a mechanism forms particular ways of civil rights protection, which may be applied by the court [14]. One of the defining components of the principle of the civil rights protection and the interest protection by the court is in the provision of the guarantees to each person for effective judicial protection [15]. It supports the consideration of judicial protection through its understanding exactly as the principle of law. It means – it provides an opportunity of applying generalization, the perception of the protection through the correlation of the general, special and particular in specific legal relations during the implementation by the person of his/her rights to intellectual property, including – in the process of protection of such rights.

## 1. MATERIALS AND METHODS

The paper uses the aggregate of the general scientific and special scientific methods. The general scientific dialectical method of cognition was basic in this system

and allowed performing the scientific tasks set in the unity of their social contents and legal form. Particularly, the dialectical method of cognition of reality allowed implementing the analysis of the nature of civil law and civil legislation principles, and the principles of private law; defining the role and contents of the legal principle of judicial protection of civil law and interest; and defining the peculiarities of its implementation in the sphere of intellectual property. The systemic-structural method was used to define the peculiarities of implementation of the civil legislation principles in the sphere of intellectual property. The method of the systemic analysis contributed to the in-depth revealing of the contents of the civil law principles in general and the principle of protection of the civil law and interest, and the definition of the peculiarities of their implementation in the sphere of intellectual property.

The application of the historical-legal and comparative-legal methods allowed revealing the contents and peculiarities of documenting the intellectual property protection principles in the TRIPS Agreement, stating the peculiarities of their implementation in the national legislation and law protection practice; defining the ways of the EU legislation development in the part of the intellectual property protection and reflection of the private law principles in the process of implementation of the right to protection. The application of the method of analysis and synthesis contributed to the revealing of the legal nature of the civil law principles, the definition of the contents of the basic forms of the intellectual property right implementation by the authorized subjects, as well as revealing of the contents of the intellectual property right violation.

## 2. RESULTS AND DISCUSSION

The European specialists note that in the European Union, the harmonization of the legislation undergoes great political and ideological pressure because this process is considered as the main element of the unified market creation. Significant harmonization also happens in other places, which is nourished by the realia of the global market economy.

This study has already mentioned that the intellectual property right protection should be based on the principles of anthropocentrism, on the implementation of the fundamental principles of the human rights protection, which lays in the basis of the private law protection of the rights of the individuals and the legal entities. It is provided that the development of the modern civil law doctrine is based on the anthropocentrism.

Exactly such theoretical legal law principles based on the anthropocentrism, new European paradigm, allow actively developing the corresponding civil law institutions, including the institute of the intellectual property right (in this case – in the part of the civil law intellectual property protection). Moreover, the corresponding legislative opportunities have been created for this purpose as well as special legislation

in the sphere of intellectual property. However, in this case, the implementation of the intellectual property protection principles through the prism of anthropocentrism is reasonable to be defined through the epistemic of the European approaches in regard to intellectual property protection.

And in this case it is reasonable to mention the following document once again: Principles, Definitions and Model Rules of European Private Law (2009) as a result of the Draft Common Frame of Reference (DCFR) edited by Christian von Bar and Eric Clive [16] because particularly this document is a benchmark in the legal science to the European legal history and comparative law. It exactly contains the sufficient bibliography of the main legal materials together with the comparative analysis, which ensures the fullest and most available European and legal experience for the research scientists. Particularly this document is considered as the central element in all the future discussions on the harmonization of the EU legislation. It has the initial authority for the interpretation of the future UE provisions on the private law and is an important document for the experts dealing with the EU legal system.

It is of great theoretical value because as it has already been mentioned above, the DCFR model norms consist of the principles. Particularly from these positions, it is reasonable to consider the principle of the human rights protection documented in Article 1.-1:102(2) of the DCFR, which states that the model norms should be interpreted in the context of any applicable means guaranteeing human rights and fundamental freedoms.

Taking these ideas into account, we will apply exactly to the sphere of intellectual property. One may state that it is particularly the European Union, which elaborated a significant experience in the intellectual property protection because in Europe with the purpose of solving the above-mentioned problems, on 29 April 20114, the European Parliament and the Council of the European Union adopted the Directive 2004/48/EU concerning the observation of the intellectual property right [17], which became effective in 20 days after its publication. The need in the elaboration and adoption of this Directive was provoked by several factors reflected in the preamble of the Directive.

First, the Community over the years of its existence formed a particular massive of the norms of the intellectual property substantive law, which are recognized by the compound part of the Community's legal standards (acquis comunautaire), however their effective implementation is directly connected with the use of the unified approaches to the application of the means of defense and protection of the intellectual property by all the member-states of the Community at the level of the national legislation. However the incompliance between the systems of the intellectual property protection means of the member-states harmful for the proper functioning of the Internal Market, make it impossible to ensure the proper level of defence and intellectual property protection in the entire territory of the Community, as well as lead

to the weakening the material norms of the intellectual property right and to the loss of the integrity of the Internal Market in this sphere.

Second, at the international level, all the Community member-states, as well as the entire Community concerning the issues within its competence are bonded by the TRIPS Agreement concluded as part of the World settlement of sale. In Europe, the provisions of the TRIPS Agreement are applied by the member-states alongside with the national legislation and the international agreements in this sphere with the corresponding states. At the same time, it is impossible to note that the application of the TRIPS Agreement at the level of the European Union has not caused the expected exclusively possible consequences because the national legislation contained significant differences including in the part of the documented mechanisms of the intellectual property protection. Actually, the TRIPS Agreement was not enough to overcome the existing contradictions at the level of national legislation, first of all, in the procedural issues of the intellectual property protection of the Community member-states. Thus, the EU faced the goal of the harmonization of the legislative approaches as part of the legal protection and especially of the intellectual property protection, which has been namely embodied in the long-term process of work and the adoption of Directive 2004/48/EU.

The goal of the Directive became the approximation of the legislation systems for the provision of the high, equivalent and similar protection level at the EU internal market. I.e., the goal is the approximation of the means and procedures of the national systems of the Community member-states, which are subject to the application in the cases of the violation of the intellectual property rights at their commercial use. Alongside with it, as was stated in the preamble, Directive 2004/48/EU was not aimed for the establishment of the harmonized rules for judicial cooperation, jurisdiction, and execution of the solutions in the civil end economic issues, the solution of the issues of the law enforcement etc. The Community only developed the regulatory documents governing the procedural issues and able to be applied to intellectual property. However, the significant number of the provisions documented in the Directive is directly concerned with the competence of the court. Also, Directive 2004/48 / EU is not concerned with the application of the competition rules. I.e. one may conclude that the execution of the provisions of the Directive is aimed at the creation of the available minimum harmonized means of the intellectual property protection in the territory of all the Community member-states.

As stated in the preamble of Directive 2004/48/EU, the agreements of applying the precaution measures used particularly for the preservation of the proofs, the calculation of the damage or the agreement on the application of the judicial restraint significantly differ in the community member-states. In some member states, there are no measures, procedures or means – such as the right to the information and deletion for the expense of the violator of the infringing goods placed on the market. It is clear that this situation does not contribute to the free turnover within the EU in-

ternal market and does not create a favorable environment for healthy competition. Thus, the harmonization process continues.

The adoption of this Directive was initiated by the European Commission as an important, but the first step on the introduction of the horizontal means of anti-piracy. Directive 2004/48/EU is a unified structural set of sanctions in the European Union regarding the intellectual property right, in the minimum means available for the right owners and state authorities to fight against the violation of the intellectual property. Article 3 of Directive 2004/48/EU defines the general requirements to the measures, procedures, and means for the member-states. Such measures, procedures, and means should be just and impartial, should not be redundantly complicated or burdening or stipulate groundless terms or the need in lingering. The stated measures, procedures, and means should also be effective, proportional and convincing and be applied in such a way to avoid obstacles for the legal trading and stipulate the guarantees against the violation.

In 2005, the European Commission adopted the Application regarding Article 2 of Directive 2004/48/EU of the European Parliament and Council on the provision of the intellectual property rights [18]. It was caused by the need in elaborating to what intellectual property rights one needs to apply the Directive because there was an uncertainty about it. According to the application, such a list was considered as follows: copyright; related rights; sui generis right of the database producers; right of the semiconductor items' reprographies; right to an industrial design; patent rights including rights originated from the certificates of the additional protection; geographical indications; utility model rights; rights to the plant varieties, rights to the firm-names so far they are protected as the exclusive property rights of the national legislation. It is reasonable to note that the legislation generally considers the intellectual property right objects in the context of protection of such rights.

The implementation events and measures at the level of the European Union aimed at the improvement of the intellectual property protection became the adoption by the EU Council of the Message in the Implementation of the Industrial Property Rights Strategy in Europe in July, 2008 [19] and the Resolution on the Integral Anti-Counterfeit and Anti-Piracy Plan in September 2008 [20]. It resulted in the initiation of the activities of the European Observatory on the issues of counterfeit and piracy.

In March 2010, the EU Council adopted the Resolution on the Provision of the Observance of the Intellectual Property Rights at the Internal Market [21]. The Resolution recognized the problem of the insufficient level of the copyright and related rights protection in the digital environment, which has an adverse effect for the legal marketing of the media-products and development of the European industry of culture.

Also, in 2010, the European Commission based on the reports of the ой member-states and the experts of the European Observatory concerning the issues of the counterfeit and piracy, they prepared the Report on the Application of Directive

2004/48/EU [22]. They denoted a series of challenging issues at the level of law enforcement in the EU states. Particularly, there are the complications of applying the Directive in the conditions of the digital environment because the Directive was not aimed at solving the issues of piracy on the Internet). The protection process is complicated by the diversity of the application of the intermediate restraints against the law violators and judicial restraints against the mediators, including in the part of the provision of the proofs required by the national judicial authorities.

The civil law protection problems have been in the focus for many times. Particularly, the situation with the harmonization of the civil law ways for the rights protection significantly differ from the harmonization of the customs events and measures, for which except for the elaborate annual monitoring of the situation at the general European level and in the member states, the detailed roadmaps are approved covering the improvement of the legislation, the organizational activities of the customs authorities, the partnership with the private sector and the subjects of law, and the international activities. And this is really the fact of generating many problems in the European law-enforcement.

For example, the practice of application of the Directive revealed various approaches to the implementation of the corrective measures and the execution of the judicial solutions, particularly as part of the interpretation of the concepts of 'forfeiture' and 'ultimate deletion', documented by Article 10 of the Directive, the liquidation of the goods and their reuse. An extremely great problem remains the issues of definition of the reimbursement, particularly the definition of the lost benefit, the definition of the revenues obtained by the law violator, moral harm, compensations, the reimbursements at the inadvertent violations, as well as additional reimbursements. They note that the requirements of Article 13 of the Directive concerning the accounting of the violators' income were implemented by the member-states' legislation in a different way. So, some member-states (Slovakia) mind the revenue of the law violators only or as the reimbursement for the illegal income at the calculation of the losses, non-cumulatively though. In the other member-states (FRG, Italy) the transfer of the violator's revenue is applied as an alternative when the violator's revenue exceeds the lost benefit calculated by the subject of the law. In some states (Benelux countries), in case of deliberate violation, the transfer of the income may be condemned as a compliment to the reimbursement of the losses.

As a result of the long-term studies and based on the answers of the experts, the Legal Subcommittee of the European Observatory defined the following main problems of implementing the civil legal proceedings on the issues of the intellectual property violation:

– The reimbursement of losses has no restraining function;

– The complications with the proving the losses (providing the evidence), the lack of the harmonized approaches to the definition of the losses, the lack of the normative volumes of the losses;

– A rather long time of the legal proceedings, the complexity of the legislation and the procedures, the specialized courts are not de facto specialized;

– The imprecise regulation in the legislation of the loss conferment order for the imposition of the moral harm at the violation of the intellectual property rights;

– The lack of experience;

– The issues of the civil legal proceedings regarding intellectual property is not a governmental priority;

– The problems with the consideration of the mediators' responsibility;

– The problems with the infringing goods transit operation;

– The anonymity of the Internet-users. The Internet-piracy (including the mediators gaining the revenues from the advertisement and illegal exchange of the files and the violation of the copyright) is the most understudied sphere. The mistakable is a supposition that the upload of the prohibited contents from the inappropriate sources lays in the sphere of the exceptions in relation to private copying;

– The lack of interest on the part of the police, prosecutor office etc.;

– The criminal ways of protection may only be used as the last means (generally, when there is a threat to the healthcare, for example, counterfeit drugs), the criminal sanctions only exist in theory, the reluctance to apply them;

– The lack of the arbitral procedure on solving the domain disputes. In some states, the registration of the domain names is not governed by the state;

– The reluctance of the courts to ensure complete reimbursement of the judicial expenses if the complainant does not get the complete reimbursement of the declared losses;

– The majority of the population does not consider law violations in the sphere of intellectual property rights protection as illegal activities.

According to the results of Directive 2004/48/EU implementation and considering the revealed problems and further distribution of the piracy and counterfeit in Europe in 2011, the European Commission defined the further plan of actions in the sphere of intellectual property protection in the Message 'The Unified Market for the Intellectual Property Rights' [23], which is being implemented until now.

Among the scope of activities in Europe aimed at the developing of the studied area, one should also mention voluntary national presentations of the intellectual property protection modes, which usually take place at the events and measures of the WIPO and its committees. The example of the latter may be the organization of the anti-counterfeit system. In this sense, interesting is the experience of Spain and Denmark because Spain became the pioneer in the creation of the well-coordinated organizational anti-counterfeit system both at the national level and at the level of the European Union. In Spain, considering the increase in the release of the counterfeit product, in 2000, they created the Interdepartmental Commission for the Fight against the Intellectual Property Rights Violation [24].

The Director General of the Spanish Patent and Trademark Office became a member of this Commission, the main task of which concluded in the coordination of the ministries' activities taking part in the fight against the infringing goods release in Spain, and in the search of the corresponding practical solutions of this problem. This Commission composed exclusively of the state officials was replaced in 2005 by the Interbranch Commission on the Fight against the Violations of the industrial property rights (CAPRI). In 2014, CAPRI was reorganized and got new functions predominantly aimed at establishing the connections with the international organizations fighting against the violations of the industrial property rights, and first of all, it is about the European intellectual property rights violation watchpoint. As the activities of the CAPRI also had to be activated, the methods of its work were supplemented with the creation of the work groups that propose their solutions more often.

In 2003, when Spain presided in the Council of the European Union, it suggested creating the European Monitoring point over the intellectual property rights violation. In 2010, when Spain presided in the Council of the European Union again, the structure and authorities of the European Monitoring point were expended. After its establishment in 2011, OERM took an active part in the activities of five work groups of the Monitoring point. Particularly, based on this system of the work coordination, the OERM took great efforts on the distribution of the information concerning the problem of the counterfeit production and its adverse effect through the preparation of the research, campaigns and the organization of special days.

The actions aimed at the improvement of the rights protection system are also performed by other EU states. Particularly, to increase the effectiveness of intellectual property protection, the Danish Patent and Trademark Office (DKPTO) at the end of 2015, created a special Group for the Rights Protection. The idea to create the Group for the Rights Protection based on the national department was documented in the law adopted on the 24 March 2015 implying the amendments to the laws on the trademarks, the design, patents, and utility models [25]. The Law was adopted with the aspiration to increase the effectiveness of the rights protection of the industrial property. At the same time, the contents of the authorities given to the Group for the Rights Protection supports that the Group will take on the issues of the intellectual property protection in general, not only in the industry.

The Group for the Rights Protection serves an innovative center for the entrepreneurial community, consumers, and representatives of the state authorities. The users may apply with the requests of consulting in their private cases connected with the violation of the industrial property rights violation (disputes connected with the use of the identical and almost identical products, trademarks and samples). The group for the Rights Protection also presents the information and general recommendations on the issues of rights protection. The activities of the Group for the Rights Protection will contribute to the more active use of the unlawful actions of the mechanisms in

the context of regulating the disputes in the sphere of the intellectual property regarding the use of the identical and almost identical products, trademarks and samples. Also, the goal of this work is to increase the number of the complaints against the violators of the intellectual property rights through the preliminary consultations, which will probably lead to the increase in the number of the private consultants (for example, the agents on the intellectual property issues) and police. At the same time, as seen from the example, the activities of the Group for the Rights Protection should contribute to the decrease in the number of court disputes in this category of cases.

The creation of the Group for the Rights Protection allowed uniting all the functions and professional experience as part of one DKPTO division in the sphere of intellectual property protection. It is done with the purpose of forming the optimum base or the agreements, effective and competent work. Notably, the DKPTO currently solves a series of tasks aimed at the increase in rights protection effectiveness. Particularly, the DKPTO performs the functions of the Ministry Network secretariat on the fight against the intellectual property rights violation, takes part in the European Committee on the Monitoring of the Intellectual Property Rights Violation, the development of the policy at the national and international level, as well as on the international forums for the purpose of cooperation.

Notably, for the purposes of the interdepartmental cooperation, there is the Ministry Network on the Fight against the Intellectual Property Right Violation in Denmark. This network was created in 2008 and operates rather effectively. The work of the Ministry Network is supported by the following bodies: State Prosecutor Office on the Investigation of Major Economic and International Crimes; National Police of Denmark; Customs Department of Denmark (SKAT); DKPTO (secretariat of the network); Ministry of Culture; Healthcare and Drugs Department of Denmark; Technical Safety Department of Denmark; the Authority for the Fight against Monopolies and Consumers Rights Protection of Denmark; Veterinary and Food Control Service of Denmark; Department on the Issues of the Entrepreneurial Activities of Denmark; Ministry of Internal Affairs (Commerce Council). As seen from the above-stated, the work of the network is only performed by the state authorities. It allows the participants to quity openly discuss to actively exchange the information. Alongside with it, the network was able to adjust the meaningful dialog with the industrial circles and this cooperation is important and very beneficial. The organizational structure of such a format was agreed by the representatives of the Network and the industrial circles in 2010.

For the purpose of improving the copyright protection, in June 2012, the Minister of Culture of Denmark promulgated eight initiatives aimed at the contributing the development of the creative branches and reduction of the piracy scales on the Internet. These eight initiatives were called ‘the copyright portfolio’. As part of the implementation of such initiatives, two written codes of conduct were developed.

The first code of conduct is concerned with the delivery of judgments on the website blocking based on the copyright violation (first of all, the copyright of the authors, but not limited to it), while the second is aimed at encouraging lawful behavior on the Internet.

## CONCLUSION

In the regulation of the legal relations in the sphere of intellectual property and the implementation of the intellectual property rights, the following branch civil law principles are applied:

– The principle of not permitting the dictatorial interference into the personal life – regarding personal non-property rights of intellectual property;

– The principle of not permitting expropriation except for the cases set by the legislation – the implementation of this principle in regard to the intellectual property right object has its own specificity caused by the legal nature of the intellectual property objects, which is reflected both in the national legislation and in the ECHR practice;

– The Freedom-of-Contract Doctrine – the implementation of this principle is applied to the sphere of the intellectual property completely in the process of the intellectual property rights disposal and the implementation of the other deals regarding the objects of the intellectual property rights which complies both with the civility doctrine and with the legal documentation and is supported by the multiple judicial practices;

– The lawful entrepreneurship liberty principle – for the civil relations in the sphere of intellectual property, the implementation of this principle is mediate, caused by the lack of the direct connection between the legal protection, the intellectual property protection, and entrepreneurial activities;

– The principle of the judicial protection of the civil law and interest has a direct impact on the implementation of the intellectual property protection (both personal non-property and property) and has its own peculiarities revealed in the paper;

– The principle of justice, reliability, and reasonability in the sphere of intellectual property, including directly at intellectual property protection.

Considering the wide-spread practice of the law violation in the sphere of intellectual property, it is necessary to document the principle of reliability at the level of special legislation in the sphere of intellectual property.

The specificity of consideration of the court disputes in regard to intellectual property protection is caused by a series of factors, namely:

– The complications arising in the process of the evidence collection and may prove or disapprove the presence of the intellectual property violation;

– The involvement of a state registration authority as the defendant (especially for the industrial property objects);

– The revealing of the source of the intellectual property rights violation;

– The opportunity of applying the parallel protection of the same intellectual property object in a series of cases.

One intellectual property rights object may use patents, trademarks, commercial name and in case of the violation (for example, in case of production of the counterfeit goods) the same rights are violated, which causes the difficulty in the protection. The negative factors for intellectual property protection are also the following:

– The lack of the precise mechanism for the reimbursement of losses and the methods for the calculation of losses;

– The problems with the real estimate of the abilities by the right owners to de facto fulfill the complaints and thus, the reasonability of assertion of claims to the court not only in relation to the law violation termination but also in relation to the recovery of damage or losses and the reimbursement.

At the same time, significant problems arising in the process of the civil law principles implementation in the process of the intellectual property protection are caused not only by the imperfect contents of the legislation or non-observance of the regulatory prescriptions. The factors of exposure are also general law legal consciousness of the population and low level of the legal culture lacking the respect to the intellectual property in general. Thus, an integral component of the reform in the sphere of the intellectual property is the formation of the legal culture and respect to the intellectual property alongside with the private property.

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# ВІДКРИТТЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ І ПОЧАТОК РОЗСЛІДУВАННЯ ПЕРЕВИЩЕННЯ ВЛАДИ АБО СЛУЖБОВИХ ПОВНОВАЖЕНЬ СПІВРОБІТНИКАМИ ПРАВООХОРОННИХ ОРГАНІВ

**Анотація.** *У статті розглянуто особливості відкриття кримінального провадження і початок досудового розслідування перевищення влади або службових повноважень співробітниками правоохоронних органів. Зазначено, що успішному вирішенню організаційно-тактичних завдань розслідування, оптимальному визначенню напрямів діяльності слідчого сприяє чітко побудована модель періодизації етапів досудового розслідування, на визначення якої впливають слідчі ситуації та відповідні процесуальні рішення, які приймають учасники кримінального провадження. Показана відмінність процедури відкриття кримінального провадження передбаченої чинним Кримінальним процесуальним кодексом України у порівнянні із КПК 1960 року. Доведена доцільність виокремлення відкриття кримінального провадження в окремий етап досудового розслідування. Запропоновані алгоритми дій слідчого на початку досудового розслідування зазначеної категорії кримінальних правопорушень залежно від вихідних ситуацій, що виникають.*

**Ключові слова:** досудове розслідування, відкриття кримінального провадження, вихідні слідчі ситуації, алгоритми дій слідчого.

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# OPENING OF CRIMINAL PROCEEDINGS AND BEGINNING AN INVESTIGATION OF EXCESS OF POWER OR PERSONAL AUTHORITY BY LAW ENFORCEMENT OFFICTRS

**Abstract.** *The article deals with the features of the opening of criminal proceedings and the beginning of an investigation of excess of power or official authority by law enforcement officers. It is noted that a well-structured model of the periodization of pre-trial investigation stages, the determination of which is influenced by the investigation situations and the corresponding procedural decisions taken by the participants in the criminal proceedings, facilitates the successful solution of the organizational and tactical tasks of the investigation and the optimal determination of the directions of the investigator's activity. It is shown that the procedure for opening criminal proceedings provided for by the current Criminal Procedural Code of Ukraine is different from the CPC of 1960. The expediency of distinguishing the opening of criminal*

*proceedings in a separate stage of pre-trial investigation has been proved. The algorithms of actions of the investigator at the beginning of pre-trial investigation of the specified category of criminal offenses are proposed depending on the starting situations that arise.*

**Key words:** pre-trial investigation, opening of criminal proceedings, beginning a pre-trial investigation, initial investigation situations, algorithms of investigator's actions.

## INTRODUCTION

Refusal of local legislators from pre-trial criminal proceedings as a whole and the stage of opening of criminal proceedings, particularly, made essential changed in organization of the beginning a pre-trial investigation of criminal offences. It goes about different understanding as compared with provisions of the CPC of 1960, reasons and grounds for opening of criminal proceedings (initiation of a criminal case), and, consequently, the necessity of carrying out inspections to detect essential elements of an offence (Art. 97 of the CPC of 1960), the possibility of appealing against opening of criminal proceedings and beginning of criminal prosecution of a specific person and other. It is noteworthy that certain scholars are very critical of abolishment of the practice of opening of criminal proceedings as a certain guarantee of justification of criminal prosecution. Thus, A. F. Volobuyev sees it as destruction of not theoretical structures alone, but also of a certain algorithm of actions of pre-trial investigation authorities and intelligence squads, which had been forming within many decades, and in which verification of statements of offense and notices was a certain "filter" for false and mistaken statements [1, p. 237].

New provisions in the Criminal Procedural Code of Ukraine of 2012 changed the procedure for arranging a pre-trial investigation [2; 3], including determination of the periodization of carrying out criminal proceedings.

The problem of optimization of pre-trial investigation has always been of interest for forensic scientists. Such distinguished scholars, both local and foreign, as V. P. Bakhin, R. S. Belkin, O. M. Vasilyev, A. F. Volobuyev, V. G. Goncharenko, V. A. Zhuravel, V. O. Konovalova, V. Ye. Kornoukhov, I. M. Luzgin, G. A. Matusovskyi, V. O. Obraztsov, M. V. Saltevskyi, M. O. Selivanov, V. V. Tischenko, V. Yu. Shepitko, M. P. Yablokov and others dedicated their works to this problem. Since the Criminal Procedural Code of Ukraine of 2012 came into effect, the need in rethinking of separate provisions, changing the scientific paradigm in respect to determination of the periodization of pre-trial investigation arose. In forensic literature appeared works of V. D. Bernaz, V. V. Vapnarchuk, G. V. Moskalenko, I. I. Stativa, O. Yu. Tatarov, V. M. Shevchuk and many other scholars dedicated to resolving the problem of the periodization of pre-trial investigation stages, defining specific features of opening of criminal proceedings as compared with initiating a criminal case, which was envisaged by the CPC of 1960. Along with that, works of the above-mentioned and other scholars dealt with general issues of this complex problem only, not taking into account investigation of a specific category of criminal offences. That is why the

goal of this Article is to study specific features of opening of criminal proceedings and arranging the beginning a pre-trial investigation of excess of powers by officers of law-enforcement authorities.

## 1. MATERIALS AND METHODS

To achieve the above-mentioned goal of study, the author used a set of general scientific and special methods of scientific knowledge. So, the use of dialectical and historical methods of cognition allowed studying development and changes of the regulatory framework of carrying out pre-trial investigation in the domestic criminal procedure. The comparative method provided the possibility to study norms of the current Criminal Procedural Code of Ukraine and norms of the CPC of 1960, show their differences and specific aspects of application.

To make own conclusions, statistical method was applied, which helped to generalize criminal proceedings (cases) with investigation of excess of powers by officers of law-enforcement authorities and develop on this basis the author's classification of grounds for opening of criminal proceedings in respect to such category of criminal offences. The method of system analysis allowed spotting the initial stage among other stages of pre-trial investigation, defining its tasks and means of achieving them. The use of the formal logical method allowed developing the algorithms of investigator's actions depending on starting situations that arise.

Materials of this Article are component parts of a separate forensic methodology of investigation of excess of powers by officers of law-enforcement authorities and they can be used both for performing theoretical studies and practical activity of investigators, prosecutors related to investigation of this category of crimes.

## 2. RESULTS AND DISCUSSION

Current domestic criminal procedural laws include pre-trial investigation to a separate stage of criminal proceedings, within which separate stages can be distinguished, which reflect a certain landmark in the course of criminal proceedings, have their distinctive features and a circle of problems to resolve. In other words, a stage of investigation means such element of it, which represents the interconnected system of actions with common tasks, conditions of achieving them, and specific features of forensic techniques [4, p. 86].

At the time when the CPC of Ukraine 1960 was effective, forensic scientists advanced proposals as regards the periodization of investigation depending on making certain procedural decisions. Specifically, M. P. Yablokov suggested to differentiate the initial, the follow- up and final stages [5, p. 488], A. F. Volobuyev [6, p. 171–182] and G. Yu. Zhyrnyi [7, p. 165] suggest just two stages – the initial and the follow-up stage. To justify their position, the latter state that procedural actions related to completion of criminal proceedings not directed at investigation of crimes, gathering and verification of evidences.

Since the CPC of Ukraine of 2012 came into effect, discrimination of stages of pre-trial investigation became much more complicated, and suggestions as for their determination advanced in scientific sources are discussible. For instance, V. V. Vapnarchuk distinguishes three stages of pre-trial investigation. "The first stage, in his opinion, – is the stage of investigation carried out based on the fact of detecting an event with elements of a criminal offense in respect to an undefined circle of persons (when the person committed the crime is not identified yet (the suspect). The primary goal of this stage of pre-trial investigation is establishing the presence or absence of a criminal offense, identifying and exposure of the criminal. The second stage of pre-trial investigation takes place when, based on analysis (evaluation) if the aggregate of evidences gathered in the course of proceedings, in the investigator's or the prosecutor's opinion, the identified person involved into committing a criminal offense and he/she shall be brought to criminal responsibility. The goal of this stage if to notify about suspicion the person, who, in the opinion of subjects of the prosecution, is involved into committing a criminal offense, that means this stage, in essence, is congruent with the procedure of sending a written notice of suspicion. The third stage of pre-trial investigation refers to a certain person (the suspect). It starts after the respective person received a written notice of suspicion and ends with drawing up a bill of indictment and further submitting it to court". [8, p. 344].

As it seems, the drawback of the suggested model of the periodization of stages of pre-trial investigation is non-envisaging the situation when criminal proceedings are opened on the grounds of arrest of the person involved into committing a criminal offense (Art. 207, 208 of the CPC of Ukraine).

A more complex periodization of stages of pre-trial investigation taking into account specific features of making certain procedural decisions was suggested by V. M. Shevchuk. He distinguishes two models of periodization named conventionally as differentiated model and synthesizing one. The first one includes the initial and the follow-up stages of investigation in their traditional understanding, i.e. the initial stage starts from the moment of entering a statement or notice of a criminal offense into the Unified register of pre-trial investigations (Art. 214 of the CPC of Ukraine) and ends with sending a notice of suspicion (Art. 276 of the CPC of Ukraine). The primary goal of this stage is finding good evidences to notify the person about suspicion in committing a crime. Tactical operations shall be directed at achieving this goal. The follow-up stage in the contemplated model of periodization starts with dispatching the suspected person a written notice of suspicion (Art. 278 of the CPC of Ukraine) and lasts until pre-trial investigation is completed and the prosecutor entered the required data into the Unified register of pre-trial investigations. This stage in its essence is the final one aimed at formation of the adequate evidential basis proving the prosecutor with the grounds for performing one of the following actions as soon as possible after delivering a notice of suspicion to the respective person: 1) close criminal proceedings; 2) submit a motion on releasing a person from

criminal responsibility to court; 3) submit to court a bill of indictment, motion on applying enforcement measures of medical or educational nature (Art. 283 of the CPC of Ukraine). Formation of the adequate evidential basis implies the need of resolving various tasks of investigation, including tactical ones, which can be resolved by means of the respective tactical operations.

In the opinion of V. M. Shevchuk, there can be another model of the periodization of stages of investigation, which can be conventionally called as synthesizing model. In this model the two above-mentioned separate stages are combined into one as criminal proceedings start with notifying the respective person of suspicion in case if his/her arrest at the place of committing a criminal offense or immediately after committing it, or when applying one of preventive measures envisaged by law (Art. 276 of the CPC of Ukraine), and they end with completion of pre-trial investigation and entering the required data into the Unified Register of pre-trial investigations by the prosecutor. Such synthesizing , integrative stage combines the totality of problems that shall be resolved at the time of pre-trial investigation, as well as recommendations regarding optimal methods and means of resolving them [9, p. 252, 253].

In her turn, G. V. Moskalenko connects the periodicity of investigation and defining the limits of its respective stages not with making various procedural decisions, but with the investigator' situation, nature of problems and actual possibility of finding and recording evidences. Taking into account the said above, she distinguishes such stages and sub-stages of crime investigation: the initial and the follow-up stage, and the latter as the more complicated and longer lasting one she divides into three sub-stages: the sub-stage of analytical work of the investigator, the working and the final one [10, p. 8–15].

As regards suggestions of G. V. Moskalenko, one should agree with critical comments of V. A. Zhuravel that they are discussible and do not resolve fully the problem of the periodization of pre-trial investigation. Particularly, refusal from considering certain procedural decisions for discrimination of periods of investigation is objected, for instance, such as notices of suspicion, suspension or renewal of proceedings, applying a measure of restraint and other. These procedural decisions are fundamental and have impact on the course of criminal proceedings, the procedure of gathering evidences. Dividing the process of investigation to sub-stages also looks quite artificial. Particularly, analytical work of the investigator takes place at each stage of investigation, that is why limiting it to one single sub-stage is illogic [11, p. 140].

It is worth mentioning that there are opposite opinions as regards defining the opening of criminal proceedings as a separate stage of pre-trial investigation in the specialized literature. For instance, V. V. Vapnarchuk states that "activity related to the beginning of pre-trial investigation (acceptance and registration of information on criminal offenses) considering a short period envisaged by law for it and a small scope of actions to be performed is not sufficient to distinguish it as a separate stage of the course of criminal proceedings. Besides, this stage does not end with making

final procedural decision in terms of Part 3 Art. 110 of the CPC (entering or not entering data to the URPTI is not recorded in the ordinance of the investigator or prosecutor)" [8, p. 334]. Then the author makes quite a controversial conclusion, from which it is hard to understand the final position of the author as regards the contemplated issue. "Hence, – summarizes V. V. Vapnarchuk – activity related to the beginning of pre-trial investigation, in our opinion, is not the *stage* (italics supplied by us – *S. M.*) of criminal proceedings. However, it meets criteria of separate proceedings as it represents the system procedural actions within the limits of the criminal procedural form of pre-trial investigation, which precondition arising a certain cluster of procedural relationships and aimed at fulfilling a common task, so, understanding and studying this activity as separate proceedings is completely justifiable" [8, p. 334, 335]. As seems, the above-mentioned scholar brings forward unobjectionable arguments in favour of the opening of criminal proceedings being a separate stage of pre-trial investigation.

Thus, the opening of criminal proceedings shall be deemed as a separate stage of pre-trial investigation, which shall also be seen as a separate element of the structure if specific forensic methodology. The above-mentioned is conditioned by specific features of procedural actions, which pre-trial investigation starts from, a circle of subjects taking part in performing such actions (the investigator, prosecutor, claimant and other), the nature of top-priority tasks to be resolved, the need to define strategic lines of the investigator's activity.

Pre-trial investigation of excess of powers by officers of law-enforcement authorities starts from the moment of entering respective data to the Unified Register of pre-trial investigations (URPTI) [12; 13; 14; 15]. As V. D. Bernaz and N. V. Neledva state, "decision on the beginning of pre-trial investigation is actually equal to entering into the register respective data that may testify of committing a criminal offense" [16, p. 63]. Sources for such data are as follows:

– statements of the persons, who suffered from unlawful actions of officers of law-enforcement authorities (the injured) (this source takes 89.43% of the total number of generalized criminal proceedings (cases);

– statements of offense (notices) of claimants (Art. 60 of the CPC of Ukraine), i.e. the informed persons (relatives, acquaintances, colleagues of the injured, paramedics or medical workers of emergency rooms of hospitals, common citizens, who became witnesses of unlawful actions of officers of law-enforcement authorities) (2.57%);

– notices (reports, protocols) of officials, who arrested the subject / the suspect (Art. 208 of the CPC of Ukraine) (0.58%);

– information on the fact of excess of powers by officers of law-enforcement authorities made public in mass media or documentaries, video records or the Internet (1.14%);

– reports of prosecutors occupied with procedural management of the investigation (0.86%);

– reports of officers of the National Security Department of the National Police of Ukraine regarding revealing facts of unlawful actions of officers of law-enforcement authorities (4.00%);

– reports of investigators on detecting signs of excess of powers by officers of law-enforcement authorities in the course of carrying out another pre-trial investigation, i.e. prejudicial evidences (1.43%).

From the said above it follows that the most wide-spread sources of data becoming the basis for the opening of criminal proceedings are statements of offense from the persons who suffered directly from unlawful actions of officers of law-enforcement authorities (the injured). These statements of offense (notices) can be submitted both in oral form with drawing up a protocol with notifying the person about criminal responsibility entailing providing untruthful information against signature, and in written form (by post, or submitted personally by an individual to the respective authority / institution). Should the fact of excess of powers of officers of law-enforcement authorities be established in the course of investigation of another crime or performing respective operational procedures, the report shall be drawn up containing information representing the essence of data entered into URPTI. This report shall be forwarded to the head of the pre-trial investigation authority, who shall determine the preliminary legal assessment and commission the investigator with carrying out pre-trial investigation. The investigator, in his turn, shall forthwith notify the prosecutor in written form about the beginning of pre-trial investigation, the grounds for the beginning of pre-trial investigation and other information (Part 6 Art. 214 of the CPC of Ukraine).

To confirm the trustworthiness of information set forth in statements of offense (notices) of individuals, chief managers of mass media or reports of the respective officials, it can be accompanied with certain attachments as confirmation of the fact or circumstances testifying the fact of excess of powers by officers of law-enforcement authorities. Particularly, such attachments can be certificates issued by medical institutions certifying hospitalization of the injured, video records from outdoor surveillance cameras and other. Reports of officers of criminal intelligence units can be accompanied by data received in the course of performing intelligence operations [17, p. 43–51].

It is noteworthy that a certain specific feature of obtaining information (statements of offense, notices) about the facts of excess of powers by officers of law-enforcement authorities is anonymity of such information, for example, when transmitting oral information by phone and in written notices people often don't state their true names, or state fictitious data as they are worried about their life/safety. And these fears are justified as claimants understand whom they are going to deal with, they are aware

of "cover-up" among officers of law-enforcement authorities. That is why we find it expedient in case of receiving anonymous statement or notice of a criminal offense by internal affairs bodies and subdivisions, the prosecutor, the judge, to register them in compliance with Cl. 13 Section III of the Guidelines on single record procedure (SR). If an anonymous statement (notice) of offense contains information about a socially dangerous act, then such statement (notice) of offense shall be registered only with document support subdivisions and, upon resolution of the head of a police body or the person acting as such head, shall be submitted to structural subdivisions for use for detection of crime, particularly through verification by intelligence means. And only after such verification is completed, and if elements of a criminal offense are confirmed and officers of the criminal intelligence unit sent a respective report to the investigator/prosecutor, its results can serve as the grounds for entering the received information into URPTI as if such elements of a criminal offense were discovered by the investigator / prosecutor himself.

## CONCLUSIONS

In summary, a well-structured model of the periodization of pre-trial investigation stages is the guarantee of successful resolving organizational and tactical problems of the investigation, as well as optimal determination of lines of the investigator's activity, as each stage of the investigation, each phase of criminal proceedings has tasks and ways/means of resolving them of its own.

Taking into account the said above, we believe it possible to affirm that determination of the periodization of investigation of criminal offences is influenced by the investigation situations and the corresponding procedural decisions taken by the participants in the criminal proceedings. This means that when defining stages of investigation it is necessary to take into account these two factors. Therefore, among stages of pre-trial investigation of excess of powers by officers of law-enforcement authorities we distinguish the following ones: 1) the opening of criminal proceedings; 2) the beginning of criminal proceedings (the initial stage); 3) continuation of criminal proceedings (the follow-up stage); 4) completion of criminal proceedings (the final stage). With that, depending on whether the suspect is arrested or not, the top-priority tasks of the initial stage of investigation change to some extent, and consequently the means of resolving them change, too. So, in case of arresting the suspect and notifying him/her of suspicion within twenty four hours from the moment of arrest, the primary task of the investigator/ prosecutor is to prove involvement of this person into committing a criminal offense and confirm justification of notifying of suspicion. And if the person is not arrested, then the prosecution efforts shall be focused on gathering evidences for delivering a notice of suspicion. After making this procedural decision and resolving primary tasks, the following stage of investigation begins related to gathering the required evidences of committing a crime by the respective person and completion of pre-trial investigation.

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# ГЕРМЕНЕВТИЧНИЙ АНАЛІЗ ДЖЕРЕЛ ПОРІВНЯЛЬНОГО ІСТОРИКО-ПРАВОВОГО ДОСЛІДЖЕННЯ

**Анотація.** *Порівняльне правознавство застосовує широкий спектр методологічних прийомів для дослідження юридичних фактів і явищ як на макро-, так і на мікрорівні. Тому основна мета роботи полягає у визначенні специфіки герменевтичного аналізу джерел порівняльного історико-правового дослідження. Автором визначено співвідношення історичного і правового підходів при інтерпретації історичних пам'ятників, зроблено висновки про дуалістичний характер історико-правової герменевтики. З точки зору інструментального підходу до тлумачення історичних джерел аналізуються такі герменевтичні категорії, як «текст», «розуміння», «значення», «інтерпретація». Автором виділено такі форми пояснення смислу тексту, як логічний аналіз мови, діалог, структурний аналіз. В роботі наведено найбільш розповсюджені методи інтерпретації письмових документів, зокрема, культурно-історичний аналіз, психологічна реконструкція, аплікація тощо. Виокремлено найважливіші принципи герменевтичного тлумачення джерел компаративного історико-правового аналізу.*

**Ключові слова:** герменевтика, історико-правова герменевтика, текст, розуміння, значення, інтерпретація, методи інтерпретації, принципи інтерпретації.

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# HERMENEUTIC ANALYSIS OF COMPARATIVE HISTORICAL AND LEGAL RESEARCH SOURCES

**Abstract**. *In the historical and legal comparative studies a wide range of methodological techniques is used to research the historical and legal facts and phenomena both at the macro and at the micro level. However, the main one is the comparative method, adapted to its needs. With the object of further concretization of this way of scientific knowledge, the specificity of the hermeneutic analysis of the sources of comparative historical and legal research is considered in the work. The author determined the ratio of historical and legal approaches when interpreting the historical monuments, made conclusions about the dualistic nature of historical and legal hermeneutics. From the point of view of the instrumental approach to the historical sources interpretation such hermeneutical categories as "text", "understanding", "meaning", "interpretation" were analyzed. The author considered such forms of clarification of the text meaning as a logical analysis of the language, dialogue, structural analysis. The paper presents*

*the most prevalent methods of interpreting written documents, in particular, cultural and historical analysis, psychological reconstruction, application, etc. The key hermeneutic interpretation principles of the sources of comparative historical and legal analysis are indicated.*

**Keywords:** hermeneutics, historical and legal hermeneutics, text, understanding, meaning, interpretation, methods of interpretation, principles of interpretation.

## INTRODUCTION

After major historical sources of comparative historical and legal analysis have undergone external and internal critics, falsification verifications and have been read by palaeographically and grammatically by the researcher, it becomes important to establish implication that was put by the authors. This circumstance has been already understood by 18th-19th century scientists, and in the course of time even special branch of scientific knowledge – hermeneutics has been established, which set sights on explaination, interpretation, explanation the meaning of the document being studied.

Hermeneutics aims to recognize what can be taken as truth in historical document. Document represents the final result of a long series of processes, the details of which are not reported by the author. It can easily happen that the author has not equally correctly conduct such different from one another operations, as observation and compilation, making phrases and spelling words. Consequently, each case of comparative work main sources study requires the use of hermeneutic analysis procedure in order to distinguish between the processes that were carried out incorrectly and to reject the conclusions drawn on their basis in a timely manner.

Regrettably, for the time being the statement still of S.-V. Langlois and C. Seignobos remains relevant, saying that hermeneutics of historical documents is usually applied only when necessary and they are trying to take it to minimum. The most demanding historians use in this case the short-cut method, which concentrates all operations into two groups: 1) document content analysis and positive criticism of the text interpretation (explanation) required to make sure what exactly the author wanted to say; 2) analysis of conditions associated the occurrence of the document, and negative criticism required to verify the author's statements. However even this twofold hermeneutic work is carried out only by the selected few ones [1, p. 144–145].

For comparative researcher on historical and legal issues, knowledge of the basics of hermeneutical analysis of comparative research sources is extremely important, since this particular procedure is the final stage in their study. At the same time, despite the pronounced relevance of this aspect of the methodology of historical and legal comparative studies, the stage of hermeneutic learning of historical artifacts has remained almost undeveloped untill nowadays. This particular issue determines the purpose of presented scientific article – to characterize the historical and legal direction of hermeneutics, as well as to determine the main components of hermeneutical analysis method of the main sources of comparative historical and legal research.

## 1. LITERATURE REVIEW

The lack of fundamental research on historical and legal hermeneutics has led to the necessity to engage the papers presented in general philosophical, legal, and historical spheres while writing of this article. It should be noted that, in contrast to philosophical hermeneutics, which has been developed quite thoroughly, legal and historical hermeneutics only begin their formation as separate methodological disciplines. Surely, this circumstance makes the work on the methodology of historical and legal hermeneutic analysis much more complicated. At the same time, it is possible to specify separately those domestic and foreign authors, whose works in the field of sources interpretation is featured with most pronounced instrumental value.

Thus, common understanding of philosophical hermeneutics and hermeneutic analysis logics has been given in his work by S. A. Farenik [2]. E. V. Bogdanov has noted the main stages of philosophical hermeneutics formation and considered major tendencies of its contemporary development [3]. E. M. Spirova gave rather detailed institutionalization of the hermeneutic circle as one of the basic categories of art of texts interpretation [4]. Fundamental work of M. E. Soboleva "Philosophical hermeneutics: the concept and position", is also worth noting here, which in its essence is a full-fledged guide to the methodology of this discipline. In particular, in her work in addition to the well-executed definition of hermeneutics she provided the most complete coverage of such categories as "text", "comprehension", "meaning", "interpretation", etc. In addition, the author briefly describes the hermeneutics of Wilhelm Dilthey and Martin Heidegger, the "hermeneutical logic" of George Misha, the hermeneutic ontology of Hans-Georg Gadamer, and others [5].

Legal hermeneutics as research area of jurisprudence is quite completely presented in the paper of A. V. Vasiuk, who also examines the relationship between jurisprudence and hermeneutics, tries to establish the relation between hermeneutics and the general process of interpretation of law, etc. [6]. G. V. Papakin, introducing documentary hermeneutics concept, adds new categories and principles to the general methodology of texts interpretation [7].

O. P. Pronnestein, representing historical science, in his fundamental work gave a general overview of the process of historical interpretation of documents, noting the connection between language and thinking, grammatical and logical interpretation. In addition, the scientist pointed out the specific features of the interpretation of certain types of written sources, in particular, legislative instruments, contractual letters of recognition, correspondence documents, narrative sources, etc. [8]. S. V. Langlois and Ch. Seignobos, considering the content of external and internal criticism of historical documents, have rather successfully for their time identified the place of hermeneutics in the structure of source studying work [1]. The well-known antерevolutionary scientist O. S. Lappo-Danilevsky in the historymethodology context has described in detail the psychological, technical, typification and other methods of historical sources interpretation[9].

Among the modern scholars being deep into comparativism and hermeneutics, we should mention as follows: Martin Van Hawk [10], K. Walsh [11], S. Eric [12], C. Lincoln [13], J. Poyanovsky [11], J Reni Juste [14] and others. However, despite their considerable interest in this issue, the matter of hermeneutical analysis method of sources of comparative historical and legal research regulation remains out of attention of the named professionals.

## 2. MATERIALS AND METHODS

Methodological basis of the present scientific paper are the general provisions of philosophical hermeneutics concerning text interpretation as a symbol, language and structure, the hermeneutic circle, as well as such categories as "comprehension", "interpretation" and "meaning". In distinguishing the idea of "historical and legal hermeneutics", methodological developments from the The methodological basis of this scientific article is the general provisions of philosophical hermeneutics concerning the interpretation of the text as a symbol, language and structure, the hermeneutic circle, as well as such categories as "comprehension", "interpretation" and "meaning". Methodological groundwork of historical and legal interpretation of documents has been used In distinguishing the concept of "historical and legal hermeneutics".

The article continues refinement of the comparative historical and legal method at comparative work methods level, in particular, the last stage of source study activities – hermeneutical analysis is reserached. Since the scientific method is a theoretically substantiated normative cognitive tool, its structure in the form of theory, methodology, and technique of the study is entirely natural. The methodology, being mid level of specification of scientific knowledge means refinement, despite the fact that it does not contain specific technical techniques, is important in the context of detailed elaboration of the research procedure itself. Since it's it as a set of rules and procedures, techniques and operations, allows to realize in practice the concepts of the basic approaches and requirements of the principles on which the theory of method is based [15, p. 40–46].

Academic expositions of M. A. Damirli concerning specificity of historical and legal scientific search allow to develop methods of comparative historical and legal study, which, in particular, manifests itself with the presence of two dimensions of the latter – historical and legal. In this case, notwithstanding their pronounced autonomy, they constitute integrated mental process in this form of social cognition. In addition, the scientist correctly points out that "specific historical researches carried out within the framework of historical and legal sciences, although they form the core, major part of historical and legal knowledge, nevertheless, dozens of possible research areas in this area ... are not yet realized "[16, p. 416–418]. And in case we take into consideration the direct connection of historical and legal knowledge with texts, it becomes obvious that the methodological activities should be symbolificantly intensified in this direction.

## 3. RESULTS AND DISCUSSION

### *3.1. Specific nature of historical and legal hermeneutics*

Fundamentals of hermeneutics as a general science of interpretation have been laid by the German philosopher F. Schleiermahrer in the late 18th – early 19th century. Under his concepts hermeneutics was conceived primarily as an art of understanding personality of another human being, another expression of personified individuality. W. Dilthey has developed hermeneutics as the methodological basis of humanitarian knowledge. From his point of view, hermeneutics is the art of interpreting literature masterpieces, understanding of manifestations of life expressed in written. In the 20th century hermeneutics has been developed by M. Heidegger, H. Gadamer (ontological hermeneutics), P. Ricker (epistemological hermeneutics), E. Betty (methodological hermeneutics) [2, p. 119–120].

Like many other philosophical concepts, the concept of "hermeneutics" is not subject to unambiguous definition. For the time being, the most often hermeneutics (translated from Greek means "to explain", "to proclaim", "to interpret", "to translate") is understood as universal theory of interpretation of symbols. It is quite indicative that since the days of its origination hermeneutics has had the character of the exegesis and has been an auxiliary, technical discipline within the framework of jurisprudence and theology [5, p. 5]. Today we are dealing with ontologization of hermeneutics, and the status of hermeneutics in the general configuration of modern knowledge is connected with the fact that the issue of understanding is a common issue for any scientific and cognitive area – no matter if it is natural or humanitarian. Today there good grounds to say about literature, legal, theological, historical and other hermeneutics [3, p. 3–4].

Conducting comparative historical and legal research requires flexible combination of three scientific approaches – comparative, historical and legal, respectively hermeneutical interpretation of historical and legal documents at the stage of studying the sources of comparative analysis will also have an integral nature. Nowadays we can even speak of the separation of historical and legal hermeneutics, surely making in the nearest future all the required methodological works on its formalization in this status.

Thus, historical scientist O. P. Prontshtein notes that the interpretation of historical sources, in addition to disclosure of the meaning of structures, formulas, symbols, texts, etc., has its own specific features. Interpreting a source, the researcher attempts to understand what is communicated in it about specific facts, events, phenomena. It is also taken into account that there is substantial difference between the historical fact (or phenomenon) in itself, the way it is perceived by creator of the source and the way it is reflected in the document.

Any source reflecting historical fact does not works like a mirror, it shows such fact through the prism of consciousness of its compilers. For the same reason, in order to understand what is expressed in it, it is necessary to take into account the

symbolificance of the source as a phenomenon created in a certain historical context and containing the views of its creator as representative of a particular social system and certain ideology. At the same time, this thesis relates not only to narrative sources, the interpretation of which is impossible apart from class and political positions of their authors, but also to all other types of sources.

Interpretation is aimed to disclose the symbolificance of the entire historical source as a whole, as well as in its individual parts grounded on the above-mentioned positions. Surely, the interpretation of completely comprehensible pieces does not require any special work, however they must pass through the prism of researcher's consciousness [8, p. 146–147].

In contrast to the historical direction of documents interpreting, the relationship between jurisprudence and hermeneutics comes out, above all, in interpretation of various forms and sources of law, relating both to historical and legal documents, and to the various types of legal acts effective in our times. "Legal hermeneutics" term is widely spread at the moment and is usually used to characterize the interpretation of various legal texts.

Modern legal hermeneutics as an independent research area in the field of legal science is relatively young phenomenon. As a rule, it is associated with the general process of interpretation of law. The interpretation of law is a form of cognition that includes cognitive and emotional components, that is rational and irrational levels, explanation and understanding. Legal hermeneutics is one of the types of cognition, which results in a process from understanding to explanation. It should be attributed to special knowledge, the so-called legal analysis: the analysis of literal text, dogmatic analysis and culturological [6, p. 84–85].

As a rule, it is associated with the general process of law interpretation. Interpretation of law is a form of cognition which includes cognitive and emotional components, that is rational and irrational levels, explanation and compherension. Legal hermeneutics is one of the types of cognition resulting in a process from comprehension to explanation. It should be referred to special cognition, so-called legal analysis: literal analysis of a text, dogmatic analysis and culturological one [6, p. 84–85].

Thus, historical and legal hermeneutics, combining the "historical" and "legal", is a dual discipline the symbolificance of which while studying the sources of comparative analysis and reconstruction of the objects to be compared is hard to overestimate. At the same time, it's necessary once again to emphasize the fundamental difference between the historical and legal approaches of hermeneutic interpretation of texts, since understanding of that allows both methodologically correctly interpret the historical legal document and to develop further on an adequate tooling for this new methodological discipline.

Thus, historical hermeneutics is aimed at finding out the meaning of notions, terms, turns of speech which are out of use or acquired another meaning, determining the genuine sense of sources in cases where this content is concealed, developing

methods for studying and interpreting the meaning of texts, scientifically grounded technical approaches to restore the first wording of the text of the historical artifact, etc. [7, p. 2]; the result of historical hermeneutic analysis is often the establishment of a new historical fact.

With that said, the professional focus of legal hermeneutics is to seek and realize the meaning of the legal rule, studying the issue of multiplicity of meanings. The purpose of legal hermeneutics is not only to clarify the meaning of the norm, but also to translate this meaning into the language of more specific statements, approximate to practical situations so such extent which do not allow for any doubt about their reference to the norm subject to interpretation, thereby facilitating its administration. Hence, legal hermeneutics is most often considered in the context of legal rules understanding and interpretation, more rarely it is understood as a legal technique in a broad sense with general tasks of law comprehending and objectifying [6, p. 86–87].

*3.2. Historical and legal hermeneutics as a text comprehension science*

Two main points of view on hermeneutics have been formed in the course of its historical developmen. The first proceeds from the concept that hermeneutics is first and foremost science of compherending the text, and the second one is based on idea that hermeneutics is to be considered as a science of understanding. Each of these types of hermeneutics has its own methodology and tooling, however this work pays attention exclusively to the first approach. In particular, in the context of comparative historical and legal analysis methodolohy, it is necessary to consider and adapt to its needs such basic categories of "hermeneutics of the text" as "comprehending", "mean-ing", "interpretation".

It should be noted that in hermeneutics, including histot=rical and legal one, the text can be treated as: 1) symbol, 2) language, 3) structure. Accordingly, its interpre-tation can be done in the form of: 1) logic analysis of language, 2) dialogue, 3) struc-tural analysis.

Major concern of the text hermeneutics is to get sense from the available symbols, and therefore it attempts to offer methods allowing to extract the meaning from written text maintaining the authentic content of the text. Hermeneutics, which reduces the art of interpretation to the logical analysis of symbols, is called representative or semiotic. Concentration on the logical analysis of symbol is explained by the fact that semiotic hermeneutics proceeds from the assumption that a properly organized system of symbols represents the logical form of the text. However since the logical form of the text in its turn refers directly to the facts, from this it follows that grammatically and syntactically correctly constructed text shall represent true knowledge. In other words, the basis of representative hermeneutics is the belief in the logical congruence of symbols to the elements of reality described by them [5, p. 17].

In hermenetics, understanding the text as a language is complicated by the fact that adequate and unambiguous definition of this category is not available. This leads

to the necessity to use the work of other well-known philosophers-hermeneutics to develop the methodology of hermeneutical interpretation of comparative historical and legal analysis sources. Thus, H.-G. Gadamer in his book "The Truth and the Method" notes that the text in general and the literary text in particular are uncovered as hermeneutic phenomenon only provided that it is perceived as a language, that is, if it is heard [17, s. 47]. To hear the text means to penetrate into its meaning, to understand it. The text is comprehended when it begins to sound, when the sound unfolds its inner semantic structure, and when all semantic interrelations clearly appear and become clear to the reader.

Since the text for Gadamer is the language in its essence, then his understanding is based on the same mechanism as language understanding, that is, on conversation or dialogue. In his opinion, the text is an entity which is the bearer of the language and, accordingly, the bearer of a certain meaning, to reveal which it is necessary to be in dialogue with it. The text as an entity of the language is bi-directional: on the one hand, it refers to the above said, and on the other hand, it is outside opened and oriented towards another human. In such a way, the text becomes an intermediate link between the meaning contained therein and the interpreter who attampts to penetrate into this meaning on the basis of the text [5, p. 20–21].

Structural hermeneutics is focused at restoring the structure underlying the artifact. This is not about the structure that is clearly presented in the text, but about the structure that needs to be reconstructed in the form of a regular interrelation of elements. Thus, the purpose of structural hermeneutic analysis is to distinguish the aggregate of members of the text structure and to identify the relations between these members. It is aimed to find out certain deep structures beyond the surface of the text and determining their effects on its content.

Let us note that in the course of historical and legal comparisons all the abovementioned forms of sources interpretation are used, and the main focus of researcher is directed to unpack their sense in line with the specific historical conditions in which they were created. At the same time "it is mistake to think that the semantic interpretation is separated by Chinese Wall from the grammatical interpretation ... Logical categories can not but penetrate the language – directly and hiddenly – not least because the language is a means to express our thinking, which in itself is impossible without logic. Language and thinking are relate as form and content. Language is the form in which thought is expressed. That is we can not agree with those researchers who elect not to use logical interpretation of legal documents and reduce it to the grammatical, or rather – even to syntactic interpretation [8, p. 148].

Generally, since its inception as a philosophical discipline, hermeneutics was nothing less than a science of understanding. At the same time, the "comprehension" is heterogeneous process, and types of comprehension vary both in ways and mechanisms, and in the entities to which the understanding is directed. Usually the cate-

gory of "understanding" in hermeneutics is associated with language symbol comprehension. "Understanding" can be considered as a specific form, which allows working with specific data – "hermeneutical subjects" [4, p. 201].

In the context of comparative historical and legal analysis method quite significant seems to be F. Schleiermacher's doctrine concerning the interpretation in the framework of which "comprehending" category gets its specific substantive manifestation. Its essence is to develop a strict canon of rules of interpretation of texts, which includes three domains: grammatical, psychological and historical. Schleiermacher's method implies, on the one hand, a transcendental analysis of general conditions that constitutes an understanding as such, and, on the other hand, the application of general rules for various special areas of hermeneutics, such as theology and jurisprudence.

His essence is to develop a strict canon of text interpretation rules, which includes three domains: grammatical, psychological and historical. Schleiermacher's method implies, on the one hand, transcendental analysis of general conditions constituting comprehension as such, and on the other hand general rules application for various special areas of hermeneutics, such as theology and jurisprudence.

Thus, according to F. Schleiermacher, the first step in the text analysis, shall be its grammatical analysis, focused on "main" and "minor" thoughts distinguishing, that is, to establish logical structure of the text. At the same time, he emphasizes the importance of the ability to "distinguish between main and minor thoughts from simple means of expression." His psychological interpretation should be the second step, the central points of which are establishment of historical circumstances of the author's life and text creation, making possible background for comprehension, as well as individual psychological features of the author establishment and his style. In general, understanding is achieved only as a result of both steps – grammatical and psychological interpretation, whereupon "grammatical interpretation is lower, and psychological is higher" stage in this process. F. Schleiermacher emphasizes that successful application of hermeneutical technique is based on the competence of the interpreter to both the language and the understanding of people.

The high point of F. Schleiermacher's efforts to develop hermeneutical strategy can be considered his "general methodological rule", which includes the following steps: a) start with a general overview of the text; b) simultaneously move in both directions, grammatical and psychological; c) continue to interpret only provided that both of its forms have led to the same result; d) go back in case grammatical and psychological interpretations contradict each other, until a mistake in understanding is found. This methodological "iterative" interpretation rule further on has been called the "hermeneutical circle" rule. In its essence, the idea of a hermeneutic circle is a formalized idea of inquiry. The interpreter conducts a fictitious conversation with the author of the text and, by asking him/ her and himself/ herself fictitious questions, is striving to reveal the hidden meaning of the text [5, p. 28-30].

*3.3. Methods and principles of historical and legal sources interpretation*

The term "interpretation" is a key one to understand the process of hermeneutical analysis of comparative historical and legal research sources. At the same time, the aims and interests in interpreting sources of texts are so different from each other that we can even speak of different methods and principles of interpretation.

Thus, the most widely used methods of interpretation of historical and legal sources include as follows:

1. Reconstruction of the main text while working with poorly preserved sources or with cryptotects. Notwithstanding the fact that the reconstruction itself is not actually a hermeneutical process, the restoration of the "body" of the text within its framework, as a rule is accompanied by attempts to understand its meaning.

2. Text content resporation to the most accurate degree, taking into account the cultural and historical conditions for its creation. Thus, unfolding of the content of concepts contained in the historical legal documents, quite often can not be reduced to their direct translation. The content of many of them can be clarified only on the basis of careful interpretation, taking into account specific historical conditions in which existed the categories denoted by these concepts. For example, Articles 42-44 of the Pskov court charter refer to isornics. Unfolding its content, V. O. Klyuchevsky, P. Ye. Mikhailov and M. Bogoslovsky described the isornites as free tenants of the landlord's land. However, B. D. Grekov and B. B. Kafengauz, having carried out a cultural-historical analysis, found that these articles are speaking of isornics as a category of feudal-dependent population, which is close to the arable land of Ancient Rus [8, p. 153].

3. Interpretation directed at author's intentions identification, that is what the author tried to say in the text and by means of the text. As a result of the linguistic interpretation of the source, the meaning of all the words and sentences of the written document is clarified. However it is not enough to decide what the author of the source intended to say. Yes, it should be taken into account that historical sources quite often have hidden meaning, that is, the author uses certain words in a sense different to the sense these words are used in the given language at the time of the source creation, or images created by the source have allegorical or symbolic meaning.

4. In addition, under source content interpretation it should be borne in mind that with the development of human society, with the change of production relations and with the development of science the way of people's thinking has been changing. There is nothing more false than to make assumption that people have always thought the way we think at the present and that they have always responded to certain phenomena as we do now. Therefore, in order to establish what the author of the source really wanted to say, it is necessary to know in what epos author lived, to what class and domain he/ she has belonged, what his general outlook, his political beliefs and aspirations have been. It's also necessary to know specific features of his thinking

(for example, metaphysical, dialectical), the degree of culture he/ she has achieved. It should be borne in mind what has been learned by source's author from the existing culture and what has not, if he /she was familiar with his contemporary scientific idea, etc. [18, p. 113–114].

5. Psychological reconstruction, which often takes the form of psychoanalysis and requires a deep knowledge of psychological, sociological, historical nature, etc. O. S. Lappo-Danilewski noted that "without a psychological interpretation one can not approach the understanding of the historical source: the historian gives him more than "mechanical" meaning or known sense only because he/ she uses his/ her own similar psychic experiences." At the same time, psychological interpretation of the source is faced with considerable difficulties, since "the complete and mutual understanding of the two entitiess implies, in fact, the identity of their psyche (at least in relation to what is expressed) at the very moment nthey communicate, what is already unlikely; but the historian is questioning the entity who has spoken prior to him /her; under such conditions, the identity of their psyche, of course, is even less likely" [9, p. 322–323].

6. Application aimed on the text relevance identification, for example, its suitability to solve any pending issue. For example, new interpretation of the text in the spirit of a new scientific theory, new political ideology or new religious doctrine can fill it with new content and give it a new life.

The most important principles of interpretation of the texts of comparative historical and legal analysis sources in the framework of hermeneutics are as follows:

– *text autonomy recognition principle*, which involves recognizing recognistion of the intrinsic to it. This principle proceeds from the assumption of the semantic completeness of the text, which manifests itself in the fact that the text fully expresses own opinion and own truth;

– *the principle of understanding the subject of the text*. Interest in the subject matter of the text firstly and primarily facilitates its correct comprehending and correct interpretation;

– *the principle of understanding the cultural tradition within the framework of which the text has been created;*

– *"hermeneutical openness of the text" principle*, originating from the thesis of the meaningful incomprehensibility of the text, according to which the hermeneutic comprehension appears as an endless process. In connection with hermeneutic openness of the text issue another issue associated with it should be mentioned here. In particualr time the question widely discussed im hermenautics was whether it is possible to understand the author better than he/ she understands himself/ herself. In the opinion of Gadamer, who reduced the hermeneutic task to a substantive formulation of question, such situation is really possible provided that the interpreter understands the subject better than the author of the text [5, p. 41–47].

## CONCLUSIONS

Thus, hermeneutical interpretation of the sources of comparative historical and legal analysis is a logical continuation of the procedures of their external and internal critisism, verification reliability check, and in fact it is the final stage of their comprehensive study. The consequence of establishing the authentic meaning of the texts of written artifacts is the construction of historical and legal subjects for further comparative analysis. Methodologically correct reconstruction of the "body" of historical and legal subjects is a guarantee of reliability of the findings obtained in the result of comparative work. And this, in turn, becomes possible only by observing the main methodological requirements and principles of historical and legal interpretation of the main sources of comparative research.

Taking into consideration that documents is the central element of any hermeneutical historical and legal analysis; it becomes obvious that the concepts of "comprehension", "meaning" and "interpretation", even given the diversity of their interpretations, continue to serve for comparative historian as the most important tools for comprehension of the texts of the historical and legal artifacts. Even though history itself as a science today becomes more complicated in t epistemological sense and less ambitious in the context of its ability to reproduce the true picture of the events of the past.

One of the most significant limitations of the nowadays historical science is recognition that the text with which the historian works is not a direct testimony to the events of the past, but only their representation, that is, mediated (first of all with language) presentation of historical and legal phenomena. The immediate consequence of such recognition is the consent of the majority of contemporary historians with the initial uncertainty of the meanings of the text, and even their deception [19, p. 22]. Nevertheless, despite of the whole complexity of work with historical documents, hermeneutical analysis of comparative research sources allows to avoids typical mistakes and prepare for historical and legal subjects comparison stage at the higher qualitative level.

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# МАЙНОВІ ПОВНОВАЖЕННЯ УКРАЇНСЬКОГО НАРОДУ

**Анотація.** *Українській державі сьогодні належить великий обсяг державної власності, що використовується або принаймні повинен використовуватися з суспільнокорисною метою. Тому основна мета роботи полягає у характеристиці майнових повноважень українського народу. Для більш детального розгляду питання використано позитивістсько-нормативістський, герменевтичний, формально-юридичний, порівняльно-правовий методи. В роботі розглянуто поняття «майно», «власність», «право власності», досліджено поняття та ознаки майнових повноваження Українського народу, а також виокремлено деякі з них. Це такі як: право власності на землю, право власності на надра, право власності на атмосферне повітря, право власності на водні ресурси, право власності на інші природні ресурси, право власності на природні ресурси континентального шельфу, право власності на природні ресурси виключної (морської) економічної зони. Виявлено, що майнові обов'язки є основою сучасного цивільного обігу. Встановлено, що право власності Українського народу та право державної чи комунальної власності не можна порівнювати.*

**Ключові слова:** майно, власність, право власності, майнові повноваження, український народ.

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# PRORERTY RIGHTS OF THE UKRAINIAN PEOPLE

**Abstract.** *Now the Ukrainian government owns a large amount of the state property which is or at least should be used with a socially useful purpose. Therefore, the main purpose of the work is the characterization of the property powers of the Ukrainian people. For a more detailed consideration of the issue there are used positivist-normative, hermeneutic, formal-legal and comparative-legal methods. In the work there are considered the concepts of "property", "ownership" and "ownership right", investigated the concept and particularities of the property powers of the Ukrainian people and highlighted some of them. Such as the right of ownership of land, the right of ownership of subsoil, the right of ownership of air resources, the right of ownership of water resources, the right of ownership of natural resources of the continental shelf, the right of ownership of natural resources of exclusive (marine) economic zone. It is revealed that property duties are the basis of the modern civil turnover. It is established that the right of ownership of the Ukrainian people and the rights of state or municipal property may not be compared.*

**Key words:** property, property, ownership, property rights, Ukrainian people.

## INTRODUCTION

Today, in the process of reforming Ukraine and its establishing as a democratic and rule-of-law state, and Ukrainian people realizing their independence, one should recognize that the important element of its constitutional status is property powers. The regulatory act regulating property relationships and dedicated to legal equality, declaration of will, property independence of participants is the Civil Code of Ukraine [1]. The objects of the Civil Code include things (taking into account money and securities), property rights, results of work, services, information, results of intellectual (artistic) activity and other material (non-material) values.

The existence of property powers in the territory of Ukraine not only gives the possibility of exercising own right to own, use and dispose of the property belonging to the subject at his/her own discretion and in his/her own interests, and the need to realize own property duties in the context of non-violating legal norms established by law that regulate property relationships to the damage of other subjects or society, and the possibility of intrusion of the state in its property right.

Arising of any powers begins with the process of legitimization of the legal status of state authorities in 3 aspects (material and statutory, processual and dynamic and procedural). Along with powers the respective management paradigm appears and gets legalized, and this paradigm contains a number of management actions of statutory and functional nature – the respective order of exercising competence rights and obligations by the above-mentioned state authorities as well as fulfilling their functions, assuming liability for not fulfilling them or improper fulfillment and the like is deemed to be formed [2;3;4]. All this is accompanied by issuing the respective regulatory acts of norm-establishing and law-enforcement nature.

It shall also be noted that the problem described is extremely up – to – date, even though it is not elaborated theoretically well enough by Ukrainian scholars. The theoretical base of this work is as follows: the Civil Code of Ukraine [1], Legal encyclopedia [5], the Constitution of Ukraine [6], the Economic Code of Ukraine [7], the Land Code of Ukraine [8] and other domestic and foreign regulatory acts.

## 1. MATERIALS AND METHODS

At present the problem of property powers of Ukrainian people is not well-studied. As special scientific papers of complex conceptual and methodological nature dedicated to this problem are absent, therefore the methodological basis of this article is a number of philosophical, general scientific, special scientific methods and principles giving the possibility to cover the above-mentioned scientific problem comprehensively and understand notions, features and types of property powers of Ukrainian people, review property rights and obligations and make their comparative analysis comparing them with those existing in foreign countries. Among the methods and principles used the following shall be mentioned: the dialectical method, which was used for consistent, logical and clear statement of the scientific paper; the positivistic and normativistic

method, which helped to study legal formalization of property powers of Ukrainian people; the principle of interrelation of theory and practice was applied when advancing suggestions as for entering amendments into local laws of Ukraine; the hermeneutic method was applied for interpretation of such terms as the "property", "ownership", "ownership right"; the systemic method was applied for analysis of various types of property rights and obligations of Ukrainian people; analysis and synthesis while formulating definition for property powers of Ukrainian people; induction and deduction was used for making conclusions from the present scientific paper; the historical and legal method for studying the existing points of view in regard to the notions falling under the contemplated problem; the comparative and legal method was applied when comparing property powers of Ukrainian people з property powers existing in other countries; the formal and legal method was applied for defining elements of those legal phenomena, which were contemplated in this Article, and distinguishing their distinctive features and other.

Combining methods of formal logic with comparative and legal analysis and interpretation of legal norms allowed performing scientific analysis of current laws and make conclusions and formulate guidelines regarding non-compliance of the system of property relationships with the Constitution of Ukraine, the possibility and need of implementation of the constitutional model of fulfilling property duties of Ukrainian people into the legal system, formulate definitions of separate notions as legal categories.

## 2. RESULTS AND DISCUSSION

*2.1. Study of such notions as the "property", "ownership", "ownership right", "property powers of Ukrainian people"*

The study of property powers of Ukrainian people shall begin from modern understanding of the notions of "property", "ownership», "ownership right" and other contiguous notions.

Thus, Art. 190 of the Civil Code of Ukraine No 435-IV of January 16, 2003 states that "The property as a special object is a certain thing, a number of things, as well as property rights and duties. The property right is a non-consumable thing. Property rights shall be deemed as proprietary rights" [1]. In the six-volume *Legal Encyclopedia* it is said that "*The property (P.)* in civil law means – 1) a certain thing or a number of things , including money and securities. The term is used to define objects of the ownership right, the subject – matter of gift contracts, property lease agreements, loan agreements and the like 2) the array of things and property rights (rights of claim) of a certain person (asset). It is used in norms regarding protection of the property of the citizen, who was recognized as missing, as well as in norms regarding responsibility of legal entity. 3) The aggregate of rights and obligations of a certain person characterizing his/her property status. In this understanding the property consists of things and rights of claim belonging to a certain person and

defines property asset, as well as his/her debts constituting property liabilities. It is used in norms concerning inheritance, reorganization of legal entities as legal assigns receive not only rights, but obligations as well, thus universal legal succession is formed" [5, p. 551].

"*The ownership (O.)* means appurtenance of facilities and manufactured products to people, as well as certain individuals and legal entities. The structure of O. is manifested through such elements of it as possession, use and disposal of *property*. Economic relationships regulated by legal norms are realized as *legal relationships* and fall under such legal category as *the ownership right* in modern states. Certainly, the O. right and its forms shall be formalized in the constitutional order» [5, p. 492].

When studying the ownership right, first of all, it is necessary to draw attention to Art. 316 of the Civil Code of Ukraine No 435-IV of January 16, 2003, which, formulating the notion of the ownership right affirms that "the ownership right is the right of a person to a thing (property), which such person exercises in compliance with law voluntarily and nor depending on the will of any other persons"; and Art. 317 of the same Code, providing for the maintenance of the ownership right, affirms that the "Rights of possession, use and disposal of own property belong to the owner" [1].

From the notion and nature of the ownership right it proceeds that the ownership right (objectively) means the totality of legal norms and principles that regulate and social relations related to possession, use and disposal of the property by its owner at his/her own discretion and in his/her interests. Meanwhile, the ownership right (subjectively) means the type and measure of possible behavior of Ukrainian people, individuals and legal entities in respect to possession, use and disposal of the property belonging to the person guaranteed by regulatory acts.

In Part 1 Art. 13 objects of the ownership right of Ukrainian people are listed, and Part 1 Art. 14 of the Constitution of Ukraine acknowledge that land is the greatest national wealth, which is under special protection of the state. Along with that one can mention other Articles of the Constitution of Ukraine concerning the property, including property of Ukrainian people. First of all, these are: Art. 41, which states that "Every person has the right to own, use and dispose of his/her own property, results of his/her intellectual and creative activity", and, furthermore, it establishes the procedure of acquiring, exercising, compulsory alienation of private ownership rights, use objects of rights of state and municipal property, confiscation of property, obligations arising from use of the property; Clause 36 Part 1 Art. 85, which includes approval of the list of objects of rights of state property not subject to privatization, determining legal grounds for seizure of objects of private ownership rights with powers of the Supreme Council of Ukraine; Clause 7 Part 1 Art. 92 envisages that the legal regime of property shall be defined by laws of Ukraine only; Clause 5 Part 1 Art. 116 imposes on the Cabinet of Ministers of Ukraine ensuring equal conditions of development for all forms of property; management of state property objects in compliance with law; Clause 3 Art. 138 states that the Autonomous Republic of

Crimea can exercise management of property; Part 1 Art. 142 regulates that the material and financial basis of local self-government is movable and immovable property, incomes of local budgets, other funds, land and other natural resources, which belong to territorial communities of villages, residential settlements, towns, districts of cities and objects of their common property managed by regional and oblast councils [6].

Along with that, Art. 318 of the Civil Code of Ukraine No 435-IV of January 16, 2003. Affirms that "Subjects of the ownership right are Ukrainian people and other participants of civil relationships…», and Art. 324 titled "The ownership right of Ukrainian people" actually dupes Parts 1 and 2 Art. 13 of the Constitution of Ukraine [1].

The Economic Code of Ukraine No 436-IV of January 16, 2003 in Part 2 Art. 5 states that "The constitutional framework of legal and economic order in Ukraine is maintained by: the ownership right of Ukrainian people of land, its subsoil, air resources, water and other natural resources located in the territory of Ukraine, natural resources of its continental shelf, exclusive (marine) economic zone exercised on behalf of Ukrainian people by government authorities and local self-government authorities within the limits , defined by the Constitution of Ukraine; the right of each citizen to use natural objects of the ownership right of people in compliance with law…». In Part 5 of Art. 24 dedicated to peculiar features of management of economic activity in the utilities sector of the economy it is stated that "Law can set … additional requirements and guarantees of the ownership right of Ukrainian people and rights of municipal property at carrying out the bankruptcy procedure regarding business entities of the utilities sector of the economy". In Art. 141 concerning peculiar features of the legal regime of state property in the economic field, it goes that the state, through the authorized government authorities, exercises rights of the owner in respect to objects of the ownership right of Ukrainian people mentioned in Part 1 Art. 148 of the Economic Code of Ukraine No 436-IV of January 16, 2003. Part 1 and 2 Art. 148 of the same Code actually dupe Part 1 and 2 Art. 13 of the Constitution of Ukraine, and Part 4 Art. 209 "Incapacity of the business entity" states that "As regards bankruptcy of state commercial enterprises, law envisages additional requirements and guarantees of the ownership right of Ukrainian people" [7].

Taking into account all the mentioned-above, one can affirm that property powers of Ukrainian people constitute the aggregate of their primary, fundamental rights and obligations assigned to them by law or existing objectively, and they shall be exercised with the purpose of ensuring possession, use and disposal of their property at their own discretion and in their interests.

From the above-mentioned definition the following elements of property powers of Ukrainian people can be singled out:

– the aggregate of rights and obligations of Ukrainian people or a certain part of them;

– the aggregate of their primary, fundamental rights and obligations, that is those, which extend to all social subjects with the ownership exercising the ownership right, and all objects of the ownership right of Ukrainian people;

– assigned to them by law or existing objectively;

– exercised with the purpose of ensuring possession, use and disposal of belonging to them;

– exercised actually at their own discretion and in their interests.

*2.2. Property rights of Ukrainian people*

The most important, systemic property right of Ukrainian people is their ownership right of land situated in the territory of Ukraine. Unfortunately, the Land Code of Ukraine No 2768-III of October 25, 2001 does not contain any regulations dedicated to the property right of Ukrainian people of land. This gives the grounds to affirm that it does not comply with the Constitution of Ukraine and other regulatory acts regulating the ownership right of Ukrainian people, envisaging, first of all, objects of rights to such property. However, Part 1 Art. 3 acknowledges that land relationships are regulated by the Constitution of Ukraine, the Land Code of Ukraine No 2768-III of October 25, 2001, and regulatory acts adopted in compliance with them [8].

Analysis of the Declaration of State Sovereignty of Ukraine No 55-XII of July 16, 1990, which is currently ineffective, Law of Ukraine On ownership No 697-XII of February 7, 1991, currently in effect, Law of the Ukrainian Soviet Socialist Republic On economic independence of the Ukrainian SSR No 142-XII of August 3, 1990, other regulatory acts in the part of property powers of Ukrainian people, came to the following: 1) the exclusive right of Ukrainian people to possess, use and dispose of the national wealth of Ukraine was acknowledged; 2) land, its subsoil, air resources, water and other natural resources located in the territory of Ukraine, natural resources of its continental shelf and exclusive (marine) economic zone, the entire economical and scientific and technical potential generated in the territory of Ukraine, major production means in the industry, construction, agriculture, transportation, communications, housing stock, buildings and structures, financial resources, scientific achievements, a part in the national wealth created thanks to efforts of Ukrainian people, specifically, in the national diamond and currency funds and the gold reserve, national, cultural and historical values, including those, which are currently outside its territory, were recognized as property of Ukrainian people; 3) land, its subsoil, air resources, water and other natural resources of its the continental shelf and exclusive (marine) economic zone were included into objects of rights of the exclusive property of Ukrainian people; 4) the procedure of exercising rights of exclusive property through Referendum by Ukrainian people was envisaged.

Studying the ownership right of Ukrainian people of land it is not possible not to mention provisions of Part 1 Art. 14 of the Constitution of Ukraine, which envisage

that land is the major national wealth, which is under special protection of the state; and this represents detailing of Part 1 Art. 13 of the Constitution of Ukraine. Besides, provisions stating that land is the major national wealth, which is under special protection of the state, are contained in Part 1 Art. 373 of the Civil Code of Ukraine No 435-IV of January 16, 2003 [1].

Taking into account that the Land Code of Ukraine No 2768-III of October 25, 2001 is not compliant with the Constitution of Ukraine and other regulatory acts regulating the ownership right of Ukrainian people, and relying on Art. Art. 13, 14 of the Constitution of Ukraine and Art. 73 of the Constitution of Ukraine, which declares that "the issue of changes in the territory of Ukraine shall be resolved though the All- Ukrainian Referendum only" [6], it seems expedient to make changes in the Land Code of Ukraine No 2768-III of October 25, 2001 adding a separate Article, which reads as follows:

"Land is the major national wealth, which is under special protection of the state.

Land is the exclusive property of Ukrainian people and can be provided for use only.

Any agreements or actions, which directly or indirectly infringe the ownership right of Ukrainian people of land, shall be invalid.

Ukrainian people have the right to resolve issues regarding the legal status of land, its use and protection through Referendum.

Ukrainian people exercise the ownership right of land through the Supreme Council of Ukraine, the Supreme Council of the Autonomous Republic of Crimea and local councils. Certain powers regarding disposal of land provided for by laws of Ukraine can be provided to the respective executive authorities".

Another property right of Ukrainian people is their ownership right of subsoil in the territory of Ukraine. In contrast to the Land Code of Ukraine No 2768-III of October 25, 2001, the Code of Ukraine on subsoil No 132/94-BP of July 27, 1994 states that "Subsoil is the exclusive property of Ukrainian people and can be provided for use only. Any agreements or actions, which directly or indirectly infringe the ownership right of Ukrainian people of subsoil, shall be invalid. Ukrainian people exercise their ownership right of subsoil through the Supreme Council of Ukraine, the Supreme Council of the Autonomous Republic of Crimea and local councils. Certain powers regarding disposal of subsoil provided for by laws of Ukraine can be provided to the respective executive authorities". The unobjectionable advantage of the Code Ukraine on subsoil No 132/94-BP of July 27, 1994 as compared with the Land Code of Ukraine No 2768-III of October 25, 2001 is the fact that it confirms the ownership right of Ukrainian people of subsoil, and Part 1 Art. 1 formulates the understanding of subsoil, more specifically – "Subsoil is the part of the Earth's crust, which lies under the surface of terrain and bottoms of water basins, and it stretches to the depths accessible for geological survey and development" [9].

The constitutionally regulated property right of Ukrainian people is their ownership right of air resources located in the territory of Ukraine. In this regard Law of Ukraine On protection of air resources No 2707-XII of October 16, 1992 in Part 1 Art. 1 regulates that "air is the vital component of environment, which represents the natural mixture of gases outside of residential, industrial and other premises" [10].

Unfortunately, Law of Ukraine On protection of air resources No 2707-XII of October 16, 1992 does not contain norms, which would relate to the ownership right of Ukrainian people of air resources. In contrast to that, Law of Ukraine On protection of environment No 1264-XII of June 25, 1991 in Art. 4 titles "The ownership right of natural resources" in Part 1, 2 and 3 clearly says that "Natural resources of Ukraine are the property of Ukrainian people".

On behalf of Ukrainian people rights of the owner are exercised by government authorities and local self-government authorities within the limits defined by the Constitution of Ukraine, this and other laws of Ukraine.

The citizens of Ukraine have the right to use natural resources of Ukraine in compliance with this and other laws" [11].

Property rights of Ukrainian people also include their the ownership right of water resources in the territory of Ukraine. The Water Code of Ukraine No 213/95-BP of June 6, 1995 in paragraph 1 of the Preamble states that "All waters (water objects) in the territory of Ukraine are the national treasure of Ukrainian people and one of the natural grounds for its economic development and social well-being"; and in Art. 6 titled "The ownership of waters (water objects)" it is said that "Waters (water objects) are the exclusive property of Ukrainian people and can be provided for use only.

Ukrainian people exercise their ownership right of waters (water objects) through the Supreme Council of Ukraine, the Supreme Council of the Autonomous Republic of Crimea and local councils.

Certain powers as regards disposal of waters (water objects) can be granted by the respective executive authorities and the Council of Ministers the Autonomous Republic of Crimea" [12].

This group also includes the ownership right of other natural resources in the territory of Ukraine. First of all, it refers to the forest fund, plants and animals, reserve fund, it shall be mentioned that the Forest Code of Ukraine No 3852-XII of January 21, 1994 in Part 1 and 2 Art. 7 states that "Forests as the object of the ownership right" and, respectively, establishes that "Forests, which are found in the territory of Ukraine, are objects of the ownership right of Ukrainian people".

The rights of the owner of forests are exercised by government authorities and local self-government authorities on behalf of Ukrainian people and within the limits defined by the Constitution of Ukraine" [13].

Law of Ukraine "On the plant world" No 591-XIV of April 9, 1999 does not envisage the ownership right of Ukrainian people of the plant world, and in Art. 9

establishes the regime of common use of natural plant resources, according to which "In the order of common use of natural plant resources citizens can gather medicinal and technical raw materials, flowers, berries, fruits, mushrooms other food products for satisfaction of own needs, and also use these resources for recreational, cultural and educational purposes" [14].

In contrast to the previous legislative act of Law of Ukraine On the animal world No 2894-III of December 13, 2001 in Part 2, 3 and 4 Art. 5 "the ownership right of objects of the animal world", respectively, states that "Objects of the animal world, which are naturally free and stay in the territory of Ukraine, its continental shelf and exclusive (marine) economic zone, are objects of the ownership right of Ukrainian people".

Rights of the owner of objects of the animal world, which are the natural resource of common value, are exercised by government authorities and local self-government authorities on behalf of Ukrainian people and within the limits defined by the Constitution of Ukraine.

Every citizen has the right to use objects of the animal world – objects of the ownership right of Ukrainian people in compliance with this Law and other laws of Ukraine" [15].

Law of Ukraine On the natural reserve fund of Ukraine No 2456-XII of June 16, 1992 p. in Part 1 and 2 Art. 4 "Forms of the property in the territory and objects of the natural reserve fund" regulates that "Territories of natural reserves, preserved areas of biosphere reserves, land and other natural resources provided to the national natural parks, are the property of Ukrainian people".

Regional landscape parks, buffer zone, zone of anthropogenic landscapes, regulated reserve regime of biosphere reserves, land and other natural resources, included but not provided to national natural parks, wildlife reserves, natural landmarks, reserved border lands, botanical gardens, dendrological parks, zoological garden s and parks – monuments of garden art, can be the property of Ukrainian people, and exist in other forms of property as envisaged by laws of Ukraine" [16].

The Mining Law of Ukraine No 1127-XIV of October 6, 1999 regulates in Part 1 Art. 6 that "Forms of the property in the mining industry" applies a quite odd provision according to which "Companies of the mining industry can exist in various forms of property, unless otherwise envisaged by laws of Ukraine" [17]. Because the fact that companies of the mining industry can exist in various form of property is already clear, and it would be more appropriate to set forth which forms exactly the property, which are objects (companies), depending of their nation-wide or local status, can exist. Moreover, it is not clear which laws exactly, and what else may be envisaged by laws of Ukraine and why Parts 2, 3 and 4 Art. 6 of The Mining Law of Ukraine No 1127-XIV of October 6, 1999 titled "Forms of the property in the mining industry" actually are dedicated to privatization of companies of the mining industry.

The ownership right of Ukrainian people of natural resources of the continental shelf are of the property nature, too. Along with that, Art. 1 of the Convention on the Continental Shelf of April 29, 1958, which came into effect on June 10, 1964, declares that in Articles of the Convention the term "the continental shelf" is used in respect to:

a) the surface and subsoil of the sea bed of underwater areas adjacent to the shore, but situated outside the area of the territorial sea up to the depth of 200 meters, or, above these limits, up to the place, in which the depth of waters allows extraction of natural resources of these areas;

b) the surface and subsoil of the similar underwater areas adjacent to shores of islands [18].

Unfortunately, the Convention on the Continental Shelf of April 29, 1958, which came into effect on June 10, 1964, does not contain regulations, which would regulate and protect the ownership right of people, particularly Ukrainian people.

Property powers of Ukrainian people include the ownership right of natural resources of exclusive (marine) economic zone. Art. 2 of Law of Ukraine On the exclusive (marine) economic zone of Ukraine No 162/95-BP of May 16, 1995 formulates definition of the exclusive (marine) economic zone of Ukraine, particularly, it states: "Sea areas adjacent to the territorial sea of Ukraine, including areas around islands belonging to it constitute the exclusive (marine) economic zone of Ukraine".

The width of the exclusive (marine) economic zone is up to 200 nautical miles counted from the same base lines as the territorial sea of Ukraine" [19].

It also doesn't mention the ownership right of Ukrainian people of natural resources in the exclusive (marine) economic zone.

*2.3. Property duties of Ukrainian people*

It is doubtless that property powers include the duty of Ukrainian people according to which the ownership shall not be used so as to harm people and the society as envisaged by Part as envisaged by Part 3 Art. 13 of the Constitution of Ukraine. With that, the systemic and logic analysis of the above-mentioned part of Articles convinces that it actually mentions two duties. The first one if the most general rule of behavior, that is a duty –principle related to all the owners and subjects of the ownership right. Because the ownership obliges. It means that it shall be considered not only as the type and measure of the possible (the right or discretion of the subject), but also as the type and measure of objectively necessary (duty of the subject) behavior conditioned by the need to protect interests of other owners, and all social subjects as a whole.

Another duty – the ownership, which shall not be used so as to harm people and the society, is detailed in Part 7 Art. 41 of the Constitution of Ukraine, as it says that "The use of property shall not infringe rights, discretions and dignity of citizens, interests of the society, deteriorate the ecological situation and natural qualities of

land" [6]. It means that the ownership shall perform the stabilizing and progressive social function, i.e. it shall ensure conformity and development of public, state and private interests in the course of its realization. The owner is obliged to use his/her ownership not only in own interests; he shall be obliged to respect interests of other social subjects. That is why the Constitution of Ukraine provides for certain limitations on the ownership right.

Besides, the similar duties are stipulated in Constitutions of many foreign countries. Thus, the Constitution of the Republic of Moldova of July 29, 1994, which came into effect on August 27, 1994, in Section 1, Part 2 Art. 9 "Basic principles of property" states that the ownership cannot be used so as to infringe rights, discretions and dignity of man [20]. Paragraph 2 Art. 14 of the Basic Law of the Federal Republic of Germany of May 23, 1949 contains provisions according to which "The ownership obliges. Its use shall benefit general welfare" [21, p. 86]. Part 2 Art. 29 of the Constitution of Japan promulgated on November 3, 1946, which came into effect on May 3, 1947, regulates that the ownership right is defined by law so that it was not inconsistent with common welfare [22]. The Constitution of Greece, which came into effect on 11 June 1975, in Part 1 Art. 17 declares that the ownership is under protection of the state, however, the rights arising from it cannot be exercised so as to damage common interests [23].

## CONCLUSIONS

The above-mentioned rights and duties testify that, first of all, Ukrainian people are independent and full subject of the ownership right of the above-mentioned objects. They shall, irrespective of other, have the possibility to exercise directly their competence in respect to possession, use and disposal of them. Government authorities and local self-government authorities just exercise rights of the owner on his/her behalf within the limits defined by the Constitution of Ukraine. But the fact that they exercise rights of the owner on his/her behalf means that they shall act exclusively in interests of Ukrainian people, for their well-being and welfare.

Besides, one shall pay attention to the fact that Part 1 Art. 13 of the Constitution of Ukraine envisages that not the state or territorial communities exercise rights of the owner, but only government authorities and local self-government, so, there is no replacement of the subject. This formulation detaches by the subject element the ownership right of Ukrainian people, from the ownership right of the state and territorial communities.

This gives the grounds to affirm the ownership right of Ukrainian people and the right of the state or municipal property shall not be identified, as otherwise the fundamental theory of the ownership right, according to which the ownership right is not limited to powers of the owner, is ignored. That is, the ownership right of Ukrainian people means that even if their powers will be limited, transferred or delegated to other subjects, the ownership right shall not be terminated on the condition of main-

taining the legal status of the owner. As soon as limitations on powers of the owner will be eliminated – this right shall be restored in full. And mentioning the property right of Ukrainian people in Section I "General provisions" of the Constitution of Ukraine preconditions the primary nature, consistence and integrity of this right.

Taking into account all the said above, there are sufficient grounds to affirm that in the Civil Code of Ukraine No 435-IV of January 16, 2003 it is expedient to: 1) restore the notion of national wealth as the exclusive ownership right of Ukrainian people; 2) envisage the unified list of objects, which are the property of Ukrainian people; 3) define meaning of each object for Ukrainian people and group them depending on that; 4) create the mechanism of exercising the ownership right of Ukrainian people. First of all, the latter means that: a) a clear definition of those objects of the ownership right of Ukrainian people, which are exercised in direct form, that is by performing independent actions by Ukrainian people related to realization of competence in respect to possession, use and disposal of natural resources. In the direct form of realization of competences by Ukrainian people, the owner shall be envisaged in Laws on the All-Ukrainian Referendum, public discussions, polls and other forms of direct democracy; b) a clear definition of those objects of the ownership right of Ukrainian people, which are exercised in the indirect form, that is by means of performing actions by government authorities and local self-government aimed at ensuring realization of competences of Ukrainian people in respect to possession, use and disposal of natural resources. With that, it is important that legislation contains an exact list of powers exercisable by government authorities and local self-government on behalf of Ukrainian people when disposing of natural resources belonging to them under the property right.

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# МІЖНАРОДНИЙ ПАКТ ООН ПРО ГРОМАДЯНСЬКІ ТА ПОЛІТИЧНІ ПРАВА: МЕХАНІЗМИ ВІДСТУПУ ВІД ЗОБОВ'ЯЗАНЬ

Анотація. *Стаття досліджує нормативний та сутнісний зміст відступу (дерогації) держав від зобов'язань згідно з нормами Міжнародного пакту ООН про громадянські та політичні права. Проаналізовано норми Міжнародного пакту ООН про громадянські та політичні права та інших міжнародних договірних актів, які містять гуманітарні та правозахисні зобов'язання щодо фізичних осіб. Досліджено відповідну практику Ради ООН з прав людини, Комісії ООН з прав людини, її підкомісії, Комітету ООН з прав людини, доктринальних джерел. Показано формування специфічного інституту відступу держав від власних зобов'язань у сфері громадянських та політичних прав. Доведено фактичні відмінності між відступом від зобов'язань та механізмами обмежень прав. Зроблено висновок, що відступ від зобов'язань є юридично можливим тільки у повній відповідності до міжнародних стандартів, що регулюють підстави, форми та процедуру такого відступу*.

Ключові слова: дерогація, гострота становища, життя нації, надзвичайний стан, права людини, обмеження прав, універсальні договори.

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# THE UN INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: MECHANISMS OF DEROGATION FROM COMMITMENTS

**Abstract**. *Article is aimed at the research of normative and substantive content of the derogation from States` obligations in compliance with norms of the International Covenant on Civil and Political Rights. Provisions of the Covenant and other universal international treaties that contains the humanitarian and human rights obligations relative to the persons was analyzed. The relevant practice of the UN Human Rights Council, of the UN Commission on Human Rights and its Sub-Commission, of the UN Human Rights Committee, as much as the doctrinal sources was researched. The formation of the specific institute of the derogation from the States` own treaty in the areas of civil and politic rights was demonstrated. The actual distinctions between the derogation and mechanisms of the limitations of rights are proved. It is concluded that derogation is legally possible only in full compliance with international standards governing the grounds, forms and procedure for derogation*.

**Keywords***:* derogation, exigencies of the situation, life of the nation, public emergency, human rights, limitation of rights, universal treaties.

## INTRODUCTION

Issues on states derogation from their obligations in the field of certain rights granted to individuals in the twentieth century have been embodied into several universal and regional contractual mechanisms. One of the most important and most practically developed procedures in this field is states derogation from their obligations under the norms of the UN International Covenant on Civil and Political Rights, 1966 (hereinafter – the "ICCPR"). The issues mentioned are still poorly studied in the modern doctrine of the international law, and not only in the domestic law. It is possible to point out that the relevant issue was mentioned in the works of A. Kh. Abashidze, M. M. Antonovych, O. S. Hondarenko. M. Y. Hrenza, A. De Zaias, A. Yu. Zamula, A. Ye. Zubareva, V. V. Mytsyk, G. J. Galdi, T. Opsal, T. L. Syroyid, Kh. J. Stainer, J. A. Walkate, V. Y. Ukhov, N. Y. Faiada, D. D. Fisher, M. G. Schmidt, I. D. Yahofarova and others [1, p. 24]. Until now, no generalization of the relevant derogation mechanisms was made, therefore the relevant analysis is deemed to be relevant.

The main subject of the UN International Covenant on Civil and Political Rights is human rights and freedoms protection. Human rights are an integral part of the international law, and international observance control is conducted [2; 3; 4]. In each country, international control depends on the state of fundamental human rights observance.

The means of international control, which depend on their observance of the fundamental human rights, include: a) international law acts containing the rules for activities formulate the rights and obligations of the relevant subjects (conventions, covenants, agreements, contracts), as well as international documents, which do not usually contain the norms and rules of conduct, do not directly formulate the rights and obligations (declarations, statements, memorandums); b) international bodies for monitoring, control over fundamental human rights observance (commissions, committees) and protecting these rights (courts, tribunals). Human rights recognition by the state by consolidating them in the constitution and other legislative acts shall be considered only as a first step towards their adoption and implementation. The scope of human rights consolidated in the international human rights documents serves as an example to which all peoples and nations shall strive [5; 6]. International human rights standards are the ground for intergovernmental cooperation on the issues of their provision, and for activities of special international bodies involved in monitoring of human rights observance and protection

Therefore, the goal of this article is to systematically characterize the regulatory and substantive content of derogation mechanism as states derogation from their own obligations under the norms of the ICCPR. This goal settlement should be based both on analysis of the norms, institutions and mechanisms of the ICCPR and other international treaties that contain humanitarian and human rights obligations for individuals, studied and correlated practices of the UN Human Rights Council, the UN

Commission on Human Rights, its sub-commission, the UN Committee on Human Rights (hereinafter - the CPL), and doctrinal sources.

## 1. MATERIALS AND METHODS

In the course of the study, a number of general theoretical and special-scientific methods of cognition and approaches to study of the international legal status of the UN Committee on Human Rights were applied. The systemic-functional method used in the work allowed to determine specific features of the Syracuse principles that define understanding of the terms "public order" and "national security".

The method of analysis revealed that the normative basis of the thesis research is multilateral international treaties, the subject of which is human rights protection, in particular, the International Covenant on Civil and Political Rights dated 1966 and its Optional Protocols, the decisions of the UN Committee on Human Rights, bodies of international justice and acts of international organizations in this regard, as well as the Constitution and legislation of Ukraine, which determine the basic principles and specific features of the state's participation in the international cooperation targeted at human rights protection, in particular, in activities of the Committee.

General theoretical methods allowed to determine that each state participating in the International Covenant on Civil and Political Rights is committed to:

– provide an effective remedy to any person, even if this violation was committed by the persons acting as official persons;

– ensure that the right to legal protection for any person was established by the competent judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the state and develop the possibilities of judicial protection.

The comparative method allowed to assess Committee`s effectiveness by comparing existing human rights bodies. Special legal method contributed to the definition of the Committee legal nature and the study of its law enforcement practice. Its essence is to describe the phenomena of state-legal reality through legal terminology and to clarify activities of social subjects in terms of legal behavioural models, from legal or illegal standpoint, mandatory or possible. The description allows to reconstruct the facts and phenomena of legal validity, their legal assessment, to identify tendencies and regularities of legal practice and to improve legal terminology.

## 2. RESULTS AND DISCUSSION

### *2.1. Features of the UN international covenant on civil and political rights in Ukraine*

According to art. 4 of the ICCPR during a state of emergency in the state during which the life of the nation is threatened and the occurrence of which is officially announced, the State-Members of the ICCPR may take measures to derogate from their obligations under the ICCPR only to the extent dictated by the severity of the situation, provided that such measures are not incompatible with their other obliga-

tions under the international law and do not cause discrimination solely on the basis of race, colour, skin, sex, language, religion or social origin.

The specified clause of part 1 of art. 4 of the ICCPR cannot be the ground for any derogations from articles 6, 7, 8 (clauses 1 and 2), 11, 15, 16 and 18, where any state participating in the ICCPR and using the right of derogation shall immediately inform the other States participating in the ICCPR, through the Secretary-General of the United Nations, of the situation from which it has derogated and of the reasons that led to such a decision. The state shall also notify by the same way the date when the state terminates such derogation [7; 8]. Based on this norm, modern researchers distribute the rights protected by the Covenant into two groups. This applies to the rights "for which no restrictions are possible" and rights that may be subject to restrictions [1, p. 37, 38]. However, this approach has some gaols that highlight the difference between state derogation from its contractual obligations and the possibility to limit rights guaranteed by the ICCPR in certain circumstances.

So, for example, the ICCPR indeed prohibits derogation from freedom of thought, conscience and religion under extraordinary circumstances, but these rights can objectively be the subject of legislative restrictions, according to part 3 of art. 18 of the ICCPR. On the contrary, propaganda of the war and speeches in favour of national, racial or religious hatred, incitement to discrimination, hostility or violence are absolutely prohibited by art. 20 of the ICCPR, but at the same time art. 4 allows state derogation from these human rights obligations.

It should be added that the General Remarks, in order to interpret norms of art. 4 of the ICCPR, have been discussed at the meetings of the CPL for a long time. In this context, it is worth studying discussion on their project at the 1797th meeting of the UN CPL on October 27, 1999, as reflected in the UN CPL document CCPR/C/66/R.8. This discussion was moderated by S. M. Kwigora, a lawyer from Chile who had previously headed the Inter-American Court of Human Rights, was based on the report submitted by the Special Rapporteur, Martin Scheinin (Finland). According to M. Scheinin, the relevant project had to solve the issue of the "grey zone" that appeared between the ICCPR norms application and requirements of international humanitarian law. The Special Rapporteur called on the UN CPL to be more active in analysing the fact of derogation and analysed the situations where derogation from the obligations is not permissible in particular and not stipulated in art. 4 of the ICCPR. The Special Rapporteur raised the issue of the need to develop model national emergency legislation and to analyse the role of non-state structures in the context of derogation [9].

It is important to note ideas of Abdelfattah Amor, member of UN CPL from Tunisia, who pointed to the dual purpose of art. 4 of the ICCPR: to protect fundamental human rights and, at the same time, to protect the life of the nation. He pointed out that analysis of the legal form of emergency in in the states is not sufficient to understand this dual purpose, since in many countries such a situation has been a form to legalize systemic human rights violations for decades. He pointed out that in many

countries of Asia and Africa, "the existence of the nation is more theoretical than real" and in these countries "the life of the nation" is a form of not fully voluntary coexistence of communities with vivid differences in economy, ethnic and religious traits; moreover, very often the nation formation is hindered by external forces. Under such conditions A. Amor suggested an idea of inadmissibility to introduce foreign domination or anarchy on human rights issues, the inadmissibility to abuse derogation mechanisms to restrict the right of peoples to self-determination [9].

Similar ideas were also suggested by the representative from India in the UN CLP P. N. Bhagwati when evaluating political life in post-colonial countries; in addition, he pointed out to the need to clear understand derogation category, as used in art. 4 of the ICCPR term, but at the same time noted the flexibility of the category of threats to the life of the nation, and these theses were also shared by the member of the UN CLP from Poland R. Verushevski. Expert from Argentina to the UN CLP I. S. Yrigoyen, by agreeing with the most opinions on the draft Final Remarks, recognized the importance of inadmissibility of derogation under art. 4 of the ICCPR from the obligations under the rights recognized as absolute by other universal and regional international agreements [9].

General Comment No. 29, significant among the UN CLP acts relevant today in terms of states derogation from their obligations, was reviewed on the basis of above studied discussion concerning deviations from Covenant during the state of emergency (article 4), approved at the 1950th meeting of the Committee on July 24, 2001, document HRI/GEN/1/Rev.5/Add.1 (hereinafter - the Comment No. 29). This Comment was approved replacing similar General Comment No. 5 approved at the thirteenth session of the UN CLP in 1981. [9].

Comment No. 29 notes that the measures taken by the countries to derogate from the norms adopted in the ICCPR should be of an exceptional and temporary nature, and two key conditions must be met by the state before their application. They include the very fact of the situation equivalent to the state of emergency under which "the life of the nation is under threat", and the fact of official announcement by the member state of the state of emergency with exceptional meaning "to maintain the principles of the rule of law and dominion in a period when most required". After all, as stated in the Comment No. 29, by announcing the state of emergency with consequences of derogation, the states shall comply with the frameworks of their own constitutional and other legislative requirements regarding the state of emergency. At the same time, the UN CLP should control these national acts observance as provided in art. 4 of the ICCPR, and their application in its development; to this end, the states should include relevant situations into national reports to the UN CLP in accordance with art. 40 of the ICCPR in the form of "sufficient and accurate information on ... legislation and practice" [10].

It is interesting art. 3 of the Comment No. 29 which states the key character of the criterion "the threat to the life of the nation" during any disturbances or disasters

by their qualification under part 1 of art. 4 of the ICCPR. The role of the international humanitarian law regulations to be applied under armed conflict of an international or non-international nature in addition to provisions of art. 4 and cl. 1 of art. 5 of the ICCPR to prevent abuse of extraordinary powers, refers to the application of art. 4 only under conditions of "a threat to the life of the nation", even in the armed conflict. Moreover, it appears from art. 3 of the Comment No. 29 that, in the armed conflict, to prove the situation to the UN CLP of the possibility to apply art. 4 of the ICCPR is easier for the state than with the absence of such conflict [10].

Comment No. 29 refers to a number of individual Final Comments on the State Reports to the UN CLP, in which the UN CLP has expressed its concern over the state of affairs in a number of states that have made derogation from the ICCPR norms without complying with art. 4 in the abovementioned context or applying legislation that does not comply with art. 4 of the ICCPR [10].

Article 4 of the Comment No. 29 specifies that measures under art. 4 of the ICCPR should only be applied if it was "stipulated by the severity of the situation", in particular in terms of duration, territorial coverage and material scope of the state of emergency and measures within derogation. It specifically states the difference between the derogation under art. 4 and rights restrictions that are allowed even under normal conditions by a number of ICCPR provisions, but the importance of proportionality and coherence of both derogation and rights restrictions is stated, as amongst others it was stated in the Final Comments of the UN CLP to Israel in 1998 CCPR/C/79/Add.93. In addition, art. 5 of the Comment No. 29 states that the "severity of the situation" should be conditioned not only by the fact of the state of emergency announced, but also by the adoption of specific measures under "natural disaster, mass disorder with expressions of violence or a major industrial accident". After all, for example, it is added that the possibility of some rights restriction defined in ICCPR, such as freedom of movement or assembly in such situations is "generally sufficient" and does not require derogation of the states under art. 4 of the Covenant [10].

In addition, art. 6 of the Comment No. 29 states that the list of the regulations in part 2 of art. 4 of the ICCPR, not covered by the possibility of derogation, "does not mean that it is permitted to arbitrarily derogate from other articles of the Covenant, even if the life of the nation is under threat", at the same time it is added in art. 7 of this document by the UN CLP that "the qualification of any provision of the Covenant which does not provide for a derogation does not mean the impossibility of any reasonable restrictions", with the reference to art. 18 of the ICCPR, from the regulations of which one cannot derogate under art. 4, but the rights guaranteed are subject to restrictions, with the reference to thirteen examples specified by the UN CLP in the Final Comments on the National Reports [10].

In addition, art. 8 of the Comment No. 29 investigated the issues of correlation of the possibility to derogate from the norms of art. 2, art. 3, part 1 of art. 14, part 4 of article 23, part 1 of article 24 of art. 25 of art. 26 of the ICCPR prohibiting dis-

crimination, and non-discriminatory application of the norms of part 1 of art. 4 of the Covenant. Moreover, art. 9 and art. 10 of these Comments specifically note the inadmissibility to derogate through the application of art. 4 of the ICCPR from the obligations under international humanitarian law or from other international contractual obligations. As examples in the notes to Comment No. 29, the United Nations Convention on the Rights of Child dated November 20, 1989 was provided, which does not contain any clause on derogation, and more, contains the norm on its application in emergencies (art. 38) [11]. Also above examples specify also doctrinal sources and resolutions of the international structures [10].

Among other things these are the reports on the minimum humanitarian standards to the Commission on Human Rights E/CN.4/1999/92, E/CN.4/2000/94 and E/CN.4/2001/91, the Paris Minimum Human Rights Standards during the state of emergency (1984), the report of the Special Rapporteur, Mr Leandro Despoui, on the issue of human rights and emergency situations E/CN.4/Sub.2/1996/19, E/CN.4/Sub.2/1997/19, the Turku Declaration on the Minimum Humanitarian Standards included in the report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/1995/116 [12] and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights concerning restrictions and derogations [10].

It should be noted that the list of the ICCPR regulations in its art. 4, from which derogation is impossible, art. 11 of the Comment No. 29 interprete, among other things, as "the recognition of imperative nature of some of the fundamental rights enshrined in the Covenant in a contractual form", and in art. 12 of the Comment it correlates with the crimes against humanity. Moreover, in art. 13 of the Comment No. 29 it is specifically stated the inadmissibility of derogation on human behaviour and respect for human dignity (in spite of no relevant art. 10 of the ICCPR in the list of the regulations from which derogation is impossible), holding of hostages, kidnapping or secret detention, human rights protection of the persons belonging to minorities, deportation or forced displacement of the population (with the reference to the Rome Statute of the International Criminal Court) and war propaganda [10]

Also it is stated in art. 14-17 of the Comment No. 29 about the right protection guarantees by applying art. 4 of the ICCPR, stressing on impossibility to deviate during the derogation from the remedies, which is a "contractual obligation that follows from the Covenant as a whole", with the statement that it is impossible to cancel, in the framework of derogation of judicial rights protection, from which derogation is impossible, and recognizing the need to comply with the international notification regime during derogation [10].

The theses provided in the Comment No. 29 are supported by the provisions of the issues submitted by the UN CLP to the states according to the results of their reports. IT is supported by the List of Issues of the UN CLP on the third regular report of Syria dated April 28, 2005. CCPR/C/SYR/2004/3 (art. 6 "Emergency situation

under art. 4") [13], in the List of Issues of the UN CLP on August 13, 2004 CCPR/C/82/L/ALB on the initial report of Albania on "Derogation and counteraction to terrorism, art. 4" [14], in the List of Issues of the UN CLP on September 20, 2001 CCPR/C/73/L/UK on the fifth regular report of Great Britain in the part "Derogation, art. 4" [15].

It should be added that the relevant activities of the UN CLP on checking the state of compliance with the derogation conditions are reflected, among other things, in Consolidated Guideline on State Reports under the ICCPR, approved by the UN Human Rights Council at its 70th session on February 26, 2001 CCPR/C/66/GUI/Rev.2, according to part C.3 of which the period, grounds, consequences and procedures for derogation state introduction and termination under art. 4 of the ICCPR should be investigated by the UN CLP in full for each article of the Covenant from which the derogation was made. Similar provision was also in part C.3 of the previous Consolidated Guideline dated September 29, 1999. CCPR/C/66/GUI [16].

It is also worth pointing out to the separate provisions of the General Comment No. 31 of the UN CLP on the nature of general contractual obligations imposed on the member states by the ICCPR dated March 29, 2004. In particular, they state that attention of the states to a possible violation of the ICCPR regulations "should be treated as a reflection of the general legitimate interest, but not as a hostile act" [17], which can be presumed also in the situation of derogation.

2.2. Specific features of Siracusa Principles

Siracusa Principles interpreting limitations and derogations is a doctrinal act significant among the issues highlighted above from provisions of the ICCPR approved at the conference of human rights scientists and experts held from April 30 to May 4, 1984 under the auspices of the International Commission of Lawyers, the International Penal Law Association, the Urban Morgan Institute for Human Rights, etc. The Siracusa Principles were submitted to the United Nations Commission on Human Rights in the Netherlands (UN document E/CN.4/1985/4) and are widely used by international law doctrine and practice [18].

The title – Siracusa Principles - can evidence that they cover situations both limitations and derogations from the regulations of the ICCPR, clarifying the relevant provisions of the Covenant [18]. The issue of derogation from the human rights in connection with the state of emergency is highlighted in Part II of the Siracusa Principles. So, according to art. 39 of this document, the Member State of the ICCPR may take measures derogating from its obligations only in cases of exceptional and real or imminent threat to the life of the nation. In this regulation of Siracusa Principles, the threat to the life of the nation is interpreted as the threat affecting the entire population and all or part of the state, and also constitutes threat to the physical health of the population, political independence or territorial integrity of the state, or, for sufficient functioning of the institutions, required to ensure and protect the rights

recognized by the ICCPR. Moreover, in art. 40 and 41 of the Siracusa Principles it is added that international conflicts or disorder that do not cause a serious and inevitable threat to the life of the nation cannot be the ground for derogation from provisions of art. 4 of the ICCPR, and that "economic complexities cannot be the ground for derogation from the rights" in general [18].

According to the regulations of art. 42-50 of the Siracusa Rules the procedure for derogation and termination is thoroughly regulated. In particular, it is emphasized that the Member State of the ICCPR, which derogates from provisions of the ICCPR, shall officially declare the state of emergency due to the threat to the life of the nation, under which procedures for the state of emergency declaration should be provided for in advance [18]. It is interesting, that although the ICCPR, the General Comment No. 29 and the Siracusa Principles consistently specify the possibility of derogation not in any state of emergency, but solely in case of threat to the life of the nation, the description of such threat (threats), its classification or definition in the legislation on the state of emergency is not required from the states by the specified sources.

In the regulations of articles 51-57 of the Siracusa Principles the requirement to proportionality in derogation, introduced in art. 4 of the ICCPR, is thoroughly interpreted, namely, the possibility of derogation from the obligations "only to the extent where it is required due to exigencies of the situation". Such "exigencies of the situation" are explained in the Principles dated 1984 by the fact that all derogation measures should be taken solely due to sever need to eliminate the threat to the life of the nation, should be introduced for the term and in the territory where it is severely needed; these measures should be proportionate to the nature and extent of the threat to the life of the nation. Moreover, the competent public authorities have to determine the need for each derogation proposed or accepted to eliminate a particular threat posed by the state of emergency [18].

Regulation to article 53 of the Siracusa Rules is also significant, according to which derogation does not correspond to the "exigencies of the situation", if "usual restriction of rights" is sufficient to eliminate the threat to the life of the nation as provided for in certain provisions of the ICCPR. In this case, both objective assessment of exigencies of the situation and derogation direction to eliminate urgent, obvious, actual or inevitable threat are needed; so derogation cannot be applied only due to potential events expectation. "The possibility of quick and periodic, independent provisions review by the legislators on the need for derogation", and no state power monopoly for the state of "exigencies of the situation" determination should be ensured at the constitutional and legislative levels. In addition, for the persons who consider themselves victims of derogation, which was not allegedly caused by the "exigencies of the situation", the state should provide for effective remedies [18].

In addition to above regulations, which were clearly concluded by the authors of the Siracusa Principles from provisions of the ICCPR and practical experience avail-

able as of 1984 in terms of the Covenant application, provisions of articles 61-70 of these Principles are based on the broader principles, since derogation "occurs not in legal vacuum" and "several general principles of law are applied" to it. In particular, this refers to the requirement for objective and fair analysis of the situation, the need for a restrictive interpretation of the ICCPR regulations, allowing derogation, and the need to maximum preserve the rule of law during the state of emergency with a legitimate deviation from it only in extremely limited cases. It is stated that the assessment of the legitimate nature of derogation shall be made taking into account part 2 of art. 29 of the Universal Declaration of Human Rights, the Geneva Conventions, 1949 and the ILO Conventions [18].

The author focuses on the rules of law of Geneva concerning the rights of the individual for a fair trial and freedom of assembly, the right for equal working conditions, the right for trade unions and workers, the prohibition of the slave trade, and the limitation of forced labor consolidated in the ILO core conventions, the derogation from which is unacceptable within the period of any state of emergency. Also, based on the international customary law, the authors of the Siracusa Principles indicate that under no circumstances no state, even that one which is a party to the ICCPR, shall suspend or violate such fundamental rights as: the right to life, the right to inadmissibility of the criminal law retroactivity, the right to freedom from torture, cruel or inhuman treatment or punishment, medical or scientific experiments without free consent; the right to freedom from slavery or slave trade and servitude [18].

Siracusa Principles, 1984 describe in details aspects of derogation from the guaranteed by art. 9 and art. 14 of the ICCPR right to freedom from arbitrary detention and arrest and the right to fair and public hearing of a criminal case in court. This is substantiated by the fact that it is "practically impossible to imagine the state of emergency during which there was a strict need to refuse any individual in the right to respect for dignity inherent to the human personality". Separately, the Siracusa Principles emphasize the importance of presumption of innocence and other guarantees for any defendant under derogation, such as clear language when informing about the content of verdict, sufficient time and possibility to prepare for defence, interaction with freely chosen defence lawyer, the right to a free defence lawyer, court in the presence of defence lawyer, freedom to testify against themselves, the right to challenge and question the witnesses, the right to appeal, the right to publicity of the case in all and any cases, where possible, and inadmissibility of repeated punishment [18].

It is also necessary to analyse and make recommendations to CLP and other bodies of the United Nations that are contained in articles 71-76 of the Siracusa Principles. In particular, it is stated that UN CLP in exercising its powers for review, reporting and comments on the report of States "may and is obliged to supervise over the law and practice of the Member States for compliance with article 4" of the ICCPR, and

to determine this issue "when considering communications from the States and individuals within its competence". In order to determine whether the state performing derogation has complied with provisions of art. 4, members of the UN CLP can and are obliged to consider reliable in their opinion information from other intergovernmental bodies, non-governmental organizations and individuals. Moreover, the UN CLP received recommendation to develop a special procedure for additional reports for the states that reported on the derogation, as well as to develop the procedures for communications review from the individuals, which would allow to hear the authors and witnesses orally, and to accept the practice of visits to the states that are accused of violating ICCPR provisions [18]. It should be added that these proposals of Siracusa Principles made by the UN CLP were not taken into account in the following, which affects the analysis of the Comment No. 29 and the practice of UN CLP at the end of the twentieth and early twenty-first centuries.

## CONCLUSIONS

So, it can be concluded about special mechanism formed in the international law for derogation of the states from their own commitments in the field of civil and political human rights, established by the ICCPR and developed in the decisions and comments of the UN CLP, in the recommendation acts of the UN structures and in doctrinal documents. The main features of this mechanism lay in the difference, together with the mutual dependence from the mechanism of limitation of the relevant rights, its association with collective rights through the use of the "life of the nation" category, activity taking into account the institutions of imperative norms of the international law, and mechanisms of international humanitarian and international labor law. The application of such mechanism by the states is possible but taking into account the relevant universal international standards concerning the grounds, forms and procedures for derogation and communications about it and its use imposes additional positive obligations on the state. The correlation between derogation according to the ICCPR and the procedures for the states derogation from commitments under other universal human rights treaties and regional human rights treaties should be subject to additional scientific research.

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# ОКРЕМІ ПИТАННЯ ЗАСТОСУВАННЯ ЦИВІЛЬНО-ПРАВОВОЇ ВІДПОВІДАЛЬНОСТІ У СФЕРІ ПРОФЕСІЙНОГО ФУТБОЛУ

**Анотація.** *Стаття присвячена особливостям застосування санкцій в професійному футболі та їх правовій природі. Ефективний захист прав та інтересів учасників спортивних змагань з футболу неможливий без застосування видів юридичної відповідальності. У спортивній сфері до них відносяться: загальну (цивільно-правова, адміністративна, кримінальна та дисциплінарна) і спеціальну спортивну відповідальність. Кожна з них має свої певні особливості, пов'язані зі специфікою спортивної сфери. Автором вивчені питання цивільно-правової природи окремих видів санкцій, передбачених регламентними і дисциплінарними документами відповідних футбольних організацій. У професійному футболі переважну роль відіграють заходи цивільно-правової відповідальності, до яких відносяться, передбачені дисциплінарними актами, санкції. Наприклад, обов'язковий грошовий внесок у національній грошовій одиниці. Автор вважає, що невірно ототожнювати зазначену санкцію зі штрафом в традиційно розумінні цивільно-правого законодавства. Крім того, суспільні відносини, що виникають у сфері професійного футболу з приводу застосування відповідальності, засновані на добровільному виконанні порушниками покладених на них санкцій. На думку автора, така риса притаманна цивільно-правової відповідальності.*

**Ключові слова***: цивільно-правова відповідальність, спортивні правовідносини, об'єктивна відповідальність, відповідальність у професійному футболі.*

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# SOME ISSUES RELATED TO THE APPLICABILITY THE CIVIL LIABILITY IN THE ARENA OF PROFESSIONAL FOOTBALL

**Abstract.** *This article is devoted to the features of using the types of sanctions in professional football and their legal nature. Effective protection the rights and interests of participants in footballs sports competitions is impossible without the application of legal liability. In the sports field, these include: general (civil, administrative, criminal and disciplinary) and special sports*

*liability. Each of them has its own specific features related to the specifics of the sports field. The author has studied the issues of the civil legal nature of certain types of sanctions provided for by the regulatory and disciplinary documents of the respective football organizations. In professional football, civil liability measures play the predominant role, which include sanctions provided for by disciplinary acts. For example, the mandatory cash contribution in the national currency. The author believes that it is wrong to identify the said sanction with a fine in the traditional sense of civil law legislation. In addition, public relations arising in the field of professional football about the use of responsibility, based on the voluntary execution of the sanctions taken against them by offenders. According to the author, this feature is inherent in civil liability.*

**Keywords:** civil liability, sports legal relations, objective responsibility, responsibility in professional football.

## INTRODUCTION

Resolving sports disputes in the professional football requires special attention, as on the legislative level regulation of methods and forms of protection of rights of participants of such disputes is quite weak. Moreover, the absence of a single regulatory act, which would contain procedural requirements regarding specific features of consideration of sports disputes in the individual and team sports, does not give the opportunity to participants of sports contests exercise their rights effectively and in full scope.

Rules of the game, which provide for conditions of holding football matches, exist to unify requirements to participants of such matches and impel them to behave in accordance with law. Imposing sanctions is one of the tools aimed at creating conditions of efficient adherence to rules of the football game. The procedure of imposing sanctions aimed at punishment of those participants of matches, who break the rule, has its specifics related to peculiar features of social relations arising in the field of professional football.

The sports field provides for general types of legal liability (civil and legal, administrative, criminal and disciplinary) and special sports liability. Each of them has its specific features related to the specifics of the sports field. The efficient development of the professional sports is not possible without adequate mechanisms of compensation for damages and receiving compensations by participants of sports competitions. The sports results shall not depend on unlawful conduct of their participants, and interests of the organizers of such competitions shall be under higher protection.

Civil and legal liability plays an important role in team sports, particularly, in the professional football. It seems that application is excluded when participants adhere to the rules of football matches as ensuing of adverse consequences is related to non-meeting requirements of regulatory and statutory documents of the respective football organizations.

## 1. LITERATURE REVIEW

At present in the legal literature, there are no scientific developments and complex approach to issues of imposing legal liability when resolving sports disputes. Certain scholars consider issues of legal nature of liability in sports, specific features of certain types of such liability, imposing sanctions and compensation for damages depending on the form of guilt of participants of sports competitions. Specifically, in opinion of A. M. Aparov, civil and legal liability in the field of sports has corporate nature [1, p. 346]. He sees sports sanctions as those of civil and legal nature and relating to the clearly defined circle of persons, who are members of the corporation (sports organization). A. M. Aparov emphasizes that the person (the participant of sports relations) joining the corporation performs the act of accession actually concluding an accession contract and assuming rights and obligations provided for a member of a certain corporation (sports organization). For instance, an accession contract is obtaining the respective license by a football club, which grants the right to take part in football matches [1, p. 346–347].

G. Yu. Bordyugova considers specific features of the objective liability in sport (verbatium – "strict liability"), where guilt is not the grounds of its arising and there is no need in it [2, p. 28]. In her opinion, the objective sports liability includes elements of disciplinary liability and civil liability. As an example she refers to the norm that exists in the professional football, according to which if fans of the team violate regulations of disciplinary acts of the Federation of Football of Ukraine (hereinafter – the FFU), then disciplinary sanctions shall be imposed on the club [2, p. 28]. G. Yu. Bordyugova states that such imposing of sanctions has the preventive effect and aims not to punish the football club, which did not make any illegal actions, but impose on the club liability for actions of its fans, who committed violation during a sport competition.

M. A. Tikhonova, considering the issue of exercising the right to judicial protection of participants of sports competitions, points that certain regulatory requirements of sport organizations infringe rights of sportsmen and other people entering into relationships in the field of sports. Particularly, this is about prohibition to participants of professional football competitions to refer to courts of general jurisdiction to resolve disputes arising among them. In opinion of M. A. Tikhonova, such norm limits the right of Ukrainian sports organizations and their members (participants) to judicial protection [3, c. 79].

M. O. Tkalich and G,O, Bondar study the problem of compensation for damages in sport and suggest that damage caused during any sports competitions shall be subject to compensation depending on the form of guilt. Particularly, "if damage was caused purposefully, then compensation for damages shall be paid on general grounds. If damage was caused accidentally, then the sportsman and his club shall be exempted from the obligation of compensating for damages taking into account the higher level of non-safety of sports activity as such" [4, p. 106].

## 2. MATERIALS AND METHODS

*2.1 Definition of legal nature of certain sanctions in professional football*

In the course of carrying out the study the formal logical method was applied, which allowed analyzing specific features of regulation of general and sports sanctions in football norms of the current laws of Ukraine and corporate norms of the respective sports organizations in the field of professional football. By means of the above-mentioned method analysis of provisions of civil law of Ukraine in respect to legal regulation of social relations in the field of professional football was carried out, particularly, application of civil and legal liability to relations, which are established during holding professional football competitions in Ukraine.

Application of the principle of compliance and determinism allowed analyzing the existing court practice regarding defining the legal nature of sports sanctions. It allowed to consider in the course of the study conclusions of courts in certain types of civil cases, and study judgments of courts of administrative jurisdiction and analyze them from the point of view of restoration of rights and interests of participants of professional football matches. The experience of application of legal norms in judicial practice allowed filling certain "gaps in law" at resolving issues of application of sanctions in the field of sports from the point of view of civil and legal regulation. The dialectical method allowed considering how resolving the problem of satisfying requirements of participants of sports competitions by means of lodging regress suits against fans has been formed in judicial practice.

*2.2 Defining the role of civil and legal liability when imposing certain types of sanctions in the field of professional football*

Along with application of the formal logical method, the author used a number of general scientific and special methods. Particularly, the systemic approach was applied for analysis of sources of civil law and sources of sports regulation of football. To this end, corporate acts of respective football organizations, which contain specific features of imposing liability in football for certain types of violations, were also analyzed.

The method of comparative and legal study of permits helped to establish the civil and legal nature of certain forms of liability in professional football and define a special role of civil and legal liability among other general types of liability. This approach allowed to articulate the compensatory functions of imposing certain types of sports and general sanctions in the field of professional football and gain the insight of specific features of imposing this type of civil and legal liability as compensation for damages. The latter type is aimed at restoration of the status of participants of professional football matches, and at compensations for damages borne by the organizers of respective competitions.

## 3. RESULTS AND DISCUSSION

On the legislative level there are no any special norms regulating the procedure of compensation for damages when holding professional football matches. According to Art. 54 of Law of Ukraine On physical culture and sport, civil and legal, disciplinary, administrative and criminal liability can be imposed on the persons found guilty of violating laws in the field of physical culture and sport [5]. Basically, the majority of relations established in the field of professional football falls under contractual regulation. Social relationships established in this field are based on principles of voluntary membership in national and international football organizations. Interaction between members and football organizations is exercised on the grounds of contractual and corporate regulation.

Imposing of liability in the field of professional football is effected on the basis of regulatory and statutory documents of the respective international and national sports organizations. Particularly, the basic international document, which regulates imposing of sanctions and legal liabilities in football is the Disciplinary Code of the International Federation of Football (hereinafter – the DCF). According to the content of its provisions, one can define that the Code regulates imposing of sanctions on participants of professional sports relations in the field of football. The DCF contains the list of basic sanctions, which are imposed, and conditions of imposing them.

Having analyzed provisions of the DCF concerning types of sanctions applicable in professional football, one can distinguish the following groups depending on the subject they are to be imposed on:

– general sanctions for individuals and legal entities. They include: warning; reprimand; penalty; returning awards won (Art. 11 of the DCF);

– special sanctions imposed on individuals only. They include: warning; expelling; match ban; prohibition on entering a changing room and / or sit out; prohibition on entering the stadium; prohibition to participate in any activity related to football (Art. 12 of the DCF);

– special sanctions imposed on legal entities only. They include: prohibition on transfers; playing a match without spectators; playing a match on neutral ground; prohibition on playing in the specific stadium; cancelling the result of a match; disqualification; awarding forfeit of a match; deduction of points; transferring to the lower division (Art. 13 of the DCF) [6].

The grounds and forms of liability in professional football in Ukraine are regulated by Disciplinary rules of the FFU, the basic regulatory document, which contains the list and specific features of imposing general and sports sanctions on participants of football matches, as well as certain types of legal liability. Civil and legal grounds take a special place as by its legal nature the majority of sports sanctions in the abovementioned documents are of private legal nature.

Disciplinary rules of the FFU include:

– material and legal and formal regulations, which pre-condition imposing disciplinary sanctions for violation of norms of statutory and regulatory documents of the FFU No

– defining and description of violations in the field of professional football;

– conditions of imposing sanctions;

– regulations on the structure and actions of disciplinary authorities;

– regulation of procedures which shall be completed by disciplinary authorities [7].

Groups of sanctions imposed on participants of football matches in Ukraine somewhat differ from the above-listed and envisaged norms of the DCF.

In accordance with regulations of Disciplinary rules of the FFU, sanctions can be divided to:

– disciplinary sanctions common for legal and other entities working in or involved in football. They include: warning; reprimand; mandatory monetary contribution in the national currency; deprive of the title and/or award;

– disciplinary sanctions imposed on individuals only. They include: warning; warning prior to, during and after a match, which is accompanies by brandishing the yellow card by the referee to the offender; forfeiture; excluding from participation in matches (competitions); prohibition on entering the dressing room and/or sit out; prohibition on entering the stadium when the team of the offender plays; prohibition on carrying out any activity related to football (administrative, sports and other);

– disciplinary sanctions imposed on legal entities only. They include: deprivation the club of the right to register with the FFU any new football players within the set period; playing a match without spectators; holding a match with partly closed sectors (tribunes); prohibition on using the stadium; cancelling the result of a match with further awarding forfeit of a match; expelling from participants of competitions; awarding forfeit of a match; reducing scores won; transferring to a lower league; deprivation of the status of a professional club; withdrawal of the certificate to the right to participate in competitions among teams from professional clubs [7].

Disciplinary sanctions in professional football constitute measures of disciplinary influence in the form of respective fines and penalties [7].

Imposing the above-mentioned sanctions shall occur within the framework of contractual relations arising between the above – mentioned participants of professional football matches. Individuals and legal entities, which aim to participate in football competitions in the specific season, shall enter into a civil and legal agreement with the organizer of competitions – the FFU. For instance, professional football clubs shall get re-qualified annually to be admitted to participation in competitions. They undertake to meet requirements of regulatory and statutory documents of the FFU, on the other hand. They get certain rights. Moreover, professional football clubs enter

a league (association) and/or another union of football clubs, who are collective members of the FFU.

As an example, we can consider provisions envisaged by the Rules of All-Ukrainian Football Competitions from among teams from clubs of the Association of Professional Football Clubs of Ukraine "Premier League" (hereinafter – the APFCU "Premier League") of 2018/2019 season (hereinafter – the Rules), according to which organization and holding competitions among teams of clubs of the APFCU "Premier League" is imposed on the APFCU "Premier League" according to the Agreement for organization and holding All-Ukrainian competitions among teams of clubs of the APFCU "Premier League" in the respective sports season, which shall be concluded between and by the Federation of Football of Ukraine (hereinafter – the FFU) and the APFCU "Premier League" (hereinafter – the Agreement) [8].

Considering civil and legal liability as a type of sanctions, one can divide civil and legal sanctions to measures of liability (compensation for damages, compensation for moral harm) and other sanctions, which cannot be considered as measures of civil liability (for instance, returning the property, which was purchased unlawfully) [9, p. 259]. Within this context we shall consider legal nature of such type of sanctions as "mandatory monetary contribution in the national currency" taking into account definition of such payments envisaged by the FIFA as "penalty" only. The possibility of imposing penalties in professional football is encouraged by international football organizations as one of the most effective means of influence in the present-day football context [10, p. 59–60].

According to provisions of the DCF, penalties are the type of sanctions: with that, national associations bear joint liability for penalties imposed on football players and official representatives of national teams. The same refers to clubs, more specifically – to their players and official representatives. When /if an individual leaves the club or association, it doesn't exempts them from their joint liability [6].

In disciplinary rules of the FFU instead of the word "penalty" the construction "mandatory monetary contribution in the national currency" is used. Using this construction is related to specifics of relations between participants of football matches, whom this type of sanctions can be imposed upon.

The construction "mandatory monetary contribution in the national currency" is applied to individuals and legal entities, which work or are involved in professional football.

Legal entities do include the following: association, league, institution, PCSS, regional federation – the collective member of the FFU, who organizes and holds football competitions or participates in them; professional football clubs; associations of professional football clubs [6].

According to provisions of the Statue of the All – Ukrainian Sports Social Organization "Federation of Football of Ukraine", leagues (associations) and/or other

unions of football clubs, having an intent to participate in competitions under the auspices of the FFU, UEFA or the FIFA can be collective members of the FFU [10].

Individuals do include: official persons (it means representatives, who perform official functions on behalf of legal entities, the FFU, FIFA and UEFA at the time of football events), fans, football players, trainers and other persons working or involved in football [6].

The sanction "mandatory monetary contribution in the national currency" is applied by the FFU bodies according to provisions of Disciplinary rules. The FFU, by its legal nature, is a non – commercial organization, which doesn't aim at obtaining profits . By its organizational and legal form the FFU is a public union [11].

The sanction "mandatory monetary contribution in the national currency" has certain specific features:

– it is applied to professional football clubs, whose teams show improper behavior in cases envisaged by Disciplinary rules of the FFU;

– it is applied to professional football clubs for coarse, inappropriate or groundless words of officials of the club towards referees and/or observers of the arbitration, director of the match, or the security officer of the FFU in respect to the match held or towards other officials of the FFU;

– it is applied to professional football clubs for non-meeting requirements of regulatory and statutory documents of the FFU, FIFA and UEFA;

– it is applied to individuals as an additional sanction. For instance, if an official of the professional club falsified documents with the purpose of using them in the activity related to football, he/she shall be subject to disciplinary sanction in the form of prohibition on carrying out any activity related to football for the period of at least 12 (twelve) months, and payment of mandatory monetary contribution in the amount starting from 50, 000 Hryvnias;

– it constitutes property liability (along with forfeit and fine) for breaking (non-fulfillment, delay in fulfillment, improper fulfillment) of a settlement agreement in cases considered by the FFU, if the parties have entered into such settlement agreement;

– it shall be paid jointly by legal entities and clubs for individuals, whom they have established relationships with. The fact of an individual leaving the organization shall not exempt the legal entity, club from their liability [6].

In our opinion it is not right to identify "mandatory monetary contribution in the national currency" with penalty as a type of civil and legal liability. Payments shall be made in fixed amounts to be defined depending on the type of the offense committed (for instance, failing to make a payment envisaged by rules of the competition, or perform settlements with officials of the match shall entail a fine in the amount of 2, 000 UAH for clubs of major leagues).

In the author's opinion, such sanction as mandatory monetary contribution, by its nature, is a forfeit to be defined in the fixed amount [10, p. 59–60].

Especially as the possibility of a public union (which the FFU is) to collect penalties from individuals and legal entities within the framework of contractual relations does not comply with regulations of civil laws. Collecting penalties for breaking an agreement is possible in the judicial procedure should the party to the agreement refuse to fulfill the assumed obligations. But in professional football there is prohibition on referring to courts of general jurisdiction for resolving sports disputes. Particularly, the Statue of the FIFA contains provisions saying that participants of sports relations in professional football shall undertake to refrain from resolving disputes arising among them in courts of general jurisdiction. National football associations include similar regulations to their regulatory and statutory documents and ensure adherence to them [12].

As a result, the FFU cannot apply the construction "penalty" in terms envisaged by the DCF, because it will be almost impossible to ensure imposing this type of sanctions without referring for judicial protection.

As was said above, professional football clubs are subject to sanctions for actions of their employees (particularly, for coarse, inappropriate or groundless words of officials of the club towards referees and/or observers of the arbitration, director of the match, or the security officer of the FFU in respect to the match held or towards other officials of the FFU).

According to provisions of the Civil Code of Ukraine (hereinafter – the CC of Ukraine) a legal entity shall bear liability for the damage caused by its employee during performing his/her duties [13]. To imposed civil and legal liability measures on a legal entity for actions of its employee, the following shall be available:

– general conditions of delict liability: unlawful conduct of an employee, damages caused, causal link and guilt;

– special conditions of the person, who caused the damage being in labor (working) relations with a legal entity, damages caused at the time of performing duties by the respective employee.

Responsibility for payment of the mandatory monetary contribution by football clubs for actions of their employees are regulated by provisions of Disciplinary rules of the FFU and norms of civil laws, as in this case requirements regarding payment of the mandatory contribution the FFU bodies set to the employer, which is the club. But this doesn't deprive professional football clubs of the right , after payment of the amount of the mandatory contribution set by disciplinary authorities in full, to advance to the employee the recourse claim for compensation of the damage caused to the club.

The specifics consists in the fact that at the moment of imposing the abovementioned sanction on the football club, the employee may not work already in the football club, however, the club still will be liable for actions of such an employee. Bodies of football justice connect liability of the football club with the moment, when an employee club failed to comply with requirements of regulatory and statutory

documents of the FFU [6]. With that, the football club shall be liable for actions of its employee irrespective of whether the latter works under the labor agreement or civil and legal agreement.

Another mandatory condition is failing to comply with requirements of regulatory documents the FFU by an employee during performing his / her duties. One can mention as an example cases, when the head coach of the football club offences the lead referee of the match using swear words.

Provisions on imposing certain types of disciplinary sanctions on football clubs and / or national associations for actions of fans shall be reviewed separately.

According to the general rule, the professional football club shall bear liability for actions of its fans. The scope of liability depends on the capacity in which the club configures itself at the time of holding the football match: the hosting club or the guest club. The hosting club, along with disciplinary liability, shall bear civil and legal, as well as criminal liability. This refers to the obligation of ensuring civil order, safety and complying with generally accepted rules of conduct by fans before, during and after the match in the stadium and the adjacent territory defined in the passport of the stadium [6]. The guest club shall bear liability for improper conduct of its fans; with that, it shall be obvious that misbehaving people are fans of this particular club. If the football match is on the neutral ground, then both professional clubs shall bear full liability for ensuring civil order, safety and complying with generally accepted rules of conduct by fans before, during and after the match in the stadium and the adjacent territory defined in the passport of the stadium [6].

In this case it refers to application of the principle of strict liability – the principle specified in the Principles of European Tort Law (PETL). Generally, it means that strict liability shall be imposed upon for causing damages as a result of carrying out activity that creates major hazard and all special aspects of such liability are envisaged by national laws and international treaties [14]. Actually, as a result of the influence of judicial practice of the Court of Arbitration for Sports (Lausanne), the principle of strict liability transformed in sport, as a result of which appeared the concept of imposing liability on people for actions of other people without existence of any guilt and/or causal link.

The liability of professional football clubs for actions of their fans by its legal nature is similar to the construction of civil legal liability without actual guilt. Issues of the possibility of existence of such liability are debatable in legal literature. Grounds for arising civil and legal liability shall be evidences of elements of an offence in actions of the respective persons, that is, the aggregate of the following elements: actual damages, unlawfulness, guilt and causal link between unlawful actions and adverse consequences. With that, for instance, special delicts may not contain all the components of the general one, however, the person who caused damages, or another person established by law, shall anyway bear liability. In opinion of certain scholars, cases of liability without guilt are varieties of special delicts [15, p. 9].

Imposition of the mandatory monetary contribution on clubs for actions of their fans is directed, first of all, at compensation for damages borne by the organizers of competitions. A vivid example of that burning fusees during the football match with further throwing them on the lawn of the stadium, which not only creates danger for participants of the sports competition, but also damages the football pitch.

The mechanism of bringing professional football clubs to liability in this case is envisaged by Disciplinary rules of the FFU. At present these issues are resolved by the disciplinary committee of the respective league, the member of which the football club is. After the respective resolution came into effect, the professional football club gets the right to refer to a court of general jurisdiction with a regress suit. Prohibition on referring to judicial authorities does not extend to these cases as spectators are not recognized as persons carrying out activity in the field of football or related to it. Moreover, analyzing the court practice one can come to the conclusion that professional football clubs in the majority of cases exercise their right to judicial protection. The chosen method of protection shall be compensation for material damages caused to the club by a fan.

Particularly, the resolution of the disciplinary committee ПЛ No 2 of 26.06.2012 (Cl.13.2) in the order of Clauses 3.1, 3.3 Art.11, Clauses 4, 6 ART.21 of the Rules of the All-Ukrainian Football Competitions among teams of clubs of the APFCU "Premier League" for 2012/2013 season imposed payment of the monetary contribution in the amount of 1,500 Hryvnias on the professional football club PJSC Football Club "Chornomorets" for the unauthorized appearance of the intruder in the play field of the stadium during the football match of 2012/2013 season "Chornomorets" (Odessa) – "Goverla" (Uzhgorod) [16].

PJSC Football Club "Chornomorets" fulfilled the above-mentioned resolution in full, after what it referred to the Primorskyi District Court of Odessa. By the resolution of 08.04.2013 claims of the club were satisfied. During consideration of the case, the court established the following grounds for applying the norms concerning collection of material damages:

– the guilt of the fan, who, disregarding the safety means available at the stadium, broke through the circle of stewards and security service overleaping the fence outlining the football pitch and ran to it, thus, having violated public order and rules of conduct in the stadium;

– the availability of the right of the plaintiff to refer to court, particularly, imposition on the football club by disciplinary authorities of sanctions consisting in payment of the monetary contribution in the amount of 1,500 UAH and the fact of payment of this amount in full by the club;

– causal link between actions of the fan and the fact of causing material damages to the club [17].

Substantiating reasons for the statement of claim to be satisfied, the court referred to the following norms:

– Art. 19 of Law of Ukraine "On specific features of ensuring civil order and public safety in view of preparation and holding football matches", according to which persons not meeting requirements of laws on ensuring civil order and public safety in view of preparation and holding football matches, shall bear civil and legal liability;

– Art. 192 of the CC of Ukraine, as monetary funds, which were paid to the football club, are classified as property;

– Art. 139 of the EC of Ukraine, according to which a company carrying out commercial activity uses the property, one of components of which is money;

– Art. 1191 of the CC of Ukraine, according to which the person, who compensated for damage caused by another person, shall have the right of recourse (regress) against the guilty person in the amount of the paid compensation, unless another amount has been established by law [17].

So, the Primorskyi District Court of Odessa has clearly defined that the fan caused the football club property damage, and in view of that the football club got the right to file the statement of claim as a recourse after fulfillment of the resolution of the disciplinary body.

With that, at the time of consideration, the fan gave reasons for the need to refuse in satisfaction of the statement of claim saying that bodies of delivery of football justice, according to Disciplinary rules of the FFU, should have imposed the penalty on him directly. The court had a deep insight into the nature of legal relations between participants of the football match in this case.

Particularly, the court established as follows:

– bodies of delivering football justice have the right to impose sanctions only on the persons involved or working in football. Fans do not fall under this category, that is why regulatory and disciplinary documents of the FFU and the Premier League of Ukraine state that it is the football club, who bears liability for conduct of its fans during matches in the stadium irrespective of guilt/ absence of guilt of the football club [17];

– regulatory and disciplinary norms of the FFU, UEFA and FIFA for subjects of football establish respective rules regarding protection of their rights and lawful interests in disputes arising between subjects of football, which fans do not belong to. That is why neither the fan as the person, who is not the subject of football, can file the statement of claim to the authorities of delivering football justice, nor the authorities of delivering football justice can bring the fan to any liability for his/her unlawful actions as the authorities of delivering football justice do not have respective powers, nor the football club refer to the authorities of delivering football justice with any claims towards the fan, particularly, regarding compensation for damages caused by unlawful actions of the fan [17].

Imposing sanctions on the football club for actions of its fans, in our opinion, has stimulating purpose, and exercising the right to file the regress suit is aimed at obtaining compensation as club incurred respective damages.

Social relations arising in the field of professional football in respect to imposing liability mainly are based on voluntary assuming the imposed sanctions by offenders.

This is related to the threat of expelling an offender from among participants of football matches for like. This is characteristic of civil and legal liability. Particularly, O. S. Ioffe noted that the specifics of civil and legal liability is conditioned, among other things, by the possibility of voluntary compensation for damages by the offender herself/himself, without intrusion of judicial and other state authorities [18, c. 121–125].

Expelling from among participants of football competitions means not just deprivation of the right to attend football matches held in the territory of Ukraine, but also all international and European competitions held under the auspices of the FIFA and UEFA.

## CONCLUSIONS

In the field of professional football both general types of liability (civil and legal, criminal, administrative and disciplinary), and special sports sanctions (particularly, forfeit defeat) are imposed. Relationships arising between participants of football matches, for the most part, are regulated by contractual and corporate norms. In view of that, norms of civil law are of great importance for the efficient protection of rights and interests of participants of such relations.

Having analyzed groups of sanctions imposed in professional football of Ukraine, we can make conclusion about their legal nature. The major role play measures of civil and legal liability, which includes sanctions provided for by disciplinary acts.

Particularly, such sanction as the "mandatory monetary contribution in the national currency", by its legal nature, is equal to a forfeit in fixed amount. Payments shall be made in fixed amounts to be defined depending on the type of an offense (for instance, failing to make a payment envisaged by rules of the competition, or perform settlements with officials of the match shall entail a fine in the amount of 2, 000 UAH for clubs of major leagues). The author believes that it is not right to identify the above-mentioned sanction with penalties in their traditional interpretation by civil and legal laws.

According to requirements of disciplinary acts, football clubs shall bear liability for actions of their employees (football players, trainers, officials and the like) during performing duties by them. In such cases clubs shall pay the mandatory monetary contribution as regulated by general norms of civil and legal laws in the part of compensation by legal entities for damages caused by their employees. A professional football club, after payment of the mandatory contribution specified by disciplinary authorities in full, gets the right to file a regress suit against the employee regarding compensation for damages. One of the principles applied in team sports is the principle of strict liability, which means imposing on sports organizations liability for actions made by other persons.

Liability of professional football clubs for actions of their fans, by its legal nature, is similar to the construction of civil and legal liability without guilt. Imposition of the mandatory monetary contribution on clubs for actions of their fans is directed, first of all, at compensation for damages borne by the organizers of competitions.

The mechanism of bringing professional football clubs to liability in this case is envisaged by Disciplinary rules of the FFU. At present these issues are resolved by the disciplinary committee of the respective league, the member of which the football club is. After the resolution came into effect, the professional football club gets the right to file a regress suit to a court of general jurisdiction. Prohibition on referring to judicial authorities does not extend to these cases as spectators are not recognized as persons carrying out activity in the field of football or related to it. Moreover, analyzing the court practice one can come to a conclusion that professional football clubs, in the majority of cases, enjoy their right of judicial protection. The chosen method of protection is compensation for material damages caused by the fan to the club.

Social relations arising in the field of professional football in respect to imposing liability mainly are based on voluntary assuming the imposed sanctions by offenders. This is related to the threat of expelling an offender from among participants of football matches for like. This is characteristic of civil and legal liability.

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# КІБЕРСПОРТ: ПРОБЛЕМИ ПРАВОВОГО РЕГУЛЮВАННЯ

**Анотація.** *В статті розглянуто питання розвитку нової сфери кіберспорту в Україні та проблеми доцільності його спеціального регулювання. Для більш детального розгляду питання були використані порівняльно-правовий, історичний, формально-логічний методи. Приділено увагу наявним шляхам врегулювання цивільно-правових відносин в сфері кіберспорту, використовуючи при цьому наявну, на сьогоднішній час, нормативно-правову базу. В статті також розглянуто питання права інтелектуальної власності на продукти в сфері кіберспорту, питання укладання контрактів в сфері кіберспорту загалом та з неповнолітніми кіберспортсменами, зокрема. Проаналізована проблема виключного права на трансляцію кібертурнірів. Встановлено, що однією з проблем правового регулювання відносин у сфері кіберспорту є складна модель розподілу прав на трансляції турнірів. А укладання ексклюзивних договорів про трансляцію кіберспортивних турнірів між розробниками ігор та організаторами турнірів дозволить вирішити цю проблему.*

**Ключові слова:** кіберспорт, кіберспортсмен, кіберспортивні турніри, право інтелектуальної власності, трансляція кіберзмагань, цивільно-правове регулювання, контракти.

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# ESPORT: PROBLEMS OF THE LEGAL REGULATION

**Abstract**. *The article deals with the development of a new sphere of eSports in Ukraine and with the problem of the expediency of its special regulation. For a more detailed consideration of the issue there were used comparative-legal, historical and formal-logical methods. Attention is paid to the existing ways of settling civil law relations in the sphere of eSports using the regulatory framework available to date. The article also raises the issue of intellectual prop-*

*erty rights to products in the field of eSports, the issues of setting up contracts in the field of caber sports in general, and with juvenile eSportsman in particular. The problem of the exclusive right to broadcast cyber-tournaments is analyzed. It is established that one of the problems of legal regulation of relations in the eSports field is a complex model of distribution of rights to broadcast tournaments. And the conclusion of exclusive agreements on the broadcast of eSports tournaments between game developers and tournament organizers will solve this problem.*

**Keywords:** eSports, eSportsman, eSports tournaments, intellectual property law, broadcast eSports competitions, civil law regulation, contracts.

## INTRODUCTION

Cyber sports (eSports, computer sports) is virtual competitions in computer games involving teams or individual players. Unofficial eSports competitions have started over 20 years ago, when the first network shooter – Doom 2 has been launched, allowing for simultaneously playing of numerous gamers. And the first official tournament was arranged in 1997 when the Computer Players League (CPL) was founded in USA, members of which competed in Quake. Nowadays, one of the most large-scale tournaments is "The Internationals" involving Dota 2 players. In 2017 prize pool of this competition hosted by US Seattle reached $ 20 million. The winners from the Wings Gaming Chinese team, received $ 9.1 million [1].

Consequently, eSports is rapidly developing globally and is already becoming tough competitor for traditional sports. Today, cyber sport is officially recognized as a sport in many countries all over world. Millions of fans watch eSports competitions in North America, Asia (especially in South Korea and China) and the European Union (in particular, in Germany and the United Kingdom).

eSports market growth dynamics is impressive. In 2015 aggregate profit of the entire eSports industry amounted to approximately $ 325 million, in 2016 – $ 463 million, in 2017 – $ 1 billion [2; 3]. According to experts, in 2020 global market of eSports will reach $ 1.5 billion [4].

In our country eSports is also gradually developing. In particular, one of the best computer centers in Europe operates in Kyiv. It is called Kiev ESports Arena, and it continuously hosts eSports competitions of various complexity and significance. Ukraine also has its own Star Ladder eSports League with Dota 2 and C-S: GO [5].

It should be emphasized that cyber sports is not an entirely new phenomenon: the first stages of its development have been passed in 1990s and 2000's. Thus, the very first stage of eSports development was connected with Nintendo tournaments and popularization of StarCraft – one of the first large-scale games in eSportss. The second stage of eSports development is connected with sophistication of the modern computer and handheld games, as well as high-speed broadband gaming platforms expansion.

The third stage of eSports development is taking place at the moment, and as a result it has already acquired the official status of the sport, and has become a unique strong industry.

It is worth to be noted that the general base of eSportss is similar to traditional sports: high skilled athletes (players) supported by fans and sponsors compete with each other in live performances. Surely eSportss system is under formation at the moment, however even now it is possible to detach its constituent elementsincluding as follows: skilled players; amateur and professional teams participating in leading "types of cyber sports" tournaments; organizers of the events (mainly – the leagues); fans; videogame developers (they create and distribute videogames that are used in cyber sports); broadcasters; and, finally, sponsors and other entities (in particular, advertisers), etc.

Is is interesting to note that, being a sport, cyber sport is also an umbrella term for many different video games that also claim to be a separate sport. The most popular cyber sports games are: League of Legends, Dota 2, Counter-Strike: Global Offensive, StarCraft II, Hearthstone, etc.

So, consequently logical question occurs – how to create a solid structure to regulate relation in eSportss which will be in line with the unique features of this one-off-a kind area?

## 1. MATERIALS AND METHODS

The article uses general scientific and special scientific methods of learning of legal phenomena, namely: comparative legal, historical, formal-logical, dialectical, and others.

The comparative legal method was used to identify the optimal model of legal regulation of relations in the eSports area. In particular, the authors have analyzed several approaches to such legal regulation: depending on the priority of international, national or local regulation of these relations; depending on the degree of state intervention into the named processes; depending on the expediency of special legal regulation, etc.

Using historical method the genesis of eSportss in Ukraine and the world was demonstrated and main stages of scientific thought and the practice development concerning applying lawrules and self-regulation acts to formalize relations in eSports field have been analyzed.

The formal logic method has been used to analyze legal concepts and categories arising in eSportss, and their relationship with each other. In addition, by using the above method, the main principles and directions of legal regulation in eSportss have been formulated.

The dialectical method has allowed to consider pending issues of eSportss' relations' legal regulation along with main directions for further improvement of legal regulation of these relations.

The papers of the following academic researchers have formed theoretical and methodological basis of the present researc: S. M. Bratus', O. S. Ioffe, N. S. Kuznetso-

va, V. V. Luts', R. A. Maidanyk, Ie. O. Sukhanov, Ie. O. Kharytonov, I. I. Kharytonova, R. B. Shyshka, Tom Serbi, Katarina Pietlovych, Brandy Schvab, and others

## 2. RESULTS AND DISCUSSION

### *2.1. Analysis of organizations regulating legal relations in eSports*

One of the first organizations decided to deal with legal relationships in eSports regulation was the International e-Sports Federation, nternational sports organization holding the eSports World Championship and integrating 48 national federations from various countries (established in 2008) [6;7]. At the same time, for the time being regulation of the certain types of relations in eSportss is carried out by the video streaming service – the platform which provides streaming of various events in real time mode). In particular, such services (companies) as Twitch, FACEIT, ELEAGUE, ESL participate in eSportss rules and specific rules of certain eSportss tournaments development. Special activity has been shown by ESL company, which became a co-founder of the World eSports Association in 2016 (this organization has founded first professional cyber sports clubs). Among the active members of the cyberspace, Esports Integrity Coalition company (ESIC) ( nonprofit organization created to prevent cybercrime fraud in eSports) [8] should be mentioned. Esports Integrity Coalition has already created Code against Corruption, targeting CS: GO, Dota 2, League of Legends and Starcraft. Local gaming bodies, such as Nevada Games Board (USA), have agreed to exchange information with the ESIC and contribute to suspicious bets investigations in eSports.

It should be mentioned that the fraud issue is rather important for eSports. First of all, cases of fraud involve possibility to bet in eSports. In addition, game falsifications (contractual matches) take place from time to time. Also, the issue whether the player has the right to bet on his/ her own result or against himself/ herself needs to be resolved. Thus, Esports Integrity Coalition does its best to develop the best possible model for these relationships regulation. In addition, named organization also arranges matches in partnership with sports clubs and local state gaming authorities.

In such a way, nowadays various organizations that will have a regulatory impact on eSports are coming to the stage practically simultaneously. Given the rapid scaling up of cyber-sports, there is even a point of view that it is necessary to create a separate system of control bodies for each eSports game following the example of CS: GO players regulator. Its supporters hope that the creation of such a detailed administration system is likely to contribute to the further development of eSports.

### *2.2. Particularities of the foreign experience in eSports regulation sphere*

Referring to foreign experience of eSports regulation, it should be noted that there is still no unity of views concerning legal regulation of eSports at the national level. In particular, France has recently adopted a series of laws focused on digital technologies regulation, known as the "Digital Republic". eSports has also became the sub-

ject of legal regulation of the said legal acts [9]. Instead, for example, in Germany there is no unity of views at the state level even concerning eSports recognition as specific sport.

It can also be noted that specific rules of cyberspot game, as a rule, are currently regulated by the developer (publisher) of the video game itself. So, "League of Legends" from Riot Games has the most up-to-date regulatory model for eSports regulation. Given the fact that national and international authorities and commercial companies are also creating their own rules for eSports tournaments, disputes occurrence between these entities is unavoidable.

Taking into account all of the above, inference should be drawn that it is necessary to introduce clear principles of legal regulation of eSports in order to ensure its development on a stable and long-term basis. For example, even now there is a necessity to introduce clear rules to bring under regulation the relations arising between professional eSports club and a player. In addition, cyber sports fraud, paid-for (contracted) matches [10], and use of performance-enhancing substances [11] require clear legal qualification.

Currently, eSports is featured with cut and trust is taking place on how far this area requires detailed regulation, and if so, who and how should provide it. Same with "traditional" sport, there are supporters of state regulation idea for eSportss and supporters of the idea of eSportss development on free market principles without external interference. In addition, there are disputes over the necessity for special legislation introduction to regulate the relations in eSports or "traditional" models of legal regulation use, which proved to be efficient in other areas, in particular – in "traditional" sports.

It should be also noted that there is no unambiguous decision to which of the above approaches is better, however, it should be stated that cyber sports has already entered into the period of regulatory experiment. As noted above, steps taken for regional, national, international and special regulations in cyber sports are taken almost simultaneously. Right now it is still not clear yet how these different approaches will be formed into a single integral model, however it remains to be seen.

Provided that certain part of the sports relationship is governed by domestic laws of each country, it remains unclear for the time being how eSports will qualify for state grants, subsidies, and tax benefits that have been applied to "traditional" sports in many countries all over world for decades. Thus, it is necessary to find answers to a broad range of issues, containing in particular as follows: can cyber sport be recognized as an Olympic sports? Is it necessary to have specially established rules for eSports player transfer from one professional club to another? Is it allowed for eSports club to exist in the status of a nonprofit organization? Moreover, the legal status of videogames in terms of intellectual property rights is not yet finally determined. For example, in the United Kingdom, video games are considered as computer software,

while the United States and South Africa they are currently considered as literary works and movies, respectively. However, practice evidences that video games are separate intellectual property items requiring specific legal regulation.

Getting around to the issue eSportss funding sources, it should be emphasized that the main source is Internet broadcasting (on-line broadcasting) of eSports tournamentsb. As for TV broadcasts, they are also available, however their scope for the time being is still relatively small. This is due to the fact that TV broadcasts arrangement is rather complicated, along with the fact that there is relatively small number of sponsors willing to support eSports events arrangement. Meantime, there is a global tendency of eSportss commercial opportunities growth. Meanwhile, not all major global brands are ready to invest in eSports, taking into consideration lack of clear legal regulation, in particular, in intellectual property rights protection sphere. It should be brought to light that intellectual property sphere is especially relevant for eSports. Certain issues of legal regulation are unique and inhere to eSports only. For example, how does the game's owner (publisher) transfer legal control over such a game use in eSports? Who owns the rights for eSports tournament broadcasting (organizers of the tournament, broadcasters, producers, commentators, teams and players) or how are these rights distributed? What model of relations regulation concerning trademarks in eSportss is the most appropriate, taking into account the combination of video games, traditional sports, online broadcasting and information technology?

Currently, game developers and tournament organizers make contracts to solve the issues arising while large-scale tournaments organizing. These contracts cover such matters as licensing and intellectual property use in eSports games, including the way matches are played and broadcasted. However, the issue of what intellectual property rights belong to the game developers and what to other interested parties, including organizers, broadcasters, clubs and players, need to be addressed at the regulatory level.

The next pending issue for eSports is legal protection of trademark owners. In particular, neither of the players has yet registered trademark for his/ her game tag, which is the basis of his/ her personality as professional player. In such a way, eSportss' future is highly correlated with proper legal regulation of intellectual property relations.

Another key issue for eSports is legal protection of professional players. To our opinion, one of the most important steps in this direction should be minimal standards introduction for eSports regulation. In particular, cyber-players' legal status should be clearly defined: they are individuals providing services to professional eSports club or individuals who are working as an employed persons. The first option, which is the most appropriate option for modern sports, has already been practically implemented in the United States of America. The majority of eSportssmen in this country are considered to be contractors rendering services to eSports clubs. Also, an option

is acceptable when both the first and the second ways of eSportsman's legal status legalization are acceptable.

*2.3. Pending issues of eSports analysis*

It is apparent that certain mechanisms for legal relations regulation in eSports can be borrowed from traditional sports, but there is a number of legal aspects specific eSports sphere. Currently, key issues to be solved in eSports are the clarity with respect to contractual obligations; e-doping issue; intellectual property rights in eSportss issues, in particular, the rights to broadcast game tournaments.

As for contracts in eSportss, they are similar to those that are made in "traditional" sports. In particular, contracts are made between the organizers of tournaments and participants, between sportsmen and sports clubs, between organizers of tournaments and sponsors, etc.

Concerning the personal contracts of cyber-sportsmen with cyber-sport clubs, first of all they should be focused on the rights sportsmen protection, since many of them are of minor age. Accordingly, the procedure entering into such contracts requires clear regulation and harmonization with national statutory provisions.

Case at point of sportsman's rights violation is situation happened with Counter-Strike player: Global Offensive (CS: GO) by Owen Butterfield ("Smooya") [12]. In particular, Butterfield explained that after having signed a personal contract with the Epsilon team, he lost his playing practice, since he was not released to participate in game. This led to his salary reduction from $ 2,000 to $ 700 a month; he has also lost social benefits. Non-admission of Butterfield for the game, in fact, deprived him of a professional career as he would not play for the period of the contract, thus his value as a player without game practice would reduce with time. [13]. Butterfield also said that, although his contract amounted to $ 36,000 only, ransom warning has been three times higher, so probability of his contract redemption by another club is minimal. Thus, this case shows that there is an urgent need to provide greater awareness of the players about the consequences of signing them contracts in eSports sphere, especially in case such a contract is made by under age person.

The second issue refers to obligations between the organizers of the tournament and the players and / or teams. The cases are known when organizers do not enter into written contracts with participating teams, causing failure to discharge mutual agreements. As an example, 2nd season of the Red Bull Coliseum in Malaysia [14] can be taken, in the course of which there were issues with travel costs reimbursement and accommodation of players, as well as appropriate quality laptops provision for teams. In addition, cases when organizers of the tournament do not pay the claimed prize funds are also not uncommon. For example, winners of ASSAN Games for Esports (AGES) tournament in Malaysia in 2016 have never received their winnings [15]. Another issue is that young players often can not afford qualified legal aid to protect their rights.

The issues referred to above are often exacerbated by the international specificity of eSportss. Thus, quite often German organization signs a contract with a team of Malaysians, Koreans and Lebanese, which is based in North America and stands in tournaments in Peru. In case any dispute arises between any of the listed entities, the question of jurisdiction and applicable law is arising. Consequently, the contracts should clearly define the jurisdiction and regulatory legal enactments that should be followed in case of disputes or disagreements.

In general, properly executed contracts play very important role in eSports. High-quality product, which is cybershop tournament held in a proper way, can only take place subject to a clear definition of the mutual rights and obligations of the parties to such tournament. In particular, teams, players, tournament organizers and leagues conduct negotiations on all aspects of the tournament, resulting in an appropriate contract. At the moment, certain game developers are working to better address the issue of eSportss' contracts making and signing.

One of these companies, called Blizzard, which is the developer of the Overwatch game, has offered its own rules for eSports clubs and players using this game and has founded its own league (Overwatch League (OWL).) OWL is an analogue of "traditional" sports leagues with home and away games, "transfer windows" for players, etc. In addition, OWL has introduced strict requirements for contracts with players. [16] In particular, each contract made between eSports club and a cyber-sportsman, shall be approved and registered by the league itself [17] These requirements facilitate better protection of the rights of players and assist to avoid unnecessary conflicts between clubs and sportsmen. With time OWL plans to develop rules for disciplinary measures taking against those violating the rules.

The next coming challenge of eSports relations' legal regulation is a complex model of tournaments broadcast rights distribution. Some tournament organizers, which do not have copyright for the game itself, receive the right to "stream" (broadcast) on online platforms. At the same time, such broadcasts may be banned at any time due to incompliance of legislation. As an example, ESL tournament One Genting 2018 Dota 2 in Malaysia, during which some streamers on the Twitch platform have been banned due to intellectual property rights violation under US law (namely, due to the 1998 Digital Rights Protection Act) [18]. So while intellectual property rights are exclusive to game developers, the rights of tournament organizers, players and sponsors may be violated at any time.

As for sponsorship contracts in cyber sports, they play really important role. First, no tournament can exist without sponsors. For cyber sports, where the broadcast is done predominantly online, the organizers of the tournament as a rule need to protect their broadcasters and sponsors. Regardless of whether there is an exclusive broadcasting right or brand to be displayed for certain time, the organizers of the tournament must warrant fulfillment of their obligations. The situation is complicated by the fact

that in addition to the official broadcast, in fact any broadcasters and / or streamers may broadcast the tournament by themselves.

Accordingly, such broadcasts deprive the organizers of the possibility to fulfill their obligations to sponsors, resulting in loss of profits. Consequently such a situations require clear legal regulation of relations referring to eSports tournaments broadcasting. At the same time, organizers of the tournaments may not just simply sell the rights to broadcast, since they themselves are not cyberstort game intellectual property rights owners. In this case, formally, any person can freely use the game, which has been purchased meeting all formalities.

Possible solution to the issue of games use is exclusive contracts making for cyber sports tournaments broadcasting between game developers and tournament organizers. Thus, game developers would provide to the organizers of the tournaments an exclusive license to broadcast the tournament. However, such mechanism is acceptable for certain games only. For example, Activision Blizzard company has signed an exclusive two-year contract for Twitch platform broadcast to become an exclusive third-party streaming partner for the regular season, playoffs and championships in England, Korea and France [19].

## CONCLUSIONS

Thus wise, settlement of the relations related to intellectual property rights distribution in cyber sports is the major issue to be solved in the earliest possible timeframe.

As for domestic cyber sports, the key issue here is its official status recognition by the state, as well as adoption, at least at the general principles levels, the rules of cyber sports tournaments conducting. Surely, national legislation improvement in order to regulate the entire sphere of modern computer technology, based on the model taken by France, would allow to take domestic cyber-sports, as well as the entire industry of sophisticated technologies in general to the new qualitative level.

In general, it should be noted that eSports is a new, powerful industry that needs proper legal regulation. Currently, in the absence of unified approaches to legal regulation of eSports, its development is somewhat chaotic, under logic borrowing of some regulatory models from "traditional" sports. However, there is no doubt that in the near future we will observe the viable concept development and implementation concerning all significant aspects of cyber-sport activities regulation.

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# ЗАГАЛЬНІ ПОЛОЖЕННЯ ПРО ПРАВОНАСТУПНИЦТВО В ЦИВІЛЬНОМУ ПРАВІ УКРАЇНИ

**Анотація.** *Прийняття низки процесуальних законодавчих актів України встановило нові правила процедур, головні з яких – справедливий, неупереджений та своєчасний розгляд і вирішення цивільних справ з метою ефективного захисту порушених, невизнаних або оскаржених прав, свобод чи інтересів фізичних осіб, прав та інтересів юридичних осіб, інтересів держави. Тому основна мета роботи полягає у визначенні загальних положень про правонаступництво в цивільному праві України. Для досягнення поставленої мети було використано ряд теоретичних методів, включаючи аналіз, синтез, узагальнення, конкретизацію, порівняння. Встановлено, що термін «правонаступництво» не відображає змісту правових процесів, які відбуваються при зміні суб'єктивного складу цивільних правовідносин і є методологічно хибним. Таким чином, об'єктом цивільних правовідносин є не тільки майно в сукупності з відповідними йому правами і обов'язками, а й майнові права, як об'єкти нематеріального світу.*

***Ключові слова:*** правонаступник, націоналізоване підприємство, юридичний обов'язок, правові відносини.

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# GENERAL PROVISIONS ON SUCCESSION IN THE CIVIL LAW OF UKRAINE

**Abstract.** *The adoption of a number of procedural legislative acts of Ukraine established new rules of procedures, the main of which are fair, impartial and timely consideration and resolution of civil cases in order to protect violated, unrecognized or disputed rights, freedoms or interests of individuals, rights and interests of legal entities and interests of the state. Therefore, the main goal of the work is to determine the general provisions on succession in the civil law of Ukraine. To achieve this goal, there was used a number of theoretical methods including analysis, synthesis, generalization, concretization and comparison. It is established that the term "succession" does not reflect the content of legal processes that occur when changing the subjective composition of civil legal relations and it is methodologically incorrect. Thus, the object of civil legal relations is not only property in conjunction with its relevant rights and obligations, but also property rights as objects of the intangible world.*

**Keywords:** legal successor, nationalized enterprise, legal obligation, legal relations.

## INTRODUCTION

Subjects of civil law, particularly, individuals in their day-to-day life, to satisfy their material and cultural needs enter into various legal relations with one another and with other subjects of civil law. Movement of legal relations starts with their establishment and ends with their termination. Within these limits legal relations exist and operate, and, besides, its effect is limited in time, but can last within a relatively shorter or longer period.

During their existence, legal relations can undergo some changes in the content or subject composition preserving its other features and continuing to exist in the changed form.

Any changes in the subjective and objective content of civil legal relations entails changes not only in subjects or objects of civil legal relations, but also changes in the content of civil legal relations, i.e. transfer of rights and obligations from one entity to another. In that case it is expedient to talk about such legal construction in the civil law as succession [1].

At transfer of the subjective right from the right grantor to the legal successor the active subject is changed in the changeable legal relations. And at transfer of civil and legal obligations from the original debtor to his successor the passive subject in legal relations is changes.

With that in mind, under transferring rights and obligations according to the procedure of civil succession it shall be understood that persons can become subjects of rights and obligations identical by the content to rights and obligations, which existed before, but between other persons, upon condition of termination of these rights and obligations of participants preceding relations and appearing new participants [2]. Thus, B. B. Cherepakhin notes that, according to the general rule, the right of the legal successor has the same content as the one of his predecessor [3].

In this case, changing the subject of legal relations entails changing of the content of civil legal relations, i.e. when changing subjects of rights in social relations regulated by law, change of those subjective civil rights and obligations, which the right grantor had, occurs. It is noteworthy that in this case not all rights and obligations of the right grantor and those, which arise in day-to-day life of persons, are transferred, but only those subjective rights and obligations arising as a result of undertaking specific legal relations.

In other words, the link between the acquired rights and obligations, and initial legal relations is the characteristic feature of succession. That being said, the right of the legal successor has the same content as the one of his predecessor. Nevertheless, depending on the personality of the legal successor, some transformation may take place [4].

## 1. MATERIALS AND METHODS

The sphere of succession is quite wide and manifold. Succession always occurs at changing the subject composition of legal relations. Thanks to legal succession the

link between old and new legal relations exists, and owing to that exists succession in activity of old and new subjects of rights and obligations transferred [4]. To study the arguments for the goal of research, the authors applied various scientific methods.

Having classified general provisions on legal succession, the author combined, on the basis of common features, objects of legal relations. Keeping that in mind, through analysis it has been established that succession in rights and obligations has universal and singular nature, i.e. it can be common and partial. Universal succession means transfer of all rights and obligations of the predecessor to the legal successor. Meanwhile, the characteristic feature of universal succession is the fact that the predecessor carries out transfer of rights and obligations not in specific legal relations, which he participates in, but generally, in all potentially possible legal relations arising between the predecessor and third persons (legal successors). And maintaining legal relations themselves as a legal connection of two and more persons among one another in respect to specific material values. It follows thence the property and legal nature of universal succession.

Studying legal processes by means of using regulatory, structural, index and systemic methods of analysis with simulating the existing interrelations inside and outside the system allowed defining criteria for differentiation of methods of acquiring ownership rights.

It has been established that the characteristic feature of succession is the link between the acquired rights and obligations and legal relations, which continue to exist in the changed form. Change of subjects of legal relations, which is mandatory at legal succession, raises the question of identity of rights of the predecessor and rights of the successor.

## 2. RESULTS

### *2.1. Analysis of the sphere of succession*

As this type of succession is characteristic of opposition between the legal predecessor and unidentified circle of persons, who may enter into civil legal relations. The characteristic example of universal succession is nationalization.

Thus, basing on extensive materials of individual and regulatory acts on nationalization of the years 1917-1919 A. V. Venediktov came to conclusion that all the property of nationalized enterprises is transferred “according to the procedure of succession from the former private enterprise (usually, a joint-stock enterprise) to the nationalized enterprise” [5]. A. V. Venediktov noted that, to some extent, the issue of the destiny of liabilities (obligations, debts) of nationalized enterprises is resolved quite distinctly. Irrespective of multiple contradictory legal acts, this issue was finally resolved by the Decree of the Council of People’s Commissars of March 04, 1919 “On liquidation of obligations of state enterprises” [6], which, for all cases of

nationalization, terminated obligations of nationalized enterprises, which arose before their transferring to the ownership of the state.

The similar nature of universal succession has succession at confiscation of property. At such transfer of property succession is manifested as accepting lawsuits of third persons regarding the ownership right to the confiscated property [7]. The state acquires the ownership right to the confiscated property only insofar as such right belongs to the person, whom such property is confiscated from. Besides, it is noteworthy that not only the ownership right to the confiscated property is transferred to the state, but also debts and liabilities of the former owner, if they arose before the respective bodies took measures to preserve the property or after taking such measures upon agreement of such bodies [7].

As can be seen from the above, at universal legal succession of the property of a person as the aggregate of rights and obligations belonging to him/her is transferred to the legal successor or legal successors as a single whole, at that in his aggregate through the single act all separate rights and obligations, which belong, at the time of succession, to the right grantor is transferred irrespective of whether they are revealed by that moment or not [4].

The same vital importance has succession in relative legal relations (binding legal relations). The characteristic feature of this type of succession is that succession in title and succession in obligations can take place each separately, or generally, in respect to arising and existing rights and obligations. Thus, the institution of cession of the right of claim (Art.512-519 of the ECU) is an example of succession in the right of claim, and the institution of debt transfer (Art.520-525 of the ECU) as an example of succession in debt and /or liabilities. On the other hand, succession may cover certain aggregates of rights and obligations. Thus, when selling a house let on lease the buyer is transferred not only the ownership right to the house, but also rights and obligations under the bilateral binding legal relations of property lease [4].

The author noted that the characteristic feature of this type of succession is its partial (singular) nature, i.e. transfer of a certain complex of rights and obligations to a third person.

*2.2. Specific features of criteria of succession*

The legal meaning of succession comes also to the fact that it is the criterion of classification of methods of acquiring ownership rights. Taking into account the nature succession of legal means of transferring rights and obligations from one persons to another, the initial methods of acquiring ownership rights shall include those, at which the ownership right arises for the first time or irrespective of will of the preceding owner. The derivatives shall also include such methods, at which acquiring ownership rights by the person in question is based on the right of the preceding owner [1].

In legal science there is another criterion for distinguishing methods of acquiring ownership rights.

So, O. S. Ioffe includes the right to a certain thing acquired whether for the first time or against will of its preceding owner with the initial methods of acquiring ownership rights.

The derivative method of acquiring ownership rights is characterized by the fact that in such cases the ownership right is acquired by will of the preceding owner and upon agreement of the new acquirer. Thus, O. S. Ioffe limits the initial method of acquiring ownership rights from the derivative by the will factor [8].

Nevertheless, we cannot agree with conclusions of O. S. Ioffe. They are disproven by the fact that acknowledging the will as invalid as a result of violating rights for the hereditary portion, succession occurs by law Art.1241 of the EC of Ukraine), i.e. against will of the testator [1]. Here we see that besides will of the testator occurs derivative acquiring property third person. Besides, the derivative acquiring of ownership rights with the absence of the will of the entity acquiring the property between legal entities on the grounds of administrative acts occurs. This way the will criterion of discrimination of methods of acquiring ownership rights has no realistic basis.

In view of the stated above, the author relies on the right conclusion made by B. B. Cherepakhin that the essence of acquiring the right lies not in the subjective (depending on or irrespective of will of the preceding owner), but in the objective side (in dependence of rights of the transferee on rights of the predecessor) [4].

At the same time, basic provisions on civil legal succession developed by B. B. Cherepakhin were critically analyzed by many other scientists – civilists in the USSR.

Thus, V. S. Tolstoy criticized the generally accepted view of B. B. Cherepakhin on the notion of transferring rights from one person to third persons, giving the following reasons as basic arguments:

1. rights and obligations are legal possibilities, and legal categories same as any other ideal categories cannot be transferred;
2. when transferring a thing, the ownership right of the same content, which it had with the previous owner, is not always transferred along with it – its elements might appear again (for example, when acquiring a thing from an unauthorized alienators) and vanish nowhere (for example, at acquiring the property from the state) [9].

The similar position is expressed by V. A. Belov. Studying general provisions of singular succession, the researcher has formed own position in respect to a number of questions related to the place of categories of “subjective right” and “legal liability” in the system traditionally named “legal relations”.

First of all, V. A. Belov notes that rights and obligations cannot exist by themselves, irrespective of their subjects (persons). There are no rights and/or obligations, which do not belong to anybody [10]. This conclusion is justified by the scientist by

the fact that the opposite position in respect to non-belonging of any subjective right to any person contradicts to the very nature of the subjective right, as well as the notion of legal relations as no legal relations can be even imagined without active and passive subjects. Consequently, from his point of view, it is inappropriate to affirm that there is a moment of time, when the right exists, but doesn't belong to anybody, which is the case at legal succession as transfer presupposes the existence of at least the shortest moment of time, when one person (predecessor) already transferred the right, and another (legal successor) did not accept it yet [11].

Moreover, V. A. Belov points out that the category "transfers" implies the possibility of transferring the subject of transfer not only to the authorized person, but any other person. However, as the thing, for example, can be both in lawful and unlawful (unauthorized) ownership, obviously, we cannot speak about transfer of subjective rights as the category "unauthorized" itself presupposes the persons not possessing subjective rights irrespective of the fact that certain circumstances may testify the opposite [11].

As for strictly legal arguments, V. A. Belov states that property rights are not at all the objects of civil law, which means they don't have such an important quality as transferability, i.e. they cannot be transferred from one owner to another. Arising once they shall terminate while still belonging to that person, as neither rights, nor obligations cannot change their holder [11]. The similar position is expressed by V. A. Ryasentsev [12].

So, these scientists – civilists came to the scientific conclusion that the term "succession" does not reflect the essence of legal processes taking place when changes the subject composition of civil legal relations and it is methodologically defective as it is incorrect to oppose to the objectively permanent quality something having conventional nature – a term or definition [11]. In his turn, V. A. Belov suggests to talk about "succession" as transfer of the quality of the participant of legal relations, transfer of the "place" in legal relations and inheritance in the content, merits and shortcomings of subjective rights and (or) legal obligations – "succession of the place" (change of persons) and succession of the content, but not "succession" as the essence of a legal process representing termination of some legal relations accompanied by arising new rights of another person constituting the content of new legal relations [11].

Certainly, the scientific approach developed by V. A. Belov on the basis of different points of view of other authors concerning the same problem, specifically, V. A. Ryasentsev, V. S. Tolstoy, I. B. Novitskiy, L. A. Lunets [11] and others, demonstrates the depth of the theoretical approach to the problem of civil succession, its logical structuredness. Nevertheless, in our opinion, the more argumented we consider the theory elaborated and put forward by B. B. Cherepakhin [4].

*2.3. Specific features of problems of civil succession*

Considering the problem of civil succession as a form of transfer of subjective rights (in a wide sense – also legal obligations) from persons (the right grantor) to another

(the legal successor) according to the procedure of the derivative acquiring the right (in corresponding cases – the derivative acquiring of legal obligations) it is necessary to consider a number of the general theoretical issues concerning legal relations, particularly, the object of legal relations.

The above-mentioned is conditioned by the fact that the relevance of working on the question of what exactly consists in the object of rights, and what exactly the norm gives us the right to, is conditioned by the need to define a precise and consistent understanding in the field of succession.

As regards what exactly is the object of legal relations, in legal science there are four points of view. Let's consider them in more detail.

The concept according to which the object of legal relations is actual social relations is quite known. Such understanding of the object is based on the understanding of legal relations as a special kind of ideological attitude through which the legal norm influences the actual social relations [13].

This concept, when it is applied, for example, to the analysis of procedural relations, immediately reveals its inconsistence with the provision that all its legal relations have their object [14].

One of its founders, Yu. K. Tolstoy, being the supporter of the concept that "the object of legal relations is actual social relations" pointed out at the possibility of existence of a special object within the structure of legal relations: "acknowledging social relations as a whole the common object of legal relations does not excludes material and spiritual benefits as things or special objects of legal relations" [13].

Supporters of this concept extend the notion "object" not just to material objects and results of spiritual and intellectual work, but also people's actions, human behavior.

In opinion of supporters of this interpretation, legal relations as a social link established between people as a result of their interaction, "can affect only human behavior". Therefore, the object of civil legal relations is behavior of their subjects aimed at various material and non-material benefits. At that, it is necessary to distinguish behavior of subjects of civil legal relations in the process of their interaction with one another, and their behavior aimed at obtaining material benefits. The first one constitutes the content of civil property legal relations, and the second one – its object [15].

The theory of civil law is aware of the concept according to which under the object of legal relations an action, behavior of the obliged person (behavioristic theory of the object of legal relations) is understood. Among its active supporters are O. S. Ioffe, who distinguished between a legal object of legal relations (the object of legal reality), material (thing) and ideological one (will of participants of legal relations) [16], G. M. Genkin, who acknowledged as the object of civil and legal relations only actions or refraining from them [17], Ya. M. Magaziner [18] and others.

Specifically, Ya. M. Magaziner points out that as legal relations are social relations – consequently, they are relations between people only, then their object is not material things, but only actions of its parties in respect to things. Even the property right is not the right to a thing, but "actions of everyone in respect to such thing", for example, adverse actions (offenses against things); that is why everyone possessing a thing belonging to another person is obliged to return it to its owner[18].

The same way, the above-mentioned meaning has the third concept of the object of legal relations, according to which things can be objects of legal relations (property theory of the object of legal relations).

In his monograph "Obligations under the Soviet civil law" M. M. Agarkov suggested: "…to avoid confusion, rationalize terminology and consider the object of right what behavior of the obliged person is directed at, first of all, a thing...; while behavior of the obliged person characterized by one or another signs (transfer of a thing, payment of money, performing certain work, refraining from committing an offense against a thing, refraining from publishing a literary work of another person and the like) is recognized as the content of legal relations" [19].

Particularly, exactly this position is expressed by V. A. Belov, who notes inadmissibility of treating the objects of civil law as property rights as they constitute the content of legal relations only, but not their object [11].

The second group of theories related to the object of legal relations admitting not just only one, but several uniform manifestations of the object of legal relations, can be consolidated into the theory of multiplicity of legal objects. Its supporters believe that "various phenomena of the external and inner world of a man can be objects of rights …" [8], where one of such objects can be a man himself. According to the position expressed by V. M. Khvostovyi, under the object of rights shall be understood the thing directly subjected to domination of the persons possessing the respective subjective right, namely: the personality of the subject himself, a thing, an action of another person, another person, some non-material benefits and other [20].

Along with that, all the above-mentioned theories of the "object of legal relations" are not without some shortcomings, so we cannot agree with them completely.

Thus the criticism of theories seeing human behavior or a man himself as the another person exists because it is not possible to discriminate, even with the purpose of research, human behavior from human personality. While criticism of the theory seeing a man himself as the "object of legal relations", obviously shall, besides the respective specialized legal provisions, be based on common humanistic positive rights as a cultural phenomenon. The statement that a man is the "object" of right contradicts to the humanistic concept of rights and makes a human personality, whose creative potential law as one of achievements of the world culture owes its existence to, equal to phenomena of other kind, deprived of the creative potential. Given such interpretation of the legal object, inevitable shall arise the question about the subject different from the object, which a man, seemingly, can be recognized as such. The

nature of such subject seems very vague and lies outside the legal field, but rather in the field of theology.

## 3. DISCUSSION

The most essential objections against the above-mentioned viewpoint can be formulated as a question about how behavior (actions or omissions) of people as such can respond to legal impact?

In opinion of V. I. Senchischev, one should proceed from the premise that legal relations are social relations regulated by law (legal norm), and as such it is the form of social relations, which, in their term, are the content of legal relations. Meanwhile, legal relations are not a secondary phenomenon as compared with social relations. Legal relations are relations initially constituted, created by legal norms, as, if there are no such, there is no sense to speak about legal relations irrespective whether there are real social relations or not, or whether exists something regulating them. Consequently, for legal relations not an action (behavior) is important as a phenomenon of the external world perceived by our senses, but a legal characteristic of such action or behaviour. In other words, for legal relations (and, in general, for rights) important is not an act by itself, but the objective meaning related to such act, the meaning, which it has. Its legal meaning an act of human behaviour acquires only owing to the fact that is assigned to it by a legal norm. However, the legal norm presupposes only the mandatory nature (possibility or authority) of a certain (described by norm) behaviour, but not its actual existence. And as it goes about proper conduct of an individual, then we can speak only about acts of will. And only an act of behaviour, the meaning of which constitutes the norm ("the authorized subject wants..." – an act of will; "that the obliged subject acted this way..." – according to the norm, which constitutes the meaning of an act of will), can constitute the existence. And if raise a question about which behavior exactly constitutes the "object of legal relations" (as the obligation or existence), then we inevitably come to conclusion about the possibility of existence of objectless legal relations, the very possibility of which is objected by the "behavioristic" theory: the object of legal relations, as none of two above-mentioned phenomena of behaviour cannot be the "object of legal relations" [16].

An indeed, if we admit the "object" is behavior as existence, i.e. actual completed act, then the authorized subject, strictly speaking, has nothing more to demand from the subject of obligations as the act is already completed (what in a number of cases may entail termination of legal relations). Consequently, the completed act is not the "object of legal relations". As regards the proper behaviour of the obliged person, it may not follow, as the norm *presupposes* only the *probability of* certain behaviour, and the essence of claims of the authorized person consists in the fact that the obliged subject *must* to act in a certain way, but not in that he *surely will act* in a certain way. That is why one shall distinguish conduct envisaged by the norm as obligatory one from the respective norm of actual behaviour. Conduct envisaged by the norm as obligatory one (i.e. the content of the norm) can be compared with ac-

tual behavior and conclude that it corresponds or doesn't correspond to the norm (or, rather, the content of the norm). However, conduct envisaged by the norm as obligatory one, i.e. as the content of the norm, cannot be just actual behavior corresponding to the norm.

So, the obligatory conduct constitutes the content of the norm and as such cannot be the "object of legal relations", and the existence (perfect conduct) is evaluated only according to the norm, as a result of what one can make conclusion whether the result of such conduct (act) corresponds to what the norm presupposes or not. But neither in the first, nor in the second case the legal impact is not directed at conduct, because proper conduct cannot be experienced personally, and perfect conduct can be only compared with the obligatory one (with the norm) [16].

Here it shall be noted that the criticism of the theory, according to which the "object" of legal relations is human behavior (or, more than that, – human will), can be found in one of the works of G. F. Shershenevich, where the following is said, specifically: "...obviously, a man would not seek for rights, if it only meant subjection of passive subjects to his will. This subjection to will of another is an extremely important tool, but it is not what attention of the subject is paid to. With that *will, which is not expressed as an action, is not subject to legal domination.* From the standpoint of law, the thing is in adhering to the established behaviour, but from the point of view of the authorized person, the thing is that he benefits from such behaviour. Just the same way, for the obliged subject the thing is not he shall do something, but in what exactly he shall do. The object of rights, certainly, cannot be other than the object of obligations as these are correlative notions. Attention of subjects, both the active and passive ones, is paid to what one acquires and another loses when conducting behavior established by law. The object of rights combines interests of the authorized and obliged subjects, and a legal attitude is the attitude of forcefully differentiated interests. The object of rights shall be sought in benefits envisaged by law as a goal and not the established behavior as a method" [21].

Thus, the object of civil legal relations is not just the property together with the respective rights and obligations, but also property rights as the objects of non-material world.

From the said above proceeds a quite logical conclusion that the content of succession is transfer of rights and corresponding obligations.

The said fact disproves the thesis of V. A. Belov and other scientists – civilists that according to the procedure of succession property rights and obligations of the parties cannot be transferred.

Furthermore, the provision saying that the category "transfer" presupposes the possibility of transfer of the subject – matter of transfer not only to an authorized person, but to any other person, first of all, the unauthorized one, is not well substantiated. There is no doubt that the legal order is based on principals of lawfulness, justice, equality of subjects of civil law and combination of social, collective and private interests, according to which all subjects of civil law act within the limits of

certain rights transferred to them [22]. However, the possibility of not only exceeding the limits of exercising their rights, but also abusing them is not excluded. Nevertheless, in this case, one shall speak not so much about legal succession as such (as under it transfer of rights of the predecessor (the authorized person) to a third person), but rather about abusing the right or its violation. Thus, there is no legal succession as such, because nobody can transfer more rights than he/she has.

Analyzing the position of V. A. Belov further in respect to that fact that transfer of rights and obligations, according to the procedure of civil succession, inevitably entails a time interval between the moment of transfer of rights and their acceptance, and, respectively, arising objectless rights; it is noteworthy that transfer of rights and obligations from one persons to another is performed not in absentia, but upon agreement of another party to accept them when such rights ar transferred.

So, civil succession (universal or singular) represents a civil transaction. That being said, this deal has a consensual nature, i.e. it is considered to be concluded from the moment of reaching an agreement between the parties of the contract on all essential terms, according to V. A. Belov's opinion [11]. Thus, prior to the contract's conclusion on rights transfer, they are possessed by the predecessor, and since the contract's conclusion on rights transfer – by a legal successor.

It is obvious that the logical question is whether hereditary succession is a typical example of subjectless rights? As the moment of death of the legal successor creates the possibility of entering into the rights and obligations in the legal relations of the testator to the successor (heir) only after a six-month period stipulated by Article No.1298 of the Ukrainian Civil Code. And in this case, there is a period of time during the transfer of rights and obligations of the person who is no longer alive and the reception of these rights by the successor, i.e. there is created a precedent of possible subjectless rights and obligations, according to V. A. Belov's opinion.

When reasoning of this issue, one should note that the occurrence of such a legal fact as the death of a person does not mean the appearance of subjectless rights and obligations in the legal relations in which the testator participated in the existence of these subjectless rights for a certain period of time, before the adoption of the rights and obligations of the testator by the heir since the circle of persons who are new subjects of legal relations in which the testator previously participated has already been determined (1222, 1233, 1241, 1244 1260–1266 of the Ukrainian Civil Code) [23]. And for the actual implementation of the rights and obligations of the predecessor, in this case, documentary registration of the rights transfer is required. Therefore, in this period of time legal relations do not terminate, but their implementation is suspended.

Based on the above said, one should also note that succession can not mean the termination of a civil legal relations and the appearance of other ones, since, in this case, the meaning and legal role of succession as a whole are lost, as a legal structure aimed to change the subject of the legal relations without the termination of the legal relations as such.

Succession prolongs the time of existence of legal relations, making them sustainable, thereby eliminating the uncertainty in the civil legal relations [1].

Moreover, one should note that legal relations are terminated or by the proper execution of the conditions determined by the parties of legal relations, or by other circumstances determined by Articles No. 526 and 545 of the Ukrainian Civil Code. Change of subject structure of civil legal relations can not be the basis for its termination since the legal relation exists till the moment of the goal's achievement determined at its appearance.

The same position was abided by Guliyaev A. M. Determining the essence of inheritance, he said, "With the subject's death in fact there terminate the relations that linked him with other persons regarding property as well as the his relations to this property. However, the legal relations do not terminate: they continue to exist, with the difference that the place of the retired subject is occupied now by its successor" [24].

So, of course, most of the rights and obligations shall not disappear and can not disappear with the death of a person, in their objective nature because they are rooted in legal relations that continue to exist regardless of will and case Nevertheless, it should be noted that the relations caused by personal qualities with the individual's disappearance are to stop by themselves, as without this subject they can not exist.

So, succession represents continuation of property relations, existing between the testator and subjects of the right, but already between the legal successor of the diseased and the above-mentioned subjects [25].

That is why the above-mentioned statement of V. A. Belov has strictly hypothetic nature, which has neither practical, not theoretical basis.

Besides, the legal position of V. A. Belov concerning succession in the civil law of Ukraine allowed making conclusion on legal incapacity of derivative methods of acquiring ownership rights, as well as division of succession, depending on the extent of the rights to be transferred, to universal and singular legal succession, what, in its turn, casts doubts upon the existence of the institution of property rights as a whole.

## CONCLUSIONS

The stated above allows making a number of conclusions: Firstly, under objects of civil law one shall understand phenomena of the objective reality, such as things, actions, money, securitis, property rights and the like, i.e. what can correspond to the legal impact on them from the subjects of civil law.

Secondly, the rights of economic value can be the subject-matter of a transaction. They take part in the economic turnover as an object of binding relations. They include: the right to things and the right to fictions. These rights are called property rights (immaterial property), the characteristic feature of which is the possibility of their alienation by title holders.

Thirdly, under the term "succession" one shall understand transfer of rights and obligations from one subject of civil law to another subject of civil law without changing the content and subject-matter of legal relations.

Fourthly, civil succession has a number of specific features, which are defined depending on the nature of legal relations, the subject of legal relations, the object of legal relations, the content of civil legal relations and grounds for arising of succession;

Fifthly, as a result of succession rights and obligations of the parties shall not be terminated. Only the subjects in civil legal relations change wile legal relations remain unchanged.

With the death of a person only those relations end, which were tightly connected to the person, and cannot exist without him/her neither actually, nor legally;

Sixthly, universal succession has an absolute nature and is characteristic to legal relations of ownership, while singular one has relative nature and is characteristic to binding legal relations;

Sevenly, the subject-matter of civil succession is actions of its subjects aimed at transfer rights and obligations under legal relations from one person to another;

Eightly, as succession takes place only at secondary acquiring the right, it serves as a criterion for distinction between methods of acquiring the right. Particularly, they include the initial one (at which the ownership right to the property or the property rights arises for the first time, or irrespective of rights of the preceding owner) and derivative ones (based on the right of the preceding owner).

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# ПРОБЛЕМИ ЗАСТОСУВАННЯ ЗАКОНОДАВСТВА ПРО СПОРТ

**Анотація.** *Спортивне право, як елемент системи права України, за своїми нормативними і функціональними властивостями поступово починає набувати ознаки самостійної галузі, в межах якої об'єднуються конкретні правові інститути. Тому основна мета роботи полягає у досліджені проблеми застосування законодавства про спорт. Проведено порівняння національного спортивного законодавства та спортивного законодавства Франції. Зазначено, що норми спортивного права враховані не тільки в численних галузевих нормативних актах, але й в законодавстві інших галузей, причому число відповідних норм неухильно зростає. Встановлено, що важливим фактором, що впливає на розвиток спорту в зарубіжних країнах, є комерціалізація сфери спорту, створення на його базі дохідних бізнес-моделей. Результати дослідження ускладнюють праворозуміння і правозастосування у сфері спортивного права, підтверджуючи необхідність його як найшвидшого реформування та вдосконалення спортивного законодавства.*

**Ключові слова:** спортивне право, цивільне законодавство, спортивно-правові відносини, субсидіарне застосування норм, систематизація нормативно-правових актів.

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# PROBLEMS WITH THE APPLICATION OF SPORTS LEGISLATION

**Abstract.** *Sports law as an element of the system of the Ukrainian law, by its regulatory and functional properties is gradually beginning to acquire signs of an independent industry which unites specific legal institutions. Therefore, the main purpose of the work is to investigate the problems of application of the legislation on sports are investigated. A comparison has been made between national sports legislation and sports legislation in France. It is noted that the norms of sports law are taken into account not only in numerous sectoral regulations, but also in the legislation of other sectors, and the number of relevant norms is steadily increasing. The results of the study complicate legal understanding and enforcement in the field of sports law, confirming the need for it as the fastest reform and improvement of sports legislation. It is established that an important factor which has the impact on the development of sports in foreign countries is the commercialization of the sports sector and the creation of profitable business models on its basis.*

**Keywords:** sports law, civil law, sports and legal relations, subsidiary application of norms, systematization of legal acts.

## INTRODUCTION

Over the last 10 years international sporting events have demonstrated that today's professional sport is not merely the sphere of social life, but also an important part of global politics. Any state considers achievements and success of its professional athletes at international competition to be the way to claim its place at global political Olymp. Modern stage of social development is featured with paramount importance, it has transformed from the way of health support and strengthening into specific style and mode of life of modern human, substantial portion of the market.

Over the recent years, the status of physical culture and sports in Ukraine has increased significantly. Development issues in this area became the priority tasks of the national policy. Lately global scale sports events more and more often take place on Ukrainian sports arenas, including European Championship (in cooperation with Poland, 2012), Champions League Final (2018). Despite numerous problems in the various areas of sports life, Ukraine becomes full-fledged member of the international sports community. In parallel professional and amateur sports is developing rapidly, physical culture is also stimulated. Dozens of state and municipal programs are being implemented in physical culture and sport fields, and considerable funds are being invested.

Named circumstances indicate not only significant development of legal relations in sports field, but also the necessity to bring sports legislation in line with them. Continuous transformation of sports legislation is causing quantum leap in sports law development, as well as putting the issue of further systematization of sports laws on agenda.

Although systematization of the laws and regulations does not immanently cause the development of new legal norms, at the present stage it is one of the key areas of legislative activity. The foregoing is relevant in continental legal family countries, including Ukraine.

For the time being over 20 law codes are in effect in Ukraine, and regulatory acts codification process is going on in the direction covering both existing law codes transformation and new ones development. In particular, the researchers review pending matters of transport, labor, environmental codes of Ukraine development as well as other codified regulations. Codification issue is also relevant to sports law development.

Sports law is relatively young science, and scientific community perceives it with a pinch of salt.

Legal regulation is an important factor influencing sports and creating certain conditions for its development. The Concept of the State Target Social Program for Physical Culture and Sports Development until 2020, approved by the decree of the Cabinet of Ministers of Ukraine dated March 1, 2017 No. 115 (hereinafter referred to as "the Concept"), analyzes the main causes of issues related to the crisis situation in physical culture and sports field. The purpose of the Program is to establish the

leading role of physical culture and sports as an important factor in healthy lifestyle, disease prevention, humanistic values formation, conditions creation for comprehensive harmonious development of a personality, individual's physical and spiritual perfection promotion, reserve capacities of the body identification, patriotic feelings formation among citizens. and positive image of the state generation in the global community. The Concept proposes to solve pending matters arisen in particular by improving legal and regulatory framework of physical culture and sports [1].

## 1. MATERIALS AND METHODS

For the time being this issue is subject to lively discussion in scientific community as sports laws development and improvement and solving the issues of sports laws application is an important tool to regulate sports relationships in Ukraine.

The issues of sports laws and regulations application, subsidiary application of civil law statutory regulations to sports relations in Ukraine have been investigated in domestic and foreign lawyers' publications. .

General scientific and special methods of scientific knowledge have been used to analyze the issues being subject matter of the research. Dialectical approach to legal reality cognition has been used to research general theoretical aspects of sports laws and regulations. The concept of subsidiary application of the civil law norms and regulations to sports relations has been investigated using formal-logical method. Structural-functional method allowed to consider the conditions and principles of sports laws and regulations application. The results of dogmatic (logical) analysis have been used while formulating findings and proposals, taking into account the requirements regarding certainty, consistency, coherence and relevancy of judgments within the framework of general theoretical and civil legal structures. Case study method has been used to identify the law enforcement value of sports laws.

## 2. RESULTS AND DISCUSSION

### *2.1. Particularities of sports laws in Ukraine*

The key regulatory legal act in sports laws and regulations system that could serve as the basis for the future sports code is the Law of Ukraine "On Physical Culture and Sports" dated December 24, 1993. Currently the activities to improve its provisions are going on; practically each year since 1999 modifications to it have been introduced. In 2009, this Law has been adopted by Verkhovna Rada of Ukraine restated, however it was amended and restated since than on repeated occasions [2].

The Law of Ukraine "On the Physical Culture and Sports" establishes, among other things, the basic principles of the relevant legal code, as well as defines the system of legislation of Ukraine on physical culture and sports. In accordance with the Art. 2: "The leggal code of Ukraine on physical culture and sport is based on the Constitution of Ukraine and consists of this Law, the relevant international treaties of Ukraine and other normative legal instruments regulating legal relations in this area."

The preamble to the Law states that it defines general legal, organizational, social and economic foundations of the activity in the field of physical culture and sports and regulates social relations in creating conditions for physical culture and sports development. Consequently, the adoption of the restated Law creates new opportunities for our state to attain set objectives; however unfortunately, it does not solve all the issues arising in physical culture and sports area. Such issue as legal regulation of professional sport deserves special attention. On September 28, 2004, the Decree of the President of Ukraine No. 1148/2004 approved the National Doctrine for Physical Culture and Sports Development (hereinafter referred to as Doctrine). Paragraph 13 of Doctrine states that the state creates conditions for the further development of professional sports on commercial basis. Economic and labor relations in professional sports are regulated at legislative level, measures are being developed to protect the interests of professional athletes [3]. However, despite declared intention of the state to regulate relations in professional sports by adopting relevant legal code declared in Doctrine, wide range of issues in this area still remain either unresolved or requiring improvement.

Specific system of sports laws and regulations availability in Ukraine non-prejudicially acknowledges the necessity to systematize laws and regulations which will ensure proper legal understanding and law enforcement in this area. Considering distinguished types of systematization, it should be noted that they form a strict hierarchy, the upper level of which is occupied by codification. The main and most obvious argument in favor of codification is unbiased impossibility for further systematization of legal code area through consolidation. Taking into account that the result of sports laws and regulations consolidation has been the development and adoption of the Law of Ukraine "On Physical Culture and Sports", and considerable number of sports legal regulations are contained in the laws, including codified statutory instruments of the other sectors, we can make the conclusion that codification only may become the next stage of sports laws and regulations systematization in Ukraine.

*2.2. Sports legal code peculiarities in developed countries*

In the mean time, the question relating to the necessity for sports laws and regulations codification still remains open-ended. Physical culture and sports laws and regulations codification is observed in a certain foreign countries (USA, Brazil, and France). Sports laws codification in these states has become a phenomenon of legal reality in recent decades. France stands apart, with completely developed full-fledged Sports code (Code du sport) which is already in effect. As French law refers to continental legal family, as well as our domestic law, the analysis of the French experience of codification of sports law is extremely important in the context of proposals development to improve sports legal code of Ukraine.

Sports code of France is among the special purpose codes that are the constituents of the civil law. Draft Sport code, developed in 2004 and adopted in 2006, as seen by the Ministry of Youth, Sports and Civil Life (Ministère de la Jeunesse, des Sports et de la Vie), was intended to establish the prioritized nature of the development of sports, to approve this trend as one from the key sections of the state policy [4]. In addition, the Code "was intended to improve the understanding and accessibility of sports laws and regulations", that is, in fact, was adopted for the same purposes, in the direction of which we need to go to develop Ukrainian sports legal code.

Sports code of France includes four books, each of which refers to the separate aspect of sports law [5]:

Book I – Organization of physical culture and sports;

Book II – Participants in sport events (athletes, referees, coaches, teachers, sports officials);

Book III – Various types of sports practices, safety and hygiene of sport, sports events arrangement and management;

Book IV – Sports funding and legal code application in the legal relationships that arise in overseas sports communities.

Its worth to note that the Sports code of France has envigorated French sports adevelopemnt nd created actual conditions for efficient elimination of corruption and other forms of sports crime. French experience in sports law codification is a vivid example of the way to solve the issues of physical culture and sports status enhancement, law enforcement clarity in the course of sports laws systematization, along with the way to lay right vector for legislative branch and appropriate area of law.

An important factor making impact on sports development in foreign countries is commercialization of the field of sport, revenue-generating business models creation based on it, such as it is done in UK or the United States, where one of the important tasks of sports is to earn money. Each English football club that is part of the English Premier League is a successful business project. In the USA, a professional sport in general is a unique joint business product, which is not subject to monopoly activities restriction, and objective of which is to generate income by drawing audience.

Meantime, the state is removed from resolving financial issues of sports development. China's experience in sports development area also seems to be noteworthy: here private business, including foreign investors, is allowed to participate in the state model of sports development. After sports invetsment program adoption by political leaders in 2014, Chinese business has entered global sports market. It should be noted that the main difference in the legal regulation of relations in Ukrainian sports sphere is the minimum degree of autonomy of physical culture and sports entities, their independence from state administration, even in comparison with China.

Ukrainian sports laws and regulations are characterized by pending issues which are in fact similar to those which have been resolved when codifying French sports laws. Conspicuous is the fact that effective branch regulatory document – the Law

on Physical Culture and Sports – has been chosen as the basis for codification. In this case, it is likely that foreign experience, analyzed and reviewed through the prism of domestic legal reality, gives us ready precedent for further development of Ukrainian sports legal code.

The above reasoning confirm sports law existence, as well as indicate incompleteness of regulatory process in this area. On the other hand, sports law area has key and fundamental legal regulatory instrument (the Law of Ukraine "On Physical Culture and Sports").

*2.3. Sports-legal relation principles analysis*

Rapid development of professional sports has also led to active migration of the legal norms of neighboring areas of law into sports relations. Most sports relationships are usually built on civil relations and this is supported by the Art. 12 of the Civil Code of Ukraine, in accordance with which individuals exercise their civil rights at their own discretion. It's worth mentioning that the following provisions characterizing sports legal code may be distinguished: a) the ability of the individual to determine the type and nature of behavior, his/her place in society in the system of sports relations at his/her own discretion; b) recognition of the fact that sports law subject has the right to make contracts or refraining from contracting, determine the content of such contracts at his/her own discretion in accordance with the agreement reached with contracting party; c) the requirement of fairness, reasonableness and fairness, which is expressed in establishing equal conditions for the participation of all persons in sports relations, establishing the possibility of adequate protection in case violated civil law or interest.

Sports law creates legal framework for self-regulation in the private law area, defines the principles of internal regulation of the parties to civil relations through an agreement, that is, the participants in relations can independently determine the rules of conduct for themselves. One of the most important regulations in civil relations, including sports ones, is freedom of agreement principle. The parties at their discretion, within the limits of the law, decide the issue agreement making and its content being guided by fairness, bona fides and right mindedness principles.

Article 627 of the Civil Code of Ukraine defines the freedom of agreement (sports contract) as the right of the parties to freely enter into agreement, choose contractors and decide the terms of the contracts, taking into account the requirements of the Civil Code of Ukraine, other acts of civil law, customs of business practice, requirements of reasonableness and justice. Article 628 of the Civil Code of Ukraine defines the content of agreement as provisions (paragraphs), established at the discretion of the parties and agreed upon by them, provisions that are mandatory in accordance with acts of civil law. The analysis of these articles shows as follows: a) inadmissibility of compulsory entry into sports contract relations, that is, participants in sporting

relations have the right to decide on their own discretion whether to enter into contractual relations or not; b) possibility of free choice of future counterparty; c) opportunity for the parties to freely determine the nature (kind, type) of contract they are making, that is, the parties at their own choice have the right to make contracts as foreseen by civil law and contracts not provided for by civil law however do not contradicting general principles of such law (so-called "nameless" contracts); d) possibility for the parties to the contract to determine its content without limitations.

At the same time, sports-legal relations disposition principle has certain requirements (restrictions) – the requirements of good faith, reasonableness and justice embodied in the Civil Code of Ukraine. Good faith and reasonableness principles objectivation is of utmost importance for the entire system of sports law functioning. First, they accumulate the general principles of sports law. Second, application of all the principles of sports law should not lead to unfair and unjust results [6]. In particular, Art. 627 of the Civil Code of Ukraine indicates the restriction of the principle of freedom of wisdom with requirements of reasonableness and good faith. Third, these particular principles are the basic essence of the law and indicate its natural origin and essence.

By settling the principle of free exercising of rights by sports relations participants, sports legislation simultaneously defines certain requirements which should be observed by the person at their rights exercising. The content of these requirements varies and depends on the nature and purpose of specific subjective rights, such as Art. 319 of the Civil Code of Ukraine, which states that the owner (for example, the owner of a sports club) owns, uses, disposes his/ she/ its property at his/ her/ its own discretion. While exercising his/ her/ its rights the owner shall adhere to the moral basis of society.

When exercising a variety of civil rights, sport relationships participants must act reasonably and in good faith, obeying moral and other norms of behavior accepted in society, however it does not mean that civil and sports law confer moral norms same status with legal ones, since violations of moral norms does not cause negative legal consequence to sports' legal relations participants, and any other interpretation of the requirements of the law would ignore the difference between the norms of law and moral. The content of this requirement comes down to the purpose of participants in sports relationships focusing on the necessity to observe general accepted moral norms in their activities.

Category of "reasonableness" is widely used in the new Civil Code, reasonable conduct of business (Art. 122), reasonable foreseeing change of circumstances (Art. 652) along with the other legal regulations, which in fact refers to reasonableness motives clarification (Art. 634).

Reasonable acts are deemed the acts that would have been done by sports relations participant provided that such participants have regular level of intelligence and life experience.

Makings any acts, sportsman primarily seeks to pursue his/ her own interests. However, legal regulations that require good faith actually encourage subjects to law to refrain from acts that could cause adverse consequences for other individuals. That is, subject to sports law must act in such a way as to take into account and satisfy his/ her own interests, however at the same time minimizing negative consequences for others. The boundary of reasonableness is an act that takes into account the interests of both parties. In particular, Art. 373 of the Civil Code of Ukraine provides that land plot owner has the right to use it at his/ her/ its own discretion, according to its intended purpose. That is, the owner of the stadium may use at his/ her/ its own discretion everything that is above and below the surface of this site, unless otherwise provided by law and unless this does not violate the rights of the other persons.

It is worth mentioning that sports law is considered from "conceptual approach" standpoint, which is defined as an aggregate of ideas, concepts, knowledge, associations and emotions arising in connection with the use of "sports law" term, accompanying and characterizing it. However, not paying attention to the issue of sports law place establishing in the system of the national law, it should be noted that such relations are firstly and primarily regular relations directly regulated by economic, labor, criminal, tax and civil law. Thus we'll speak now about the subsidiary (additional) application of statutory civil regulations to sports relations, which are subject to other law norms.

Given the role of civil law as the "mother sector" and allied relationships to which it applies, subsidiary application of civil law to sport relationships is quite possible. The Art. 9 of the Civil Code of Ukraine determines admissibility of the Civil Law of Ukraine subsidiary provisions application to allied relations, provided that they are not regulated by other legislative instruments.

*2.4. Civil law code subsidiary application features*

Subsidiary application of civil law norms to sports relations means legal mechanism allowing to remove from legal code inappropriate duplication of identical and similar norms and concepts in allied relations, institutes. This way of gaps overcoming refers to additional procedures, as it does not provide complete overlapping of gaps.

Nowadays subsidiary application of civil law rules takes an important place in consciously preventing legislator from duplicating the existing norms in civil law, which are applicable to allied relations in the field of sports. In other words, given the existence of civil norms expressed in civil law, the necessity is eliminated for repeated regulation of these relations along with relevant rules fixing in sports legal code.

The law delimitates subsidiary application of the norms of civil law differs from analogy of the law (inter-sectoral analogy).

First, subsidiary application of the norms of civil law in some cases may not be of temporary, as a kind of analogy of the law (inter-branch analogy), but of stable nature, directly established by the legislator, in order to achieve unity in the legal regulation of social relations, as is occurs under sport relations regulation.

Second, subsidiary application of the rules of law is carried out directly as a result of the will of the legislator, who introduces into the relevant legal norm special references to other norms governing such relations.

Third, the basis for regulatory action of the analogy of law exercising in the civil law of Ukraine is the Art. 8 of the Civil Code of Ukraine, and the basis for subsidiary application of the norms of civil law is Art. 9 of the Civil Code of Ukraine.

Fourth, only the judicial authorities while disputes settling in the field of sports are the subjects of law analogy (inter-sectoral analogy), the subsidiary application of the rules of law can be done by all participants in sports relations.

Subsidiary application of the rules of law ought to be interpreted wider than merely as an inter-sectoral analogy, since it can be used both in the presence of gaps in the law, and in the absence of them (as means to save regulatory material).

However, regardless of whether subsidiary application of the civil law norms is considered to be a kind of analogy or certain legal mechanism that allows to unloading of regulatory material, it is provisioned by certain conditions. Therefore, in order to ensure the principles of the rule of law and legality in the regulation of any relations, the necessary arises to identify the legal conditions under the presence of which legal norms application through subsidiary application of the rules of law to sports relations will be recognized as necessary, feasible and appropriate.

According to good point made by Yu. Kh. Kalmykov, "power law enforcement bodies do not use "subsidiary application of law" concept, they either directly refer to the necessity to use one or another norm from the allied domain of law, or formulate the possibility to refer to the latter in expressions, like "in accordance with the Art. ... "[7].

In particular, the provisions for subsidiary application of the civil law norms to sport relationships are as follows:

1. Lack of proper regulation of the sports relations. Unavailability of norm in the allied legislation that regulates sports relations, which can not be eliminated by analogy to the act, analogy to law, judicial practice or business conduct traditions application;

2. Availability of norm that regulates exactly these sports relations in civil law. It means certain genetic connection of allied branches of legislation

Allied branches are the branches of law with similar subject and methods of regulation. Branches a;;ied to civil law are: family, business, labor, international, private, procedural civil and economic, administrative, land, natural resources, financial law, etc. [8].

3. Uniformity of subject and method of legal regulation in allied branches of law regulating sports relations, is similar to those in respect of which subsidiary application of the civil law norms take place.

For example, civil and labor law has always been historically interconnected, because labor law has been detached from the civil system in the process of historical evolution and due to complication of legal relationships. New branches of law, institutions, and relations formation observed by us nowadays in sports law also has been taken and takes place based on the civil law. Labor law and social protection law also uses legal structures and theories developed by civil law.

4. There is not any direct prohibition for the subsidiary application of the law norms. It is necessary to take into account that subsidiary application of the civil law norms to sports relations is not prohibited by law.

5. Taking decision on the basis and within the legal norms of allied branches of law in sport activities, in accordance with their objectives and general sense principles. It is important to emphasize that when choosing subsidiary applied norm of law, the principles inherent to the branch of law to which these norms actually belong should be primarily taken into account. Thus, the subsidiary application of the norms of law takes place only between relations in sports field, that is, identical in their nature and genetically interrelated

In some cases, one of the conditions for the subsidiary application of the civil law norms is the availability subject empowered for such application. Subjects who may use subsidiary application of the civil law norms to these relations are all participants in sports relationships.

In particular, the rule of the Part 4 of Art. 209 of the Civil Code of Ukraine stipulates that at the request of individual or legal entity, any transaction under participation of such individual/ entity may be certified by a notary public. The question arises as to how notary should act in the event of the necessity to certify sports contract that is not provided for by legislative instruments or in the absence of substantive law norms required to regulate social relations being the subject of notarial acts. Since notary carrying out notarial acts may not refuse to perform notary acts without substantiation, he/ she can subsidiary apply civil law norms for sports contract certification. However, Art. 49 of the Law of Ukraine "On Notary" containing grounds for refusal to perform notarial acts, does not provide for notary's obligation to refuse to perform notarial acts in the event of lack or incompleteness of the law, noting only that the acts performance can not be contrary to the laws of Ukraine.

## CONCLUSIONS

The result of subsidiary application of civil law norms to sports relations by the named sports law subjects is the adoption of enabling legislation – order or judgment of court, decree and other legal and regulatory acts of state and private legal entities

and individuals, sports contract. In any case, compliance with the conditions of subsidiary application of the rules of the law by participants in sports relations is rather important, eliminating the risk of abuse of this legal mechanism. It is not allowed to adapt the same norm to the allied relations in sports field via slightly different interpretation, since the essence of subsidiary application of the civil law norms is not in norm content interpretation, but in its effects transfer to sports in their context and nature relations.

In order to provide meeting the requirements of specific truth while subsidiary applying civil law norms to sporting relations, such subsidiary application shall be based on the principles – such initial ideas of its being which express the most important consistent patterns and basis of the state and law of this type, which are one-way with the essence of law and make up its main attributes, are featured with versatility, higher mandatory nature and general meaningfulness, correspond to the objective necessity to build and strengthen certain social system

Taking into account general legal principles and general basis of the civil law (Article 3 of the Civil Code of Ukraine), and also bearing in mind that the subsidiary application of the norms of the law can be carried out by all participants in sports relations, the following principles can be apportioned:

1) arbitrary interference in private life sphere inadmissibility principle;
2) freedom of contract principle;
3) rights and interests judicial protection principle;
4) supremacy of law, legality, equality, substantiation principles;
5) justice, honesty, reasonableness and efficiency principle.

Currently, sports law norms are taken into account not only in numerous regulations of the branch, but also in other branches' law, and the number of relevant normss is steadily increasing. This complicates legal consciousness and law enforcement in sports law area, confirming the necessity for sports law fast reformation and improvement.

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# ПОСМЕРТНЕ ДОНОРСТВО: НА ШЛЯХУ ФОРМУВАННЯ НАЦІОНАЛЬНОГО ПРАВОВОГО ПІДХОДУ

**Анотація.** *Посмертне донорство органів є одним з найбільш актуальних питань в медицині. Практика використання органів померлих осіб для порятунку інших життів існує в більшості держав світу, але існують країни, які не знайшли єдиного вирішення цього питання. Тому основна мета роботи полягає у вивченні питання посмертного донарства в Україні і визначенні його відповідності європейсько-правовим стандартам. Матеріалом даного дослідження є правова регламентація посмертного донорства, як певної частини медицини. Зокрема, досліджуються норми міжнародного права, а також окремі положення національного законодавства різних країн, які спрямовані на регулювання відносини в сфері посмертного донорства. Результатом дослідження стали висновки про необхідність і можливість формування єдиних міжнародних стандартів правового регулювання посмертного донорства, і розробка на їх основі національного законодавства. Тому автори вважають, що назріла гостра необхідність в розробці єдиних засад законодавства про донорство і трансплантації. Їх наявність не тільки дозволить уникнути юридичних колізій, але і дозволить визначити шляхи вдосконалення національного законодавства та єдину термінологію понятійного апарату. Встановлено, що законодавчі акти повинні розроблятися системно і повно, як і будь-який інший нормативний акт.*

**Ключові слова:** трансплантація, правова охорона, трансплантологічний туризм, міжнародний стандарт.

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# POSTHUMOUS ORGAN DONATION: AT THE WAY OF CREATION OF A NATIONAL LEGAL APPROACH

**Abstract**. *Posthumous organ donation is one of the most actual issues in medicine. The practice of using the organs of the dead to save other lives exists in most countries of the world, but there are the countries that have not found a single solution for this issue. Therefore, the main purpose of the work is to study the issue of posthumous donation in Ukraine and determine its compliance with the European legal standards. The material of this study is the legal regulation of posthumous donation as a certain part of medicine. In particular, the norms of the international law as well as certain provisions of the national legislation of various countries which*

*are aimed at regulating the relations in the field of posthumous donation are examined. The results of the study were the conclusions about the necessity and possibility of formation of single international standards of legal regulation of posthumous donation and the development of national legislation on their basis. Therefore, the authors believe that there is an urgent necessity of developing a unified framework of legislation on donation and transplantation. Their presence will not only help to avoid legal conflicts, but will also point to the necessity and ways to improve the national legislation, change some approaches in the international relations and define a common terminology of the conceptual apparatus. At the same time, they should be developed systematically and fully as well as any other normative act.*

**Key words:** transplantation, legal protection, transplantation tourism, international standard.

## INTRODUCTION

Human life and health are the main values of any legal state and global community as a whole. Ukraine, which is trying to make every effort to achieve this goal, is not an exception. Therefore, medicine, which faces immediate task to preserve these values, is a flagship, and the state is a guarantor in this sphere [1]. Moreover, there is no need to additionally explain the fact that the legal regulation of relations in the field of medicine plays equally important role, in addition to the knowledge and experience accumulated in the field of medicine. The law is capable to stimulate and restrain development in one or another direction of the medical branch, and even consciously or unconsciously establish a ban on its individual elements development [2; 3]. Therefore, domestic jurisprudence faces challenges to develop single paradigm for the law development in this direction, which would meet European standards. Without any doubt, such guidelines are necessary for Ukraine. At the same time, domestic legislation remains imperfect and unsystematic complicating national-level program implementation in terms of its adaptation to the EU legislation. Therefore, such adaptation sometimes is made by segments.

One of the challenges on the way to Ukrainian legislation improvement is the level of legal regulation of the posthumous organ donation, as a specific part of medicine, with which this article is concerned.

An important issue of the whole legal approach is to verify compliance not only with the European legal standards, but also the ability to globally unify legal regulation of posthumous organ donation in Ukraine. This goal achievement seems possible through establishment of the key vectors for a certain countries development, including EU countries in the matter of legal regulation of posthumous organ donation, as a specific part of medicine.

Therefore, the task of the state is not only to form a public understanding of the need for legal regulation of these relations, but also a scientific idea which existing vectors for development to choose, its features, and obstacles that can arise on the way of its development and why.

The issue of posthumous organ donation has been the subject of research made by many scientists, in particular: M. Bryukhovetska [4], N. Margatskaya [5], E. Ste-

panova [6], E. Alsynbaeva [7], K. Sangster [8], K. Novotna [9], T. Godalova [10], L. Jirmářová [11], A. Nevečeřalová [12], D. Baniubala [13], T. Woo [14] et al. In general, literature review confirms that this topic is sufficiently investigated. However, it still requires a systematic study. In spite of the fact that unification in approaches of posthumous organ donation, perspectives and vector of its further development, generalization, and research of existing experience were given a sufficient attention by the representatives of various branches of science even in the last century, but the legal regulation of relations in the field of posthumous organ donation is still far from perfection in Ukraine.

## 1. MATERIALS AND METHODS

To study the issue of posthumous organ donation in Ukraine, the authors used various theoretical methods: comparative legal method, methods of induction and deduction, analysis and synthesis, system analysis, and analogy. These methods included analysis of various literary sources and regulatory acts. The comparison method allowed to determine that the process of regulatory framework building, which regulates relationships in posthumous organ donation is still in infancy in Ukraine. But certain steps towards the national legal approach development have already been taken. As an example, it can be referred to the recently adopted Law of Ukraine "On the use of transplantation of anatomical materials to humans" [15], where approaches to relationship regulation in the field of transplantation and activities related thereto, anatomical materials obtaining for making bioimplants and xenoimplants implementation conditions determination were updated. In particular, the basic principles of transplantation were fixed and some approaches to transplantation conditions and procedure were changed.

The formal logical method contributed to study legal nature of legal relations of donation and the right to donation. The comparative legal method was applied throughout the study, in particular, the national legislative regulation of donation and foreign countries, as well as their compliance with the international legal acts.

The statistical method allowed to determine that the main ideas of today's concept are in the fact that: 1) removal of anatomical materials can be made both from living donors (lifetime organ donation) and from a corpse donor (posthumous organ donation); 2) person's will to give consent or disagreement to the posthumous organ donation, as well as to removal of anatomical materials for transplantation and / or bioimplants manufacture from the body of deceased, which it represents, including subsequently the refusal of such removal shall be made in writing and registered in the Unified State Information System of Transplantation; 3) procedure for obtaining "express consent" ("presumption of disagreement") on a posthumous organ donation is clearly detailed with possible marking of such consent in a passport or other identity document; 4) basically, transplantation is defined as free, except for hematopoietic stem cells (this can be either paid or free, depending on the will of the donor itself),

and therefore the law prohibits any commercialization in the field of transplantation, as well as advertising of organs and / or other anatomical material; 5) legislator has introduced the institution of "authorized representative", which, after death of any adult legally capable person, the latter authorizes to give or not to give consent for anatomical materials removal from his/her body for transplantation and / or bioimplants manufacture; 6) the law provides for a special registry - the Unified State Information System of Transplantation, which contains information with limited access about donors, recipients, characteristics of anatomical materials that are collected, processed and protected in the manner prescribed by law; 7) a position of transplant-coordinator is introduced, which is entrusted with the function of transplantation process monitoring and conduct at each of its stages, including relevant information entry into the Unified State Information System of Transplantation; 8) Section 22 of the Law establishes the guarantees of the legal status of the donor and members of its family, namely, their rights and social protection in the event of anatomical materials provision and removal from the donor subsequently.

## 2. RESULTS AND DISCUSSION

### *2.1. The value and development of legal regulation of relationships in the field of posthumous organ donation*

As it was noted in the legal sources, the issue of posthumous organ donation is deeply felt in each state [16]. Moreover, it is felt even at the international level [14], about which more than one scientific work was written. It can be explained by the fact that today the skin, heart, kidneys, lungs, liver, pancreas, stomach, etc. transplantation is not surprising. And patients, most of whom could barely expect death or put up with their helpless and painful conditions until recently, get a "second life" or "chance to live".

At the same time, one of the main issues of such operations is an insufficient number of donor organs. Ukraine also faces this challenge. The posthumous organ donation can partially eliminate current "deficit". But international community faces the issue that it is very difficult, if not impossible, to solve this problem in a single country. And the matter is not only in the qualified specialists, clinics, equipment, etc., but as it seems in the legal basis. After all, each country gains its experience through its mistakes, takes the way which has been previously passed by other states. And it is not always positive. National legislations of various countries often develop in absolutely opposite directions, which does not contribute to effective processes regulation targeted at coping with the deficit of donor organs and ensuring stability in such relations regulation, especially in cases where private interests achievement becomes impossible due to different systems of legal relations regulation connected with transplantation. Therefore, an absolutely progressive view has been formed in the world about the need to develop unified system of international standards that

ensures stability in legal regulation of transplantation in general and posthumous organ donation in particular. This, in fact, was noted in the Resolutions WHA40.13 and WHA42.5 of the World Health Assembly, namely that different legal approaches fixed by different countries, and sometimes contradictory ones, complicate a single legal field formation. Indeed, no single legal field today makes it difficult to meet both private and public interests. This is explained by the fact that each state has its own unique model of legal regulation of transplantation issues. This is shown not only in the main aspects of the concept of posthumous organ donation introduced in a particular state (altruistic and/or compensatory idea of posthumous organ donation; posthumous organ donation is based on presumption of consent or disagreement; death of an individual is based on the concept of cerebral death (brain death) or on the basis of cardiac arrest (blood circulation)), but also which regulatory requirements (prohibitions, restrictions, permissions, recommendations, incentives, stimuli, etc.) are applied during such relationships. The following directly depends on this: 1) stability or instability of such relations; 2) level of legal protection or individual integrity and health protection, respect for human dignity, including adequate protection of privacy rights; 3) donor motivation to give its anatomical materials and / or organs, and recipient in determining to obtain  not obtain treatment (for example, in its own country or in another country); 4) deficit or surplus of anatomical materials and/or organs in the country, etc. It is also important to note that the level of legal regulation may also form certain market relations in the state, regardless of whether such relations are legal or not, or whether they are prohibited or not. After all, demand generates supply, therefore, development of market relations is subject to objective laws. And here there are three options for such relations development. Excessive regulation will inevitably lead to their decline and inability to develop progressively, introducing advanced experience, technology and knowledge. Insufficient and unsystematic legal regulation gives rise to such relations development and functioning outside the legal field, when the posthumous organ donation does not differ considerably from criminal activity. The confirmation of the latter is a human body, which is very often regarded as a commercial product, even despite the fact that in most countries of the world they are outside the civil circulation. For example, in India and China there is a black market for human organs, and transplant tourism is developing. And only a systematic, based on the balance of public and private interests, legal relations regulation in the field of posthumous organ donation and transplantology will contribute to their progressive development.

*2.2. Experience of foreign countries*

Analysis of international legislation and legislation of some states allows to positively assess the trends in its formation. And in this area, US law is one of the most advanced. This is confirmed by the fact that the United States among all other countries takes the first place by the number of transplant operations. Thousands of

kidney, liver, heart, and lung transplant operations are performed every year in this country [17]. According to preliminary data of American non-profit organization, Organ Procurement and Transplantation Network (OPTN), there were 10,281 cases of posthumous organ donation in the United States during 2017. This is by 3,1% more than in 2016, and by 27% more than in 2007 [18]. Figures are impressive, and therefore it would be possible to take US legislation as a basis and introduce a system of international standards for posthumous organ donation legal regulation. This includes both control over the national registration of donors, and procedure for organs receipt by recipients and anatomical gift execution, etc. [19]

To create unified international standards for legal relations regulation in the field of posthumous organ donation, one could use not only the experience of the United States, but also other advanced countries of the world. In particular, Israel has very interesting developments, where, due to successful comprehensive regulatory framework, the health care system has risen to a high level remaining accessible to the population. In particular, according to the Israeli Law "On Anatomy and Pathology", all persons who are waiting for any organ transplant are divided into three lines. And this order of priorities stimulates citizens involvement in organ donation [16]. Tax benefits, free travel in public transport, study grant, honorary certificate [20], etc. depend on this. The legislator has a differentiated approach to the consent to remove organs and / or tissues from corpse [21] (for example, removal of organs of the deceased is allowed only in the presence of a rabbi). This suggests the need to take into account religious and cultural features, social relationships and specifics of upbringing in a particular social community.

Also experience of Spain, which is the leader in Europe by the number of cases of posthumous organ donation, is also equally important for a uniform legal approach modelling [22]. In particular, Spanish model of organ donation regulation is recommended by the World Health Organization (WHO) as the most effective [23]. In this country, in average 39.5 donor organ recoveries are made per one million of the population for further transplantation. For comparison, in Germany – 10.4, in England – 20, 6, in Russia – 3 [24], in Ukraine – 0 [25]. In Belarus, due to successful model of legal regulation, 20 donor organ recoveries per one million of people are made annually [21]. Today it is a leader among post-Soviet countries.

Relationships of the posthumous organ donation are specifically regulated in China, where since 1984 national legislation has fixed the possibility to recover donation organs for transplantation from executed criminals, which significantly reduces organs deficit, for subsequent transplantation in this country [26]. The Ministry of Justice of Saudi Arabia took things a step further. In particular, it proposed to legalize not only donor organs recovery from the bodies of executed criminals, but even those who were sentenced to execution [27]. Experience of Iran also draws attention. This is the only state that officially adopted the regulated system of kidneys sale [28] and

thus virtually eliminated the "deficit" in donor organs in the country. In Japan, close relatives have a priority over donor consent in a posthumous organ donation [29].

Such legal approaches are different from that ones adopted in most countries of the world. Obviously, the experience of China and Saudi Arabia cannot be applied to Ukraine, since we have no death penalty. But, when modelling national legislation in order to regulate posthumous organ donation, it is necessary to take into account both positive and negative experience gained in the world. Moreover, according to the authors of this article, universalization shall allow certain deviations taking into account cultural, social, religious and legal factors that have traditionally been settled in a particular social group. And the world community is already developing in this direction.

*2.3. International Law in the Uniform Standards of Legal Regulation of Posthumous Organ Donation*

In 1967, the EuroTransplant, non-profit organization, was established in Europe, which not only accumulates information about potential donors and recipients, but also about donor organs of deceased availability, as well as promotes international exchange, both by this information and by existing donor organs. The organization includes eight countries-members: Germany, Austria, Luxembourg, the Netherlands, Belgium, Slovenia, Croatia, and Hungary. There are 1,601 donor hospitals and 72 transplant centers on their territory. Every year, EuroTransplant provides recipients with more than 7,000 organs [30]. And it seems that Ukraine should also join this organization.

Within the framework of the Council of Europe, in 1978, Recommendation R (1978) 28 was adopted regarding organs transplantation and legislation harmonization related to the organs transplantation. In 1985, the International Organization "Transplantation Society" developed recommendations on the organs distribution and use extracted from dead bodies at the level of the regulation [31]. In 1987, again within the framework of the Council of Europe, a Recommendation was issued on the international exchange of organs for transplantation. In the same year, the Council of Arab Ministers of Health adopted a draft law on the human organs transplantation, unified for all Arab countries [29], and the document on non-commercial approach to human organs donation was adopted at the Conference of European Ministers of Health [32]. In 1991, the World Health Organization (WHO), taking into account the diversity of health systems and rights, as well as the circumstances in which these systems operate in different countries, and social, cultural and religious characteristics, develops the Guiding Principles on Human Organ Transplantation [33] after a lot of consultations held. In the same year, the XLIV World Health Assembly approves these principles and recommends Member States to take them into account when formulating legal policies in this field. Considering that various centers licensing and accreditation for the human tissues use also take the way of free advancement in posthumous organ

donation, and international standards for transplantation centers, blood transfusion services, tissue banks and laboratories accreditation have been developed within the European Community [34]. In 2002, the Additional Protocol to the Convention on Human Rights and Biomedicine regarding human organs and tissues transplantation was adopted [35]. In 2008, the "Declaration of Istanbul on Organ Trafficking and Transplant Tourism" was adopted, which proposed standards for the transplant tourism regulation and the ways to overcome donor organs deficit [36].

Obviously, this is not the full range of efforts aimed at a unified international standards formation for the legal regulation of relations in the field of posthumous organ donation, but even it sufficiently illustrates the result of titanic work resulted from international cooperation.

*2.4. Obstacles in the unified international standards formation for the legal regulation of relations in the field of posthumous organ donation*

Despite of significant achievements of the world community, significant obstacles in the unified international standards formation for the legal regulation of relations in the posthumous organ donation are created by the differences in religious, cultural and philosophical views, difference in the legal systems and health care systems, and the circumstances under which they operate in different countries and regions. Ukraine, as a multinational country, in which various cultures, religions, philosophies, etc. have united, cannot ignore such obstacles even when forming its domestic legislation.

For example, different religions differently treat posthumous organ donation. Let`s illustrate this.

At the General Assembly of the Church of England, it was proposed to recognize the donation of blood and organs as a duty of a Christian, like a material and monetary donation. And the Church of England submitted its attitude towards organ donation in its appeal to the House of Lords [37]. In turn, Pope Benedict XVI, speaking in 2008 at the meeting organized by the Pontifical Academy of Life, stressed on organ donation which can be a form of charity, generosity and fraternal love [38]. Section XII.7 of the Fundamentals of Social Concept of the Russian Orthodox Church suggests that modern transplantology can provide effective assistance to many patients who were destined to inevitable death or severe disability. The consent of informed person to organ recovery is a manifestation of love and sympathy [39]. Similar decisions in the last third of the 20th century were made by official bodies of the Lutheran, Episcopal Church, a number of other Orthodox churches and movements in Christianity [40].

Judaism has prohibitions to desecrate the dead bodies, to receive benefits from the body, as well as Commandment of the Grave, according to which all parts of the body should be buried. But all these factors are cancelled by the situation when it is required to save someone's life [41], since life saving (pikuach nefesh (Heb. חוקיפ

שפנ, "saving a life") is a basic principle in Jewish law, more important than other commandments of the Torah. But in general, Judaism accepts organ donation. Moreover, when determining the time of death of any donor, a number of religious legal conflicts arise. Many Jewish authorities believe that the criterion for any person death is not brain death, as considered in most parts of the world, but heartbeat arrest. Up to this point (even if the heartbeat is maintained artificially) organs cannot be removed, since this will cause immediate donor's death, and in fact, murder [40]. The Ultra-Orthodox religious Jewish community "Haredi" does not accept posthumous organ donation in principle, as it is considered to be desecration of the dead body [40].

The attitude of Buddhism to posthumous organ donation is ambiguous. The matter is that Buddhists have no centralized religious authority, which would declare doctrine and ethics in the human organs donation [42]. Therefore, their attitude to organ donation may differ significantly depending on the culture in which it is acceptable. So, Western Buddhists believe that death follows after consciousness disappears from the physical body, which is destroyed by various factors. Physical body degradation is inevitable, its preservation is useless, and therefore, if it can be used to save the lives of other people, then the wisest and rational people, including Buddhists, should voluntarily agree to a posthumous organ donation, if necessary. [43 ]. Most of Eastern representatives of this religion assume that organ transplantation, like blood transfusion, is possible only from a living donor, provided that it was a gift (donation) to the patient, i.e. the donor did not receive any funds for [44]. Therefore, posthumous organ donation is condemned by them.

In Islam, the relation to organ transplant is also complicated. In a number of Arab countries, it is absolutely prohibited. For example, Sheikh Ibn Uthaymin said: "It is prohibited for any person to give part of his body (except for blood) to anyone, either during his life or after death"[45]. Abdullah bin Yazid al-Ansari believed: "The Prophet ... prohibited robbing and corpses disfiguring [46], i.e. the body of deceased should remain intact. Sheikh Ibn Baz stated: "If deceased was an apostate or enemy adherent of different faith, then I don't see the problem to expose him for a medical benefit" [46]. But in general, Islamic theologians and scholars recognize posthumous organ donation. So, in cl. 5 of Sharia provisions of the Resolution No. 26 (1/4) "On Organs Transplantation of a Living or Dead Person", adopted on February 06-11, 1988 The Council of Islamic Academy of Law (Fiqh) at the Organization of Islamic Conference, during the Fourth Session, convened in Jeddah (Kingdom of Saudi Arabia), determined that organ transplantation from the body of deceased person is permitted if life or one of the main vital functions of the patient's body depends on [47].

In Shintoism, traditional and fairly common religion in Japan, any violation of dead body integrity is treated as a very serious crime (sin). Moreover, everything related to the body of deceased person, namely, his death is considered filthy, and the main offense of faith, which should be avoided, is filthiness. Death or, rather, desecration by death is unacceptable to Shintoists and requires purification [48]. Therefore,

the organs transplantation of the dead person into the body of the persons who practise this religion is unacceptable for religious reasons. This also applies to a Shinto doctor who will not extract organs from the dead body since it will be treated as sin, i.e. desecration of itself by death becoming filthy.

The dead body is treated as a strongest source of filth requiring subsequent ritual purification in Zoroastrianism. Moreover, representatives of this religion believe that a human can give only what belongs to him. And nothing belongs to him in the human body. Therefore, he cannot donate anything, since it will look like theft. The only thing permitted in Zoroastrianism is to give dead body as a food to the vultures [49].

Obviously, when creating unified international standards for legal regulation of posthumous organ donation, to which Ukraine seeks to join, it is necessary to consider different religious views on the dead body and to balance public and private interests.

As to the issue of posthumous organ donation perception by the representatives of various social groups, cultures, nations, and nationalities, it should be noted that it also has no common view. For example, organ donation and donor organ transplantation are prohibited in many traditional communities of original residents from North and South America. The Romani usually reject organ donations by observing national traditions, and their traditions require dead body preservation intact [50]. In philosophical Taoism, which is highly developed in China, to take as a given is the only way to react to the approaching death, and all artificial measures contradict natural course of events [51]. Therefore, they consider organ donation and organ transplant unacceptable. Neighbouring countries also have different attitude to posthumous organ donation, which have the same religion and close culture. For example, in Austria, the level of consent for a posthumous organ donation among the population achieved almost 100%, but in the neighbouring Germany only 12% [52]. Different attitude is observed even within the same country, religion and culture, for example, in Italy.

Negative attitude to the posthumous organ donation, even within a single culture, religion, and nationality can be illustrated with quotations from a publication. The author advances an idea that brain death is not equal to human death. In case of posthumous organ donation, it is fundamentally necessary that the person was still alive with heartbeat, blood circulation and breathing to continue. In Germany, some doctors, who do not wish to deal with convulsions of the so-called "dead body" during its organs extraction, apply anaesthesia or anaesthetics. And the author put the logical question: if it is a dead body, then why does it need anaesthesia, and if they apply anaesthesia, if it is a dead body? [53] With good reason German law establishes a more flexible model for determining the fact of person's death. So, German Law "On Transplantation" (TPG) in § 3 of Section 2 establishes two criteria to determine death. First, the fact of death of a potential donor should be determined in accordance with the level of knowledge of medical science about. Secondly, the death of potential

donor shall be determined in the event of a final and irrevocable loss of the whole brain function, and the fact of such establishment should correspond to the level of knowledge of medical science about [54]. When creating national standards for legal regulation of posthumous organ donation, we believe that the German model (based both on brain death and relied on the level of knowledge of medical science) is more acceptable and flexible legal model. It can: cover unusual cases outside the ordinary ones; provide an opportunity for the doctors to apply contemporary and advanced methods of treatment in order to save human life; to better respond to the medical science development and create legal frameworks ensuring to proper protect the highest social values (human life and health).

In general, the issue on death criteria was widely and publicly discussed and covered due to the fact that the interests of recipients who try to obtain the most viable organ may conflict with the interests of donor whose organs are still viable at the point of death [55]. However, the moment and criterion of death are defined at the regulatory level. And this can be treated as a generally accepted standard. So, in 1968, the Harvard Committee adopted the criteria for death based on irreversible cessation of brain activity but not heart and lungs including irreversible coma [56]. In the same year, the World Medical Association adopts Declaration of Death as amended in 1983 [57]. In 1972, the American Neurological Association recognized the basic concept of brain death as the only possible fact determining human death. In 1983 was adopted the Venice Declaration on Terminal State [58].

When creating unified both international and national standards for the legal regulation of posthumous organ donation, one more thing should be taken into account. The matter is tht the different legal systems have different approaches to regulate certain relations. This also applies to posthumous organ donation. For example, according to the Model Unified Law "On Anatomical Gift" [59] adopted in the United States, the consent to a posthumous organ donation is regulated through the structure of organ donation contract [60]. At the same time, for the most countries of the continental legal system, this approach is not typical. Despite of in theory where these issues are discussed, however, the national legislation of the most countries directly avoids solving this issue. This can be explained by the fact that traditionally for the continental law system, the human body as a whole and any thereof cannot be treated as objects of civil (private) legal relations, and therefore, no deal can be concluded with them. It is obvious that contemporary social challenges require to revise established views in jurisprudence and to rethink traditional approaches taking into account new conditions for mankind development.

Also, one should take into account specific features of the system of Islamic law. After all, its sources are the Quran (the holy book of Islam and the basis of Islamic law) and the Sunna (a set of legends about statements and deeds of the Prophet Muhammad) that have important legal significance. Obviously, these sources are not

subject to change, revision and amendment, but their truth cannot be even questioned. And only Ijma, as a general and unanimous opinion of authoritative legal scholars of Islam living in the same period of time, and qiyas - judgment by analogy in the matters of law, can be changed and amended in accordance with the time and legal consciousness requirements. But they regulate relations only in the matters in which the main sources are silent and do not contradict. In fact, they play a single role in ensuring gap free Islamic law.

Differences between the Anglo-Saxon and continental system of law also require considerable attention. They differ not only in their sources, but in their internal structure, basic legal institutions, structures, legal technique, etc.

It should be noted that different legal systems and different approaches intended to regulate relations in the field of posthumous organ donation, and diverse religious, cultural, national, and ethical views do not detract the need to create unified international standards for the legal regulation of relations in the field of posthumous organ donation. And as a result, national legislation to be formed on their basis. Moreover, such a diversity is not an irresistible problem. For example, in Ukraine organ transplantation is allowed after death of donor only if he/she gave his/her appropriate consent in advance, i.e. with effect of presumption of disagreement [61]. At the same time, legislative consolidation of presumption of consent allows to achieve higher efficiency in overcoming deficit in donor organs. Therefore, we believe that it should be used in the unified national standards creation for the legal regulation of relations in the field of posthumous organ donation. In the same case, when organs extraction contradicts religious, cultural, national, moral and social views of the future donor, he/she can freely express his/her disagreement. However, presumption of consent should be differentiated. It should not apply to the persons under the age of adult and persons suffering from mental diseases. Such approach makes it possible to reject the arguments of those who believe that this category of persons is not able to realize the significance of their consent, and therefore abuses are possible.

## CONCLUSIONS

So, the need and possibility to create the unified international standards for the legal regulation of posthumous organ donation and development of national legislation on their basis are obvious. Moreover, such approach will correspond to the modern law development at the global level, its universalization and unification. Certain steps in this direction have already been taken. But in terms of globalization, we believe that there is an urgent need to develop unified framework for the legislation on organ donation and transplantation. Their availability will not only allow to avoid legal conflicts, but also indicate the need for and ways to improve national legislation, to change some approaches in the interstate relations and to define common terminology within conceptual framework. Common framework for legislation on organ do-

nation and transplantation will realize, in essence, the Voltaire's wishes expressed by him in the 18th century: "Let's make all the laws clear, uniform and precise". They should be developed systematically and fully, like any other regulatory act.

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# ДЕРЖАВНІ НАГОРОДИ СПОРТИВНОЇ СФЕРИ, СПОРТИВНІ ЗВАННЯ, СПОРТИВНІ РОЗРЯДИ, НАГОРОДИ СПОРТИВНИХ ЗМАГАНЬ ЯК ОБ'ЄКТИ СПОРТИВНОГО ПРАВА

**Анотація.** *Стаття присвячена дослідженню правового режиму спортивних нагород як об'єктів спортивного права. В якості спортивних нагород розглянуті державні нагороди спортивної сфери, спортивні звання, спортивні розряди, нагороди спортивних змагань. З огляду на загальнотеоретичне підгрунтя та приватноправовий підхід автором розглянута соціальна природа спортивних нагород та їх функції, проаналізовані особливості спортивних нагород як об'єктів спортивного права, наведена їх диференціація. Встановлено, що спортивні нагороди та нагородні системи надзвичайно різноманітні й достатньо умовно піддаються теоретичному узагальненню, але при цьому теоретична конструкція спортивних нагород має ряд специфічних рис. Виявлено, що законодавець не встановлює загальних вимог до якості спортивних нагород. Ці питання розглядаються на рівні місцевого нормативного регулювання.*

**Ключові слова:** об'єкт спортивного права, спортивні нагороди, спортивні звання, спортивні розряди.

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# STATE AWARDS SPORTS, SPORTS TITLES, SPORTS EVENTS, AWARDS SPORTS COMPETITIONS AS AN OBJECTS OF SPORTS LAW

**Abstract.** *The article is devoted to the study of the legal regime of sports awards as objects of sports law. State sports awards, sports titles, sports categories, sports competitions awards were considered as sports awards. Taking into account the general theoretical provisions and the private law approach, the social nature of sports awards and their functions are considered, the features of sports awards as objects of sports law are analyzed, their differentiation is given. That is determined that sports awards and award systems are extremely diverse and relatively conditionally subjected to theoretical generalization, but the theoretical design of sports awards has a number of specific features. It is revealed that the legislator does not establish general requirements for the quality of sports awards. These issues are considered at the level of local regulatory regulation.*

**Keywords:** object of sports law, sports awards, sports titles, sports categories.

## INTRODUCTION

By determining the term "sport" in Article 1 of the Law of Ukraine "On Physical Culture and Sports" dated 24.12.1993 as an activity of the physical culture and sports subjects aimed at identifying and unified comparison of people`s achievements in physical, intellectual and other spheres by holding sports competitions and corresponding preparation therefor, the legislator stresses on the importance of competitiveness in the field of sports and fair awarding of sports achievements. Stimulation measures and "soft" influence, specific for the private law, fully contribute to the state policy implementation in the field of physical culture and sports, since the current tendency is that "the significance of reward as a legal instrument is constantly increasing" [1].

Rewarding is not only an award for achievements, but also an incentive for further achievements in creative initiative and abilities [2].

Sports awards are a a sufficiently effective instrument, which stimulates positive and socially beneficial behavior and contributes to sports achievements growth, mass sports popularization and healthy lifestyles, helping to create a positive image of the state in foreign affairs. By affecting consciousness, including at the psychological level, sports awards create additional incentives for higher achievements, children's sports, children's and youth sports, reserve sports, professional sports, masters sports, applied military sports and sports for people with disability, and have a positive impact on physical culture and recreational activities, as well as stimulate mass sports and physical education development.

In general, the author of Theory of Awards I. Bentham defined the award as a certain share of welfare gifted for the real or designated service, while the notion of award for sure implied an act that considered as welfare [3]. In Ozhegov's Dictionary award is interpreted as "what is given or obtained as a sign of special gratitude, acknowledgement" [4].

In the field of sports, there are many honors for merits in the field of physical culture and sports, i.e. medals, ribbons, badges and cups awarded to the winners of the competition, record holders and their coaches. Sports awards are presented to the winners of sports competitions for their hard work, skills and will-to-win spirit. Sports awards can be diplomas, certificate of achievement, certificate, badge, medal, championship ribbon, cup and others. According to us, one of the signs of a sports award, regardless of its name, can be an award for sports acheivements to the subject of award introduction. Sports awards can be presented to the individual athletes, coaches, judges or teams, clubs or sports organizations. Presentation of a sports award is addressed both in the past and in the future, therefore, it has two goals at the same time: to stimulate further sports achievements and to reward an individual for the sports results already acheived.

## 1. MATERIALS AND METHODS

The social and legal nature of sports awards was considered on the basis of the laws and special and scientific literature analysis, and practice of sports awards use and observations. Social relations arose in relation to sports awards were material for study.

In the process of study, general scientific and special methods were used. Methodological basis for study was a dialectical method that allowed to review the issues in their development and interconnection.

Methods of analysis and synthesis were used to determine the nature of sports awards as an object of civil legal relations and to review the practice of the sports awards use.

The formal and logical method was used to formulate the definition of sports awards. Using the structural and functional approach, the functions of sports awards were determined. Experience of sports awards use in other legal systems was reviewed using comparative and legal method. Historical method used in historical aspects study related to sports awards appearance and formation.

Using method of analysis, it was established that sports awards as legal objects have certain features of legal regime, which can be developed in a number of aspects:

1. Due to sign of rarity and function of aesthetics, the external form of the sports award is largely embodied in the individually defined things, which "only have the attributes that allow them to distinguish from all other things (similar and different)" [5].

2. The external form of sports award is mostly a moving thing. Moreover, the award process provides for a certain registration procedure for awards in circulation, which, depending on the type of sports awards, can be carried out at different levels, accompanied by prize papers and record in a register of awards of a certain level.

3. The external form of sports awards is mostely embodied in things being in free civilian circulation. In this case, the sports award symbol (its external form) transfer from the rewarded athlete to another subject does not involve all other benefits transfer associated with the award.

The works of well-known foreign researchers were used in the article preparation, among which are Katarina Pijetlovic [6], M. Maciel & A. Walton [7], Oscar van Maren [8], R. M. Rodenberg, J. Sackmann & C. Groer [9], Rosmarin van Kleef [10], John Didulica [11], Leonardo dde Oliveira [12], Jack Kerr [13], Karen Jones, Frans de Weger [14], Frank John Vrolijk [15].

## 2. RESULTS AND DISCUSSION

### *2.1. Sports awards as a special type of incentive*

Sports awards are the special type of incentive. The sports achievement, for which the sport award is presented, is qualified as particularly significant. Awards usually encourage not for current sports achievements, but for the most weighty ones. Merits of the final nature are marked with sports awards. Such merits are the subject

of pride for any athlete, its distinction from other athletes. At the same time, such merits are fundamentally important for the competition organizer, fans, judges, other athletes and masters of sport. Such sports achievements can be treated as important factors of a particular sport development, sport in general, popularization of physical culture and healthy lifestyle.

Such a category as a rarity of awarding can distinguish sports award among other types of incentives. As rarely high-level sports achievements are made worthy of sports award level, so rarely the sports awards are presented. The rarety of sports awards has two aspects: personal and social. In a personal aspect, sports awards are characterized by a social response to significant sports achievements. Sports trainings ensure development only subject to their duration and integrity, and all of these characteristics are directly related to the athlete experience and the time spent for training. Therefore, in personal aspect, sports award is a formal point that records result of the rewarded athlete activities; this is a point of reference for athlete assessment by the organizer of the competition and for rewarded athlete perception by other athletes, fans, and society. In a social aspect sports awards are rare as they mark only sports achievements that are essential for the organizer of the competition. Therefore, sports awards are not presented in large numbers. Regarding the number of athletes in a single sport, or a range of athletes by another sign, the number of rewards is relatively small.

Sports awards, as opposed to other types of incentives, are the merits of rewarded athlete, which define its special status with respect to other athletes. A required result of reward is any change in the social and legal status of the sports award holder in a sports environment. From a meaningful point of view, sports award serves as a condition for the athlete's career growth, increase of its income and property and a simplified or extended access to the best training conditions, rest, rehabilitation and other social benefits. From a formal point of view, award received by athlete changes its position in the system of social and regulatory relationships, becomes a basis for changes in athlete behavior, and the circle of its environment.

On this basis, there is a need for such a feature of sports awards as external distinctiveness, demonstrability and presentability. The sports award shall have a certain design. The objective form of the sports award serves to recognize the rewarded athlete and points out to its social and legal status and sports achievements recognized in the sports environment and society. In everyday life, a sports award is usually meant an appropriate external honor, a certain sign, i.e. regalia presented to rewarded athlete (medal, certificate of achievement, cup, badge, ribbon, belt, etc.).

Without award objectivization, the change in rewarded athlete status in society will be sufficiently complicated and its access to social benefits will be impossible. That is why things that are created or adapted for a public demonstration usually serve as an objective form of sports award. Possible situations where some sports award is objectified immediately in several forms, for example, title of the best football player of the year in Europe is combined with awarding of the Golden Ball award.

Demonstrability and external distinctiveness include arrangement of a particular awarding procedure. When presenting sports awards, regulated process (award procedure) often takes place, i.e. a sequence of certain procedural stages, steps and actions, and distribution of procedural roles. Sports awarding held solemnly and publicly. The entire procedure of awarding is aimed at taking a form of ceremony or ritual, formalizing sports achievements and emphasizing the features of a particular sports activity.

*2.2. Analysis of attributive properties of the sports environment*

The formal nature of sports awards causes their direct connection to the system of moral norms existing in sports environment. Sports awards point out to the place of their holder in the sports environment, their merits to the state and society. So, strict observance of the rules of honest competition by an experienced athlete, who has a large number of weighty sports awards, and its respect for rivals, fans, and referees, should be always an example for young athletes. At the same time, the athlete, awarded with the sports awards, should never forget about its particular moral status in society in general, which, together with the privileges, requires a certain behavior from the athlete. Both at public events and in everyday life the awarded athlete shall be an example of a healthy lifestyle, politeness; it shall think over every its step and every word, not forget that in the eyes of society it is an embodiment of courage, strength, honesty and expertise achieved with hard work.

The athlete rewarded with a sports award should be an example of moral norms observance formed in the field of sports, which, in turn, should be strengthened by authority of the athlete rewarded. For example, champion in boxing should not use its skills for socially harmful purposes. This shall fully stregnthen the moral requirements of the oath give by any boxer beginner, which can be found on posters in some boxing clubs, should be an example for athletes beginners and in other areas, emphasizing the importance of comprehensive development of the individual by confirming the practice of some boxing trainers to review school diaries of athletes beginners.

The embodiment of a sports award in the form of a particular object leads to another feature of sports awards – their symbolism. A symbol influences on a person through its form, by images, associations, etc. On this basis the stereotypes, fixed in public and individual consciousness, connected with the general need for a healthy lifestyle and mass sports with the individual development due to sports activities, and the importance of international sports cooperation, are formed. In this aspect, the Olympic emblem, which can be placed on the medals, can serve as a good example: 5 interlaced rings located in two rows. Ring colors: blue, yellow, black, green and red. Rings are the symbol of alliance (unity) of five parts of the world and the worldwide character of the Olympic Games.

The sports award generates a symbolic context among the athletes of a specific sports type or a specific sports area, which strengthens sports environment that un-

derstands and accepts this symbol. In this aspect, the award not only unites the sports environment, but also distinguishes this social group from external environment that does not understand and does not accept sports award. Examples of symbolism in sports awards can be an award presented to the FIFA's best scorer – "Gold Bout" and award to the best goalkeeper of the FIFA World Cup – "Golden Gloves".

Attributiveness follows from the symbolism of award. Sports award is one of the attributes of the sports environment, which shows itself in the ability of the organizer of the competition to reward showing the power. By presenting sports award, organizer of the competition causes specific social and legal consequences in the sports environment. The award is a social and legal given, the appearance of which in the sports environment depends on the will of the organizer of the competition. So, sports reward is not only an incentive, but also, in social and psychological terms, a compulsion of the sports environment members who are forced to understand and recognize the sports qward, as well as to accept the rewarded athlete as a winner. For this reason refusal from the sports award shall mean context rejection, non-acceptance of the organizer of the competition authority or other subject of power, withdrawal from a certain group of sports environment or refusal to be involved in.

The large amount, complexity and need in sports awards structurization shall determine such their feature as a systemacity. To compete for certain types of high sports awards, there may be a need for a certain number and quality of other sports awards. The systemacity of sports awards causes the need in their differentiation. Sports awards have their own hierarchy.

The highest status of sports awards among other sports incentives, and more prestigeous status can be distinguished among other features of the sports awards. After all, to obtain sports reward, one shall demonstrate the best sports achievements among certain circle of athletes.

When studying the peculiarities of sports awards it should be mentioned that sports awards and award systems are extremely diverse and quite conditionally subject to a theoretical generalization. Based on this conclusion, the sports award is a symbolic incentive that affects the athlete's status in sports environment, system of social relationships and moral norms established and applied for significant merits that determine the athletic achievements of the rewarded indvidual and are of high importance to the sports environment.

The main goals of the sports awards are incentive for already demonstrated sports achievements and encouragement of the rewarded athlete and other athletes for further achievements.

Awarding is a reaction to a well-deserved sports achievement and its fair consequence. The abovementioned aspect of the sports awards does not imply the equivalent payback. The nature and degree of athletic achievement are usually more significant than the welness given for it. Sports award is not a fee for sports achievement, but mainly a positive evaluation and approval.

Sports awards encourage athletes to trainings, healthy lifestyle and sports regime observance. However, sometimes exceptional desire to obtain some sports award generates such a strong motive that empowers athlete to be in sports or strive for sports achievement only for the sake of sports reward, although such an opportunity also exists. Such a desire can be a significant condition among other conditions for the reletive motivation appearance. This aspect is often used by trainers, especially to motivate young athletes before their performances at the first competitions in thier competitive career. But in general the athlete's life regime reorganization, certain self-sacrifices in the sphere of its own education, risk to loose health, partial sacrifice of their family and material well-being at the altar of goals achievements in sport, are the basis of not external stimulus in sports awards, but the internal psychological setting formed in becoming a results-oriented person. For many athletes, the award is objectively illusory, its subjective expectation has no the most principal value among other conditions motivating to be in sports. The ideology of sports awards is in its designation for those who are capable of self-sacrifice acting as a social guide. The fact of sports award emphasizes not only the achievements demonstrated by awarded athlete, but also a stable social and positive personal attitude of the athlete associated with the sports popularization and healthy lifestyle. Therefore, sports achievements and, accordingly, awards are, as a rule, in close connection with the athlete's attitude to training, rest, rehabilitation and general social orientation of its actions. History knows some refusals from award and awards forfeiture, the grounds for which were the facts related to the sports activities, but in some aspects were related to certain athlete's behavior that could not be recognized as socially oriented in the system of social relationships that has developed in a society or any part of it at a certain historical stage of its development.

The greater sports achievement, the fewer opportunities to encorage athlete to make it by sports awards. The sports award is not equivalent to athletic achievement, and the higher achievement, the bigger gap between its social value and athlete's self-sacrifice. Sports awards are most effective to athletes for whom sports award, as a sign of public recognition, is on the list of crucial tasks.

Award procedure also serves as a means of obvious demonstration of the system of values. The organized awarding events for athletes fix values and promote memoring sports achievements and outstanding athletes, which in turn becomes an integral part of culture. The legends created around the athletes reflect the history, transfer inherited value orientations in a certin form, and contribute to prerequisites for new achievements.

By presenting sports awards, the organizer of the competition or the subject of authority fixes socially meaningful behavioral patterns, i.e. healthy lifestyle, motivation for strength, courage, endurance, concentration and purposefulness, and through them declare sports values and ideology of a healthy life style in sports environment

and in society in general. Sports awards represent a mechanism for sports elite creation and upbringing, as well as help in their develpment in other areas of human activities.

Conditions for sports awarding direct members of the social group to a useful behavioral option, i.e. to do sports, trainings and a healthy lifestyle observance while there is no talk about permission for such behavior, its prohibition or guidance for its binding nature.

Sports award is also a "visiting card" of any athlete, which in itself attributes certain merits and status to its holder and indicates its involvement in sports environment.

*2.3. Analysis of sports awards from social and legal regulations point of view*

The sports awards possessed by athlete involve special social and legal regulations applied to it as to a special subject of sports environment.

Sports awards strengthen social relations established by the athlete with the sports environment and society. Sports awarding brings pleasure to rewarded athlete and strengthens its sense of self-worth and respect for judges who appreciated its achievements. By distinguishing athlete from the masses of other athletes, sports awards unite the sports environment around them and simulteniously tie the athletes rewarded to it, providing qualities of association. Sports awards differentiate sports environment, complicate its structure by distinguishing different levels of athletes, their separation from athletes who have not yet received any sports awards, and their differentiation on the basis of various sports awards possessed. Athletes are differentiated thereby eliminating formal uncertainty of differences between them; social hierarchy is built and due to this the sports environment unites. Moreover, the effect of integration from sports awards promotes legitimacy of the organizers of the competitions and judges.

The rewarded athlete is informed of a special behavioral model, a special type of social relations, and even a special psychological image – a sample of healthy lifestyle, strength and courage, which it shall follow, thus affecting the personality of the rewarded athlete and its responsible position in the sports environment and society.

Sports award is deemed by athletes and fans as a special value thing, a certain standard of beauty. Without above things the sports awards could not fully influence by above-mentioned directions. In aesthetics sphere of sports award, one of the main elements of the psychological mechanism of its impact on athletes and society is laid in its attractiveness. Therefore, sports awards can be a cultural and artistic value, and works of art and contain precious metals and stones. A vivid example is a World Cup of FIFA World Cup produced in 1974. This sports award is "not just a symbol of leadership in the most popular game on the planet, but a model of a Jeweller's art. The trophy that depicts two human figures holding the Earth is placed on a malachite podium and having 36 cm height it weighs 6.18 kg of which 5 kg is a pure gold" [16].

The sports award has its form and content. The content of the sports award is the benefit given to the rewarded athlete. The benefits stipulated by the award can be nominally divided into sports awards symbols and social and legal benefits.

Sports awards symbols shall mean external differences of rewarded athlete which are representative and able to perform all sports award functions as a kind of symbol distinguishing its holder in society. The social and legal benefits will be moral (mental), material (property) and organizational benefits that are not the symbols, for example, the ability to act at the certain types of sports competitions, in which athletes can not take part without certain awards, the right to attend jubilees, parades, official receptions and other solemn events, preferential career growth, and the right to allowances.

The sports awarding also includes the right of any rewarded athlete to receive a sports awards symbol. Social and legal benefits are associated with additional conditions, as a rule, with the special will of the rewarded athlete.

The social and legal benefits given to the athlete may be additionally set after awarding, and may, to the contratry, be subsequently changed or even canceled. But it is impossible to change or withdraw the decorations outside the awarding procedure established.

Sports awards symbols can be established and described in the different level regulations, which can be generalized by the category of reward right. Social and legal benefits are stipulated, as a rule, not by awards law, but regulatory sources of another kind: regulations on the status of sports events, legislation on benefits, etc.

The form of the sports award is the award symbol, which often names the relevant award. Moreover, the choice of the form, as a rule, is subject to the organizer of the competition`s discretion, and may not only be a tribute to the tradition, but also an object for its invention. In this reagard, situations, when the awarding form of the sports award is not always chosen as an award symbol which is most suitable for performing all sports award functions, are possible. Situations, where influence of value and significance of the sports event is made on the small in value objective form of award at the very beggining thus creating a unique design, occur. A vivd example is the world-famous trophy – the Stanley Cup, which history begins in 1892, when a cup bowl was purchased "for $50" (in that prices) in London to present it to the best amateur team in Canada. Thus, the cup had neither artistic nor economic value, both the event itself was not world-wide and was not as popular as today. Only in 1910 the trophy became a symbol of superiority in professional hockey. The original bowl of the Stanley Cup is difficult to veiw from design and Jeweller's art position" [16]. During the time period this sports award exists, numerous changes were made to its form.

Special attention was paid to such a phenomenon of awards as awards documents. This term is widespread in the Phaleristics, a science which studies the history of various awards and decorations, their systems and attribution.

Awards document is a form documenting sports awards, a kind of copy of act about sports awards, which reproduce the act about sports awards.

The main role of the awards document is to certify the fact of awarding in relations with the social group members, who are personally not aware of the fact of this person rewarding [17].

The sports awards symbol is often clear only to the sports environment, while the awards document executed in a common language is clear to the whole society.

Certificates, athlete`s classification record books with their sports achievements and other documents play the role of awards documents. Awards documents and sports awards symbols may have quite different legal regime: for example, issuance of duplicate sports awards signs and duplicate awards documents may be carried out according to the different rules.

Anti-awards are also known in the sports sphere, which contain not approval of sports achievement, but mostly the desire to cheer up unsuccessful attempt of the athlete, attempt to more easily look at the competition, thereby attracting more participants to them. An example of abovesaid can be an award presented to the cyclist, who took the last place in the general tour of Tour de France – Lanterne Rouge (from Franch "Lanterne Rouge"; red lantern). Its name originates from a red lantern located on the last train carriage.

The issue of fair achievements recognition and, accordingly, awarding, formed the basis of idea of awards law, proposed by I. Bentam and E. Xu [18], which was supported in modern conditions by V. V. Nirkov in terms of state awarding by the courts [19]. Not offering the general distribution of these ideas all over the entire sports sphere, it is possible to state the general need in clearer regulation of awarding, for example in the spheres of higher-level and professional sports.

In accordance with Article 6 of the Law of Ukraine "On Physical Culture and Sports" dd. December 24, 1993, the central executive body, which ensures state policy establishment in physical culture and sports, determines the system of sports decoration and awards. Sub-clause 17 of clause 4 of the Regulation on the Ministry of Youth and Sports of Ukraine approved by the Resolution of the Cabinet of Ministers of Ukraine dated July 02, 2014 No. 220 provides for the list of sports awards for winners and record holders of all-Ukrainian sports events among other tasks of the Ministry. Moreover, the Regulation on the Uniform Sports Classification of Ukraine approved by the Order of the Ministry of Youth and Sports of Ukraine dd. 11.10.2013 No. 582 establishes the system of sports categories and titles, which can be also attributed to sports awards and generally called as departmental sports awards. The Law of Ukraine "On State Awards of Ukraine" dated 16.03.2000 establishes the list of state awards of Ukraine, which, in accordance with Article 1 of this law, are the highest form of citizens awarding for outstanding achievements in economics, science, culture and social sphere development, protection of the Motherland, constitutional rights and freedoms, state building and public activities, and for other

merits to Ukraine and, accordingly, can be presented also for certain high sports achievements, but are not highly specialized sports awards, since the basis for their presentation can be achievments in other spheres. The only award from this list of state awards the most close to the sphere of physical culture and sports can be the honorary title "Honored Worker of Physical Culture and Sports of Ukraine", which according to the Regulation "On the Honorary Titles of Ukraine" approved by the Decree of the President of Ukraine dd. 29.06.2001, is granted to the specialists and organizers of the physical culture and sports movement, outstanding scientists, trainers (coaches), teachers of physical culture, health and sports educational establishments and other workers of physical culture and sports, athletes for high achievements in the international sports competitions and significant merits in the national sports personnel preparation.

So, according to the aforesaid, the relevant system of sports awards has been established in the State, the main levels of which can be recognized:

1. Level of state awards. At this level, special for the sports sector award is the honorary title "Honored Worker of Physical Culture and Sports of Ukraine". The originality of this level, first of all, is that the awarding is held not by the organizer of the competitions, but by the subject of authority on behalf of the State. In accordance with Part 2 of Art. 5 of the Law of Ukraine "On State Awards of Ukraine" awarding with state awards is made by the Decree of the President of Ukraine. Such awarding shall meet all requirements of the awarding procedure, which regulates the procedure for the state awards of Ukraine granting. This level also includes the rewards of foreign states, which according to Part 4 of Art. 5 of the Law of Ukraine "On State Awards of Ukraine" may be awarded to the citizens of Ukraine.

2. The level of departmental sports awards. The sports titles are among them: Honored Coach of Ukraine, Honored Master of Sports of Ukraine, Master of Sports of Ukraine, World Class (Grandmaster of Ukraine – chess, checkers), Master of Sports of Ukraine and sportsclasses: candidate for the master of sports of Ukraine, the first category, the second category, the third category, the first youth category, the second youth category, the third youth category. The features of this level of sports awards is that awarding, according to the type of awards, is held in accordance with the Sections IV and VII of the Regulation on the Unified Sports Classification of Ukraine approved by the Order of the Ministry of Youth and Sports of Ukraine dd. 11.10.2013 No. 582:

– sports titles – by the Order of the Ministry of Youth and Sports of Ukraine

– sports category "Candidate for the master of sports of Ukraine" and the first sports category – by the Order of the structural division of the physical culture and sports of the regional and Kyiv city state administration (if required, by decision of the structural division of physical culture and sports of the regional and Kyiv city state administration; powers for the sports category "Candidate for the master of sports of Ukraine" and the first sports category assignment can be given to the struc-

tural division of physical culture and sports, executive authority of local government in cities of oblast subordination),

– second level and third level – structural division of physical culture and sports of district state administration, executive authority, local government in cities of oblast subordination

– first, second and third youth sports categories – in the Olympic and non-Olympic sports – institutions of physical culture and sports, statutory documents of which provide for the appropriate sports development; in the types of sports for disabled – regional centers of physical culture and sports for disabled "Invasport".

Regulation on the Unified Sports Classification of Ukraine approved by the Order of the Ministry of Youth and Sports of Ukraine dd. 11.10.2013 No. 582 also stipulates conditions for awarding, description of the award form of this level and description of awards documents.

3. Awards in sports competitions and contents of all kinds. Sports awards in the international competitions, sports awards in all-Ukrainian sports competitions and other sports awards can be distinguished among the awards of this level.

Transitional awards (awarded in turn to those who win in sports competition) and non-transitional awards (remain with the winner forever) can be distinguished among the sports awards. Some sports awards can be remained with the winner until determining the winner of the next competitions but some of them are remained with event organizer all the time. So, until 2006, the FIFA World Cup was handed over to the country that won the tournament, and this country kept the trophy until the final draw of the FIFA World Championship. Now, according to the current FIFA Rules, the trophy shall be handed over for storage to the winners, but since 2016 it is stored in the World FIFA Museum in Zurich and displayed only during the Trophy Tour, at the final draw of the World Championship and during the final tournament match and awarding procedure.

That is, in fact, the athlete awarded with non-transitional sports award acquires title to its outer form (medal, decoration, etc.). In case of transitional award, the winner in the competition may keep an award symbol for a certain period of time or even only hold it in his hands for a certain period of time, which is a symbol of awarding by itself. So, only the world champions and heads of the States can touch upon the main FIFA World Cup.

## CONCLUSIONS

So, the sports awards of a certain level may also stipulate the features of the legal regime. So, before the circulation of the badge to the honorary title "Honored Worker of Physical Culture and Sports of Ukraine", which is the state award in accordance with the Law of Ukraine "On State Awards of Ukraine" as well as for other state awards, certain restrictions are established, namely: orders, medals, badges for the honorary titles of Ukraine, badges for laureates of State Prizes of Ukraine and presidential

awards, as well as documents certifying award, are manufactured exclusively by the Banknote Printing and Minting Works of the National Bank of Ukraine. Persons awarded with the state awards should be careful with their safety. In case of award loss, the persons awarded shall retain their rights to them in accordance with the law. The awarded person may receive duplicate award or awards documents if the Commission on State Awards and Heraldry recognizes that the loss of state award has been caused by natural disaster, military operations or other reasons beyond the control of the awarded person. The citizens of Ukraine, foreigners and stateless persons, awarded with the state awards, or their successors in the event of their departure outside Ukraine have a right to export state awards and awards documents. The state awards export, the right to which is not confirmed by the relevant documents, shall be prohibited. The state awards of Ukraine withdrawn by the law enforcement and revenue bodies, from the persons who illegally own them shall be transferred to the relevant state authorities. After awarded person death, in case of successors, the state award remains with the family of the deceased. With the consent of the successors, state awards can be transferred for temporary or permanent storage to museums. The state awards shall be handed over to the museums on the basis of the decision taken by the Commission on State Awards and Heraldry if the relevant application was submitted by museum. The state awards handed by the successors of the deceased or awarded posthumously to the museums for permanent storage shall not be returned. In the absence of any successor of the deceased awarded person, the state awards and awards documents should be transferred for storage to the State.

Sports awards made of precious metals or precious stones, as well as those of cultural and historical value can have certain restrictions as to the procedure for their export from Ukraine.

Concerning departmental sports awards (sports titles and categories) Section IX of the Regulation on the Unified Sports Classification of Ukraine approved by the Order of the Ministry of Youth and Sportd of Ukraine dd. 11.10.2013 No. 582 titled "Procedure for awarding, wearing and storing the badges, certificates for sports titles and sports categories" essentially provides only the following: persons who have been awarded with a sports title shall be presented with a certificate and a badge of the specimen established by the Ministry of Youth and Sports of Ukraine, the issuance of certificates and relevant badges "Honored Trainer of Ukraine", "Honored Master of Sports of Ukraine", "Master of Sports of Ukraine, World Class (Grandmaster of Ukraine)" and "Master of Sports of Ukraine" shall be made by the Ministry of Youth and Sports of Ukraine, the procedure for badges and certificates for sports categories issuance shall be determined by organizations that assign them. So, notwithstanding the title of the section, requirements for badge wearing and storing and certificates for sports titles and sports categories are not provided in the Regulation. This discrepancy, in our opinion, can be eliminated by adding the relevant clauses to the specified section, or by changing the title of the section.

Concerning the level of awards for sports competitions and contests of all kinds, the legislator does not establish general requirements for qualities and circulation of the objects, leaving them to the discretion of local or local statutory regulation. Considering the application to this type of relations of the private and legal principles of regulation quite justified, the general proposal in this aspect can determine the legislative establishment of the most general limits to the transparency of the level and type of competitions, sports achievement, and the possibility to use symbols and words in the award presented to the athlete, and in the relevan awards documents.

4. With a view to the signs of external expressiveness, attributivity, symbolism, rarity of sports awards, and ability to perform aesthetic function by them and in this regard the possibility of their specific design, sports awards can be resulted in intellectual creative activites embodying the features of the legal regime of the intellectual property rights. Almost all known cups feature a unique design, for some of them a lot of time and creative effort have been applied.

5. The internal content of the sports award may act as an integral characteristic of its subject and directly affect the personal non-property rights. In this regard, the law stipulates the athletes` rights and obligations for thier rewarding with sports awards and the grounds for the sports awards withdrawal. So, with regard to departmental sports awards, the Regulation on the Unified Sports Classification of Ukraine approved by the Order of the Ministry of Youth and Sports of Ukraine dd. 11.10.2013 No. 582 stipulates that the athletes shall have a right to take part in sports competitions in accordance with the rules for competitions and regulations on sports competitions, have a right to be assigned with the relevant sports titles and categories subject to qualification norms and requirements imposed by the Unified Sports Classification of Ukraine, the right to obtain the documents certifying sports titles and categories assignment; and athletes are obliged to meet requirements of Ukrainian legislation, the Olympic and Paralympic Charter, Rules and Regulations of the International Deaflympic Committee and the Rules and Regulations on the international federations and all-Ukrainian public organizations of physical culture and sports, general provisions on sports ethics in relations with the judges, service personnel, other contestants and viewers, lead and promote a healthy lifestyle by personal example and adhere to anti-doping rules.

Along with this Regulation it is provided that the athlete or coach (coach-instructor) shall be withdrawn with the sports title in case of inadequate information identified in the documents submitted for the sports title awarding, or in case of a life sports disqualification of an athlete or coach (coach-instructor).

Concerning the honorary title “Honored Worker of Physical Culture and Sports of Ukraine”, Articles 16 and 17 of the Law of Ukraine “On State Awards of Ukraine” stipulate that the state awards may be withdrawn by the President of Ukraine only in case of awarded person imprisonment for a serious crime upon submission of the

court in cases, provided for by the law. Restoration of the rights to state awards of the persons who were deprived of these awards shall be made by the President of Ukraine in cases stipulated by law. Upon Presidential Decree entry into force on the rights restoration to the state awards, the awarded person shall receive its awards and awards documents.

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# СУЧАСНИЙ СПОРТ, ЯК СФЕРА ПРИВАТНОПРАВОВОГО РЕГУЛЮВАННЯ

**Анотація.** *Робота присвячена дослідженню приватних суспільних відносин, що складаються в сучасному спорті, та особливостей їхнього правового регулювання. Автором доведено, що головним рушієм розвитку спорту, як унікального соціального явища, на сучасному етапі є комерціалізація. Встановлено, що сучасний спорт набуває ознак окремої індустрії, сектору світової ринкової економіки, відповідно, й серед засобів правової регламентації зазначених відносин мають переважати приватноправові. У свою чергу, спортивне право являє собою інтегровану частину цивільного (приватного) права. Встановлено, що глобалізація, професіоналізація і тотальна комерціалізація сфери спорту призводять до зміни якості як самих суспільних відносин, так і засобів їхньої правової регламентації. Спортивне право доцільно розглядати як систему приватноправових норм, спрямованих на регулювання, насамперед, майнових відносини, що складаються у зв'язку із здійсненням спортивної діяльності.*

**Ключові слова:** спорт, спортивне право, Lex Sportiva, приватне право, приватноправові засоби правової регламентації, локальні норми права, акти саморегулювання.

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# MODERN SPORT AS A SPHERE OF PRIVATE LAW REGULATION

**Abstract.** *The article is devoted to the study of private social relations, which are formed in modern sports, and the peculiarities of their legal regulation. The author of the article argues that the main driver of the development of sport, as a unique social phenomenon, at the present stage is commercialization. Modern sport becomes a sign of a separate industry, the sector of the world market economy, respectively, and among the means of legal regulation of these relations should prevail in private law. In turn, sport law is an integrated part of civil (private) law. It was established that globalization, professionalization and total commercialization of the sphere of sport lead to a change in the quality of both the social relations themselves and the means of their legal regulation. Sport law should be considered as a system of private law, aimed at regulation, first of all, property relations, which are formed in connection with the implementation of sports activities.*

**Keywords:** Sport, sports law, Lex Sportiva, private law, private law remedies, local law, self-regulation acts.

## INTRODUCTION

Physical culture and sports have always played and continue to play an essential role in human civilization genesis and development process. The first sets of physical exercises and simple games have occured a good while ago in the primitive society. The primitive tribes on various continents practice in running, jumping, lifting heavy items, hurling spears and boomerangs, archery, games with primitive balls, etc. Thus, the skills of labor activity have been transferred, preparation for military conflicts was carried out, administering has been done, etc.

Over the time, apart from the ritual, sports began to perform upbringing, educational and other functions, along with entertainment function. Contemporary sports is no longer just a unique socio-cultural phenomenon, it has acquired the marks of a powerful sector of the global economy. According to various estimates, total capitalization of sports at the moment is from 500 billion to 1.3 trillion. USD [1]. For reference, global agriculture capitalization, including forestry and fisheries, in 2017, according to World Bank estimates, amounted to 3.342 trillion. USD [2].

Apparently, sports today on equal footing compete with traditional sectors of the global economy. Capitalization of sport will only increase in the future, as the main trend in sports development throughout the world is its further professionalization and commercialization.

In particular, nowadays in the world of sport happen events which could be hardly imagines even few years ago. Thus, La Liga Spanish professional football league in 2018 signed 15-years contract with Relevant Sports international media company, according to which certain number of matches of the regular Spanish football championship will be held in North America each year. Participants in these matches should be, in particular, Real and Barcelona football clubs, as, according to representations of the parties to the contract, form a positive reputation of the Spanish championship [3]. Surely, Spanish championship matches holding in the countries featured with significant interest in Spanish football, in other words, a direct access vast foreign "sports market" will substantially increase the revenue of the Spanish Football League and sports clubs. At the same time, prior to starting Spanish clubs' games overseas, the gross income of Barcelona's football club for the previous fiscal year ( 2017/18 season) amounted to an unprecedented $ 1.05 billion USD [4]. An essential portion of this amount is revenue from TV broadcasts. It should be noted TV broadcasts also produces profit during the other leading European football championships. In particular, the revenue of the English Premier League football clubs from TV broadcasts for the 2016-2017 season amounted to a record-braking som of 4.5 billion pounds. Herewith, the total cost of the sports media rights globally by the end of 2016 amounted to $ 43 billion USD. In 2019, the total cost of these rights may reach 50 billion USD [5]. The next example of sports' commercialization and its transformation into a powerful segment of the global market is the continuous improvement of sports rules in order to increase visual appeal of sports events and to attract bigger audience. One of the

first of such examples has been 24-second rule introduction in basketball. In 1954 NBA team, Syracuse Netshns owner Danny Biaason proposed to limit the time of ball posession by single team with 24 seconds. As sophisticated calculations have shown, it is the time a team needs to organize a full-fledged attack. Introduction of the named restriction to the rules of basketball has been reasoned by the fact that by that time the team that has been ahead had the opportunity to expend time and "dry" the game, which adversely affected audience appeal of basketball.

Tennis rules modification has also contributed to the increase of audience appeal of this game and tennis transformation into one of the most profitable kinds of sports. In particular, until the 1970s, it was necessary to get ahead of competitor with at least 2 games to win the set. Due to that, competitions turned into multi-hours back-breaking trials. In order to avoid such unjustified delays of the game tie-breaks have been introduced. In case of an equal score by games in such a case, the player won who first scored 7 points in the next game.

In 1990s, volleyball also focused on visual appeal enhancing. In particular, the following modifications have been introduced to the rules of the game: the ball became multicolored, so that fans in the stands and viewers felt more comfortable watching the game; it was allowed to touch the ball with any part of the body and conduct an active game with legs; the team included a libero player who performed defensive functions only; "rally-point" scoring system has been introduced, that is, the scoring after each snap, and not only on own deliveries, as it has been before [6].

Nowadays, modifications introduction to the rules of the game are often associated with modern technology application. In particular, since 2018, FIFA introduced to football play rules the rule concerning possibility to use the VAR system ("video assistant referee" – technology in football, which allows the lead referee to make decisions in controversial moments of the match using video reps) [7]. In turn, the English football Premier League allowed using gadgets during the game to monitor the physical qualities of the players. And in cricket automatic simulators has been officially introduce to simulate ball serve, which until recently could only been done by player (bowler) [8].

## 1. MATERIALS AND METHODS

Theoretical basis for the study are the papers of such well-known theorists of private law as S. S. Aleksieieva, S. M. Bratus', A. S. Dovgert, O. S. Ioffe, N. S. Kuznetsova, V. V. Luts', R. A. Maidanyk. Ie. O. Sukhanov, S. O. Kharytonov, O. I. Kharytonova, R. B. Shyshka, etc. In addition, author's concept formation concerning private law regulation of relationships in sports has been influenced by the works of such well-known foreign researchers of sports law, as Ian Blackshow, Boris Koliev, Gaiden Opi, Lorenzo Casini, Michel Bieloff, Marie Demetriou, Robert Zikman, Steven Vezeril, Tim Kerr, Gabriel Feldman, Garry Roberts, Paul Veiler, Simon Gardiner, Michael Coccilio, Charles Woodhouse, etc.

Special attention deserve the latest researches in the sports law field, published in the leading European edition of the International Sports Law Journal by Leonardo de Oliveira [9], Carolina Tetlac [10], Bronislaw Hawka, Suren Gomtsiana [ 11], Tom Serbi [12], Daniel Heerdt [13], and others.

Methods of research used in the process of research paper preparing are as follows: historical-legal – to study sports law genesis as a part of the private law; comparative law – to perform comparative analysis of domestic and foreign legal acts provisions – in order to determine specific features of legal regulation of relations arising in professional sports; method of analysis – to identify law enforcement issues in sports field; formal-logical – to identify the shortcomings of the current law in the field subject to study and to develop proposals for its improvement; formally-legal – to establish the legal status of participants in sports field and its content; simulation – while formulating the prospects of legal regulation of relations in sports field.

## 2. RESULTS AND DISCUSSION

Thus, undeniable is the fact that modern sports is developing in accordance with a market economy principles. One of such principles is "demand and supply" principle, according to which the aggregate supply of a product at competitive market at any period of time tends to be equal to aggregate demand. Perfect example of this principle in football is the creation in 2018 of a new football tournament for the national teams of Europe – the League of Nations. Establishment of such competition has been made exclusively due to profound interest of huge audience towards football competitions and UEFA's desire to earn extra money on this. Despite the large number of different football events, the demand for football competitions is continuously rising both in Europe and globally. In case with the League of Nations, non-profitable friendly games of the national teams have been substituted with official matches, transforming these competitions into a full-fledged sports product.

Another example of market economy principles operation in sports is the official recognition of new potentially profitable kinds of sports and further organization of full-fledged commercial tournaments in these sports. In particular, in August 2018, by the order of the Ministry of Youth and Sports, sports poker was recognized as a sport [14]. Together official status provision, said sport has received additional opportunities for development, in particular, the opportunity to access on TV and TV audience capture.

The next in line to get the official status of sport in Ukraine is cyber sport (computer sport). What has been previously came off exclusively as home PC entertainment for children today is the official sport in many countries all over the world. Moreover, cyber sport seriously aspires to be included into Olympic Games program. According to Forbes, cyber sport market volume in 2017 amounted to $ 1 billion USD [15]. Already in 2019, cyber sport tournaments audience will be about 400 million persons. [16] The main sources of revenue in eSports, in traditional sports, are prize money in competitions, sports merchandise sale, sponsorship, advertising, betting on competition outcome, etc.

Thus, sports market is growing at a fast pace thanking in particular to new sports. Regarding traditional sport, its various types are unevenly represented on the general sports market.

Depending on the capitalization of the sport and due to its popularity, the positions are as follows: football – 43% of all gains in sports; American football – 13%; baseball – 12%; Formula 1 – 7%; basketball – 6%; hockey – 4%; tennis – 4% and golf – 3% [17]. Capitalization of the leading sports clubs amounts to billions USD. For example, the value of National Football League's Dallas Cowboys team exceeds 4.8 billion USD [18].

Thus, sports has already turned into a powerful industry. Surely, globalization, professionalization and total commercialization of sports sphere lead to change in the quality of both social relations and their legal regulation means. In particular, the share of private relations in sports is increasing rapidly. Accordingly, sports relations, previously governed by the public law rules, nowadays require private legal regulation.

Private relations in the field of sports are mainly property relationships, based on legal equality, free willingness, property independence of their participants, occurring in connection with sports activities implementation, and regulated by the private law rules.

Since relations in sports sphere acquired features of property relationships, then logical consequence of said process has become actual recognition of sport as a kind of business activity. In particular, European Court of Justice in meca medina case has acknowledged the following conclusion: "sports organizations must comply with the rules laid down in the Treaty Establishing the European Community dated 25.03.1957 (the Treaty of Rome). Among other things, the EU Court stressed that sports activities fall under Articles 101 and 102 of the Treaty of Rome, which prohibit trade discrimination and the use of monopoly position at the market of commodities and services, and guarantee the adherence to free competition principles by all participants of the marketplace [19]. Consequently, in the EU, sports is officially recognized as a kind of economic activity.

The US experience is rather challenging. Since the century before last, sports in this country has been formed as a kind of business. Key powers in sports relations regulation are concentrated in the hands of individuals. In the United States, the basic principles governing regulation of relationships between the relevant parties of sports activities are established by the sports leagues, which solve the issues using private law mechanisms. Thus, the United States and the EU countries consider sports as part of a market economy and the sphere subject to private law regulation.

National legislator is currently do not acknowledge sports a kind of business activity, although it calls professional sports a commercial activity in sports sphere (Article 38 of the Law). However, sports commercialization process refers not only to professional sports, but also various other areas of sports activities. In particular,

under conditions of insufficient funding of sports industry by the state, sports organizations of state and municipal ownership quite often raise money in the form of sponsorship. In addition, even calling professional sports a commercial activity, legislator does not think it necessary to introduce more detailed legal regulation of professional sports, confining with noting professional sports in the aforementioned Article of the Law of Ukraine "On Physical Culture and Sports".

At the same time, rapid development of the commercial segment of sports is observed all over the world. It is entirely justified to contend that modern sport is predominantly commercial sport. Thus, the developed western countries are featured with prevailing approach that sports is private law regulation sphere. At the same time, in the post-Soviet countries different point of view prevails, according to which sports pasteurizes integrated statutory regulation sphere. It seems that such a concept is false because integrated approach violates the systemic nature of regulatory impact on the relevant relationships, generates competition between the norms of various branches of law, creates the risk of using inappropriate methods and techniques of legal regulation, and ultimately reduces the quality of legal regulation or even denies the opportunity for certain relations' legal settlement.

It is necessary fal into line with the opinion of E. O. Sukhanov, who claims that the system of law should be characterized with the internal consistency of all subsystems that make the part of it, and rely on socio-economic and organizational and legal factors ... The inconsistency of individual legal systems has been overcoming earlier through new "integrated" or "secondary" legal branches creation along with the former generally accepted ones and so has made the system even more complicated. However, "modification of this system has become one of the imminent consequences of the fundamental reform of economic and social systems. Private law fundamentals restoration and transition to conceptual division of the entire legal sphere into private law and public law ones led to substitution of subordinate branches "pyramid" with their new system, based on the equality of private law and public law approaches. In this system, two interacting however not subordinate spheres of private and public law absorb fair good number of separate legal branches and their groups ... It is also clear that the new system of law is more in line with the task of the state governed by the rule of law and civil society formation, which should no longer be under continuous and comprehensive state influence. The unity and consistency of this system are provided not by hierarchical subordination of its components, but by the unity of the general legal principles underlying it, as well as by criteria for legal branches allocation (separation), which determines the functional features of each of these subsystems. The socio-economic basis of such a status is formed by acknowledgment of the key role of the inalienable rights and liberties of individual ..., as well as the market principle of the economy "[20, p. 27].

Thus, it is clear that in the system of law there is no place for "integrated" branches of law and other "integrated" components of the system of law. Recognition of the separate branch of law status by each or most of the branches of legisla-

tion, leads to loss of the internal unity of certain components of the sphere of law and the systematic effect on social relations. Concerning the aggregates of legal norms, grouped by the subject of legal regulation, using the so-called private-public method of legal regulation, they can exist at legislation system level, however at the system of la level relevant norms shall be distributed by their "fundamental" branches of law.

Thus, the acknowledgment of the system of law division into private and public, taking off the table obsolete hierarchical construction of the system of law based on the principle of legal regulation' subject primacy and recognition of the key role of legal regulation method in separation of the branches of law, provides systemic nature and unity of individual elements of the system of law impact on the relevant social relations. The result of such systemic impact on social relations is surely legal regulation quality improvement, which is really the main criterion of expediency in choosing one or another model of system of law construction. At the same time, the very system of law breaks free from unnecessary complications and over burden, becomes clear and logical, and the concept of the "integral" branches and other components of the system of law naturally loses its significance.

Consequently, sports law should be considered as a special sphere of private law regulation, which includes in its subject, first of all, the property relations which are formed in connection with sports activities carrying out.

By reference to the the modern approaches of domestic civil law science to civil law and private law systematization in general, for the time being sports law definition as sub-branch of the civil law is fully acquitted. The classical law of pandects since the time of G. Vindscheid names only 4 subs branches of the civil law, which includes property, contractual, family and inheritance rights. However, the current state of civil relations development proves the need to detach new sub-branches of the civil law. This process is related to the fact that the general civil law rules are not able to provide fully high quality arrangement for the new types of public relations, which are civil law in their nature, however require more detailed legal regulation or regulation different from customary one. One of sub-branches of civil laws, namely corporative law has passed the very same way in its development. At certain stage of relationships development under participation of corporations the necessity has arisen to introduce special legal regulation of the relevant relations. In fact, corporate and sports law, as sub-branches of the civil law, are similar, in particular and in connection with the important role of corporate practices in sports law relationships regulation. We are talking about the fact that corporate practices regulate wide range of social relations, which are created between legal entities of the private law in the process of their activity. Same way corporate practices of sports organizations regulate wide range of legal relationship. In addition, both corporate practices in general and corporate practices of sports organizations are not rules of law, however they are taken for execution and used to clarify legal norms, which are provisioned in the

other regulatory legal enactments. Corporate practices are focused on local level of relationship regulation and are contained in special acts, adopted by the authorized institutions. Referring sports sphere, as a rule such organizations are federations in various sports. It should be mentioned that apart from corporate practices of local regulations creation an important source of the legal regulation in sports sphere are the judgments of the International Sports Arbitration (CAC), the findings of which are mandatory for all parties to the sports sphere.

In such a way, it is fully justified to name sports law the sub-branch of the civil law. Sports law rules shall be acknowledged as special with regards to the general rules of the civil law. Accordingly, with a view to regulate private relationships in the sphere of sport, general rules of the civil law shall be applied subsidiary.

Surely, it should be taken into account that civil law rules are mostly dispositive, that is, it provides they provide the participants of relevant relationships with a wide range of opportunities to regulate their relationships within the limits set by the relevant rule. However, even such a flexibility of the behavior of the participants in the relationship does not always allow to account for specificity of certain legal relationships. Of course, the current Civil Code of Ukraine, built on law of pandects allows for settlement of any private relations, in particular, in the sports sphere.

However, there is a necessity for legislative settlement of the most important social relations in the relevant sphere, which makes it possible to establish general bases and principles to regulate these relations. At the same time, it should be borne in mind that one of the specific features of the sports law, as a sphere of private law, is the availability of various sources of legal regulation, not least of which are self-regulation acts (contracts and local acts of sports organizations), which in fact attain legislative effect. In particular, the rules for athletes transfer from one sports club to another are fully defined in the corporate acts of the international sports organizations. Accordingly, de facto national legislator is significantly restricted in its opportunities for legal regulation of these and other similar relations in the sphere of sports. Nevertheless, the general principles of the state policy in the sports sphere shall be established at the level of laws. as well as concepts and principles of legal regulation of professional (commercial) and non-commercial (amateur) sports shall be determined at the same level In addition, rules should be established for sport recognition, state supervision and control measures over the state of the rights and freedoms of individuals and legal entities observance in the sphere of sports, etc. at the level of national legislation,

Thus, the availability of our own specifics of private relations in the field of sports and the formation of specific legal constructions that are not suitable for other private relations regulation provides the grounds for sports law recognition as private law sphere. At the same time, in our opinion, there are no grounds to distinguish the so-called public sports law. To our mind, public relations in the field of law may well be regulated by the rules of public law branches, that is, it is not about "public sports law", but about "public law in sports".

In view of the above, one of the main directions of the national legislation improvement in the field of sports is meant to be legal regulation of social relations improvement in the sphere of commercial (professional) sports, actual recognition of the private legal essence of the entire blocks of relations in the field of sports and legal basis creation to use the discretionary method for their settlement. In particular, it is advisable to introduce modifications to the Part 2 of Art. 38 of the Law of Ukraine "On Physical Culture and Sports" [21], which stipulates that the activities in the sphere of professional sports must be regulated to the utmost by the civil law rules. Meanwhile, said article mentions only the Labor Code: "Activities of athletes, coaches and other professionals in professional sports covering professional athletes preparation and participation in sports competitions which is the main source of their income, is carried out in accordance with this Law, Labor Code of Ukraine and other legal regulatory enactments, as well as statutory and regulatory documents of the relevant subjects of the sphere of physical culture and sports and international sports organizations. " At the same time, only one small article is dedicated to professional sports in the Law, and the Labor Code of Ukraine does not at all take into account the specificity of public relations in the field of sports.

As concerns professional sports in general, the necessity to adopt separate regulatory act is long overdue, which will clearly define at the national level the basic principles of legal regulation of the relevant relations taking into account the specific features of "sports law" as a unique system of justice going far beyond the national legal system. By the way, as far as in 2007, the Inter-Parliamentary Assembly of the CIS member states has approved a model law on professional sports. Although the laws on professional sports have not been adopted in all post-Soviet states yet, some of them pay much more attention to professional sports than our country.

In particular, in Turkmenistan separate law on professional sports came into force in 2015 [22]. The said law is dedicated regulatory legal enactment, which at the fundamental level regulates legal, economic and social relations in the field of professional sports. In particular, the said law defines the subjects of professional sports, their powers, major rights and obligations in the field of professional sports; determines the signs and types of legal relations in the sphere of professional sports, in particular provides the basis for legal regulation of labor relations in the field of professional sports, professional sports' subjects rights guarantee, the principles of legal regulation of legal relations with respect to intellectual property in professional sports, rules for professional athletes engagement to the national teams, legal liability principles for harm inflictions in professional sport; establishes sources of professional sports' funding and logistical support; establishes the principles of international cooperation in professional sports sphere.

In other CIS countries the attention is also paid to the legal regulation of professional sports. Indeed, dedicated law on physical culture and sports in the Russian Federation defines such concepts as "professional sports league", "professional sports

competitions", "professional sports club", "sports agent", "sports sanction", "organizer of sports competition". The said law will contain separate article concerning professional sports leagues, namely covering specific features of their creation, their rights and responsibilities, mechanisms of interaction with professional sports clubs and sports federations. This article of the law states that sports leagues may integrate both Russian and foreign professional sports clubs; they can also act as organizer of international professional sports events, etc. The law also regulates the activities of sports agents. In particular, agents are not allowed to in gambling using betting offices or betting terminals by making pari for official sports competitions in sport of their agency.

Named law also contains a section on disputes settlement in professional sports and high performance sports. It refers to a permanent arbitration institution, which administers arbitration (mediation) of these disputes [23].

As for Ukraine, in fact professional sport is not regulated here in terms of legislation. Currently there is not any promising draft law on professional sports. Moreover, national legislators do not plan to regulate professional sports even at the level of the general law on the physical culture and sports.

At the same time, draft law on amendments introduction to the Law on Physical Culture and Sports is placed at the website of the Ministry of Youth and Sports of Ukraine, which proposes to clarify the concept of sport, the type of competition, institution of physical culture and sports; to introduce notion of sports discipline; to bring the terminology of the law into compliance with the law of Ukraine on civil groups; to provide for the adoption of provisions on sports clubs subject to approval of the Cabinet of Ministers of Ukraine; refine upon the status of physical culture and sports associations and sports federations, etc. Draft law does not contain the rules with respect to professional sports.

## CONCLUSIONS

Thus, performed study allows making the following conclusions. Modern sport is an industry developing based on market economy principles. The share of private relations in the field of sports is increasing rapidly. Accordingly, sports relations which previously have been governed by public law rules, today require private legal regulation. Private relations in the sphere of sports are mainly property relations, based on legal equality, free act and deed, bargaining power of their participants, which arise in connection with sports activities, and are regulated by the rules of the private law.

Specificity of private relations in the field of sports and specific legal structures formation which are not suitable for other private relations regulation, give grounds for sports law acknowledgement in the sphere of the private law. Herewith, there are no grounds to distinguish so-called public sports law are absent. Public relations in law area may well be regulated by the rules of the public law branches, that is, it is not about "public sports law", but about "public law in sports".

Sports law can be recognized as sub-branch of the civil law. Sports law rules in this case will be considered special with respect to the general rules of the civil law. Accordingly, in order to regulate private relations in the area of sport, the general rules of civil law should be applied in a subsidiary manner.

National legislation in the area of sports is outdated and and does not fully meet the needs of modern sport and society as a whole. Accordingly, the improvement of the national legislation, primarily in terms of bringing it in line with up-to-date models of professional sports and sports in general, should become one of the priorities for both the executive authorities and all subjects involved in the sphere of sports. As we see it, there is an urgent need to adopt the law "On Sports" ("On Professional Sports"), which would contain special legal rules, firstly and primarily focused on private relations regulation in the field of sports. Adoption of such a law would boost national commercial (professional) sports development along with the development of Ukrainian economy as a whole.

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# ЦИВІЛЬНО-ПРАВОВА ВІДПОВІДАЛЬНІСТЬ ЗА ШКОДУ, ЗАВДАНУ ЖИТТЮ І ЗДОРОВ'Ю В СФЕРІ СПОРТИВНИХ ВІДНОСИН

**Анотація**. *В статті надано визначення поняттю цивільно-правова відповідальність в сфері спорту. Зазначено ключові особливості цивільно-правової відповідальності за завдання шкоди життю та здоров'ю в спортивній сфері. Досліджено основні підстави виникнення цивільно-правової відповідальність в сфері спорту. Автор статті робить висновок, що, незважаючи на ризиковий характер спортивної діяльності, як такої, спортсмен може бути визнаний винним у цивільному правопорушенні, якщо буде встановлено, що в його намірах є груба необережність або умисел, спрямований на завдання шкоди здоров'ю суперника. Якщо ж порушення і пов'язана з ним травма має незначний характер, а у діях спортсмена не встановлений умисел, то дії учасника спортивних заходів, навіть, якщо ними завдана шкода, будуть вважатися правомірними.*

**Ключові слова:** спортивне право, цивільне право, цивільно-правова відповідальність, відшкодування шкоди, спортивні спори.

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# CIVIL LIABILITY FOR DAMAGE OF LIFE AND HEALTH IN SPORTS RELATIONS

**Abstract.** *The article defines the concept of civil liability in the field of sports. The key features of civil liability for damage to life and health in the field of sports are outlined. The author identified the main grounds for civil liability in the field of sports. Notwithstanding the risk nature of sporting activities by themselves, an athlete may be found guilty of a civil offense if gross negligance or intention is discovered in his actions to harm the opponent's health. The author emphasizes the lawfulness of actions of a participant in sporting events, where the violation and the associated injury is insignificant, and the athlete's actions are not invented. Therefore, when determining responsibility for damages incurred in sporting competitions, it is necessary to take into account the degree of fault of the person who caused the damage and, depending on this, to make a decision on bringing him to civil liability.*

**Key words:** sports law, civil law, civil liability, damages, sports disputes.

## INTRODUCTION

Currently, sports is one of the focus areas in our country's life. State and society pay much attention to comprehensive development of the sports movement. Increased

attention to the sports field created the basis for new concept of law development, called "sports law". Legislation is being formed in the sphere of sports relations. Notice of liability aspects are also taken, however despite of the increased attention of lawyers them have not been yet investigated adequately.

The issue of civil legal liability enforcement in sports still remains to be one of the most controversial issues. Solution to this issue is complicated by the general perception of sports as risky activity, therefore, even with unbiased eye it is rather difficult to delimit the lawful activity associated with the possibility to cause harm in the sphere of sports with unlawful activity in the cause of sports events or training. However, named issue needs to be resolved, as it makes direct impact on the state of the rights and freedoms protection of the parties in sporting activities, who may find themselves in sticky situations due to harmful actions commitment towards them by the other participants in sporting activities. Certain aspects of civil liability for causing damages to life and health in the field of sports have been explored in the papers of the following authors: S. V. Aleksieieva, O. G. Bondar, A. V. Ierofieieva, M. A. Tikhonova, M. O. Tkalych, N. V. Iukhnova, etc. Among the foreign authors dealt with legal liability issues in sports the following ought to be noted: N. Schot, M. Kralik, Leonardo V. P. de Oliveira [1], Branislav Hock, Suren Gomtsian [2], Karolina Tetłak [3], Tom Serby [4], Daniela Heerdt [5], Cem Abanazir [6], Brendan Schwab [7], Tom Evens [8], Katarina Pijetlovic [9], Jaime Morente-Sánchez, Mikel Zabala [10].

Administrative and criminal liability in the sphere of sports is well studied in research literature, which is not the case concerning civil legal liability. Based on the above, and taking into account increasing number of injuries in modern sports, liability of a person for the harm inflicted to life and health in sports relations sphere needs careful legal attention, since many sports are "risky", that is injuries causing activities.

In the legal literature, liability is understood as the application following special procedural order to the person committed the offense, the means of state coercion provided for by the sanction of the legal rule. Article 54 of the Law of Ukraine "On Physical Culture and Sports" defines responsibility for sports legislation violation as: "persons guilty in violation legislation in the sphere of physical culture and sports are administratively, criminally, disciplinarily or civilly liability in accordance with the law" [11, Art. 80].

Object of the paper is studying civil liability in the field of sports in general along with studying possibility of compensation for damages inflicted to life and health in particular in sporst sphere.

## 1. MATERIALS AND METHODS

Study materials are social relations related to civil liability for damages inflicted to life and health in the sphere of sports. In the process of civil legal liability issue study in the field of sports, general scientific and special methods were used, in particular:

comparative-legal, dialectical, historical methods, as well as analysis and synthesis method.

Comparative legal method allowed to analyze the provisions of statutory regulations concerning civil legal liability in the sphere of sports, operating in Ukraine and in the other countries of the world. As for the dialectical approach in the process of study, it allowed to consider the very essence of civil liability in sports, as well as to establish the main features of it.

It is also worth mentioning that while writing this paper, historical method has been used, which, in turn, made it possible to investigate major historical stages of the establishment of the civil legal liability system in the field of sports. Moreover, it should be noted that analysis and synthesis methods application while writing this work allowed to apply approaches to civil liability for damage caused to life and health in the field of sports which legal doctrine is already aware of.

In addition, it should be noted that dialectical method of studying civil legal liability issue for damages inflicted to life and health in sports, along with other methods of legal phenomena learning, allowed to formulate major proposals to improve the existing national legislation governing the civil legal liability relations in the field of sports.

## 2. RESULTS AND DISCUSSION

The share of sports injuries is about 10-17% of all the injuries. A considerable proportion injury in sports is not life-threatening, although injuries affect the performance of the athlete and require a long rehabilitation period. However there are also such sports, where neither of duel meets can be seen without injuries, including serious ones. Sad statistics of the consequences of such injuries in professional boxing is given by Ring, American magazine. Over 500 boxers died directly in the ring, or as a result of injuries sustained during boxing matches. “Record-breaking” is 1953 with 22 fights with a lethal consequence. Lately, the number of fatalities in football has increased during training and competitions. as well as immediately after them. According to the Italian judge Guarinello’s data, in the last 30 years only in “A series” 30 football players died due to performance-enhancing drugs use. At the same time boxing and football are not the only dangerous sports.

According to experts, “currently the top injury-causing sports” should include: martial arts, mountain climbing, water tourism, auto and motorcycle racing, equestrian sport, hockey, rugby, football, downhill skiing, sky flying, gymnastics, track and field athletics and weight-lifting. It becomes apparent that in the process of sports activities there is a high risk of property damage infliction to another person. In case athletes claimed compensation for damages each time after a fight, sparring or sports game, then majority of these sports for the time being would not even exist at all. With such relevance of this issue, it would seem that the legal regulation of sports

injuries prevention, elimination of their causes and consequences should be a priority in each state. As a matter of fact the case is in life and health of individual. It is of athlete who risking with these valuables, sometimes for quite low material remuneration, provides moral values to the state, sport, sports club, sports federation [12].

Unfortunately, the state of affairs with sports injuries' legal regulation is not satisfactory. Sports activities as such, and even more – the activities in sports events preparing and conducting are featured with higher than normal degree of public danger. In particular, injury or damage can be caused to athlete participating in the sports event, the spectators attending the event, sports clubs, as well as other individuals or legal entities being involved into sports event. Therefore, special attention is required to the issue of the proper legal regulation of tort relations in the sphere of sports, the content of which provides for liability of individual/ legal entity for caused injury / damage [13, p.105]. One of the main features of such commitments in the field of sports distinguishing this liability from the general understanding of the civil injury is the particular content of subjects: athletes, coaches, medical staff, sports organizations, sporting events organizers, as well as sports fans. The listed subject at the same time can act as victim and as a person causing harm. With regard to the subject matter of civil injury liability in the field of sports, it includes material and non-material values subjected to damage (life, health, property, property rights, etc.).

To determine the content of liability in the sphere of sports, it is necessary to define main conditions of its onset. These are the requirements that should be a part of a civil offense in sports. The main criteria for civil legal liability occurrence are as follows:

– wrongful acts (failure to act);

– causative connection between act (failure to act) and occurrence of damage;

– fault of person inflicted the damage [14, p. 366].

Typically it is necessary to comply with all of the above conditions for tort liability commencement. However, in sports legal relationships, such liability arises also in the absence of any of such conditions, as a tort in sports is most often commences through inattentive, careless acts of the subjects. Most injuries caused by the participants in sporting events happens accidently, thus damage analysis as well as liability measures is a controversial issue. This sphere is of a subjective nature, since most torts are caused by injuries suffered by players resulting from violations of the rules of a particular sport. Following the analysis of athlete actions during violation of the rules, we can make conclusion that in the presence of civil offense in his/ her actions and the necessity of compensation for damage, in fact, the latter does not occur. It is known that sports is a kind of activity where it is impossible to avoid, as any participant in sporting events is always under the risk to obtain them. An athlete may be adjudged guilty of a civil offense provided that it has been established that his/ her intentions has included gross negligence or intent to make harm the opponent's health.

In case the violation and the associated injury is insignificant, and guilty intent has not been found in the actions of athlete, the actions of participant in the sporting events, even if they caused harm, will be considered lawful.

The behavior of the person, who has caused the damage, may mean not only his/ her active actions, but also failure to act. Failure to act is considered unlawful provided that the person ought to perform a certain act, but failed to do it. For example, in case sports infrastructure status has not been verified prior to sports competition, and harm could be cause due to improper operation or damage of such infrastructure, or due to sports equipment failed during the competition and caussed injury to athlete (p.16 of the Decree of the Cabinet of Ministers of Ukraine "On the procedure for preparation of sports facilities and other specially designated sites for public sports and cultural and entertainment events "[15]). So, on May 5, 1992, at Furian at Arman Cesare Stadium, prior to football match beginning between Bastia and Marseille, additional temporary stands which have been built to increase the number of seats from 10 to 18 thousand spectators came crashing down. Due to owners of the stadium negligence and non-compliance with international standards containing requirements for technical condition of sports facilities, 18 persons died and about 2 thousand fans were injured. The important feature of damages reimbursement of damage in the sphere of sports is that the athlete, taking part in the competition, acts on the basis of the civil-law or employment contract (agreement) made with sports association, sports organization or organizer. Well, organizers, sports federation or other party of the sports law, which can act as employers, bear liability for damages (Article 1172 of the Civil Code of Ukraine [16]) in case they were inflicted to individual or property. Yet such situation is possible only provided that the parties have entered into labor agreement or civil law contract (agreement). Eventually, it creates employer's liability under the labor law, however he/ she/ it may claim immediate culprit by way of recourse.

The author considers another case where civil law contract exists between the parties to the sports relationship. In this case, the person who directly caused the damage will be liable. However, such solution does not fully meet the needs of the sports movement. The described situation does not allow for full restoration of the infringed right of an athlete or other participant in a sports competition. This is due to the fact that it is practically impossible to bring to justice the person who has immediately caused damages. In this case, liability for damages must be imposed on the organizer of the competition, irrespective of who actually caused damages. For example, on August 23, 2014, at Albert Eboss, an object was thrown from the stands, which hit the head of a football player. Incident occurred during a match between Kabilye FC and UCM Alger, when the teams were leaving the field upon the end of the game. A few hours later, football player died at the Tizi Ouzou Hospital. In accordance with the norms of civil law, responsibility for the task of causing significant damage to health or life of individual shall be placed on the person who has threw

dangerous item on the football field. Given that thousands of spectators have been present at the match, it's almost impossible to identify the offender. In this regard, it is feasible to place liability for recovery of damage inflicted to life and health on sports competition organizer, since he/ she/ it did not provide adequate security for the event.

However, as there is not relevant provision in the current legislation, for the time being it is practically impossible for athlete to obtain payment for damages caused by the actions of fans. Obviously, the current situation needs to be resolved by amending the rules of the current legislation, which would establish corresponding right of individual (athlete, fan, etc.) for recovery of inflicted losses.

Another specific feature of civil injury characteristics in sports sphere is "sports" liability, the existence of which is based on considerations concerning the necessity to take into account the circumstances that sports injuries sustained during sports events can be caused by the rules of the game and injury risk of a particular sport, etc.

As it was mentioned, sports event participant may in some circumstances be injured by actions of opponent, and sometimes it can happen not through the opponent's fault. During certain sport activities one can get various kinds of injuries. One of the most high injury sport is football. Let us give an example of damages infliction in this sport. Two athletes have collided in the fight for the ball, in the result one of them received a craniocerebral injury. Obviously, the injury has been caused by the actions of the opponent, and there is a direct causal relationship between the actions of the latter and injury. At the same time, the actions of individual caused the damage do not create his liability, since the damage is caused by the peculiarities of the game itself and is the result of unintentional action of the opponents. In such cases, the issue of the liability of individual who caused the damage has estimation and subjective nature. Thus, the damage caused in sports legal relations does not always have the nature of civil injury. According to Ie. V. Pogosian, "the specific feature of the damage caused during sports competitions, is that as a rule, it does not have civil injury origin" [17, p. 141]. In determining liability for damage caused during sports competitions, it is necessary to take into consideration the degree of fault of individual who caused the damage and, depending on this, to make a decision on bringing him/ her to civil liability. Competent authority (disciplinary committee, court, etc.) needs to establish the fact of deliberate or accidental violation of the rules of the competition. However, intentional damage caused to participant in sports events is not subject to recovery provided that he/ she has given the consent for possibility of injury during the event.

The condition of civil liability also includes the presence of cause and effect relations. Thus, liability for damage causing is regulated by the provisions of the Chapter 82 of the Civil Code of Ukraine "Compensation for losses" and forms a separate civil law system, which firstly and foremost performs compensatory (restorative)

function and becomes of particular importance in the modern society. According to the Art. 1166 of the Civil Code of Ukraine property damage caused to personal non-property rights by unlawful decisions, acts or failure to act by individual or legal entity, as well as damage caused to property of individual or legal entity, is subject for full compensation by the person who has caused it.

In such a way, a person is hold liable for inflicted damage, provided that it is established that without his/ her guilty act (failure to act) the damage would not have been inflicted. Thus, for example, the court of Trondheim (Norway) awarded monetary amount to compensate for damage caused to football player who has been injured as a result of a strike by his opponent in the crural region. Adjudicating on the matter, the court indicated that "there is direct causal connection between the kick in calf and the injury. The resulted injury and damage were not caused by the rules of the game ". In this case, guilty person is liable for the damages caused to the athlete's life and health, as provided for by the general provisions of the Civil Code.

Sports activities as it is, all the more activities related to sports events preparation and conduct, is featured with high risl of public danger. In particular, the injury may be caused not only to athlete participating in the appropriate sports event but, as mentioned above, to the viewers attending the event, to the sports clubs, as well as to other individuals and legal entities involved in the sports event [ 3, p. 106]. That is, any individual/ entity subject to damage at a sports event has the right to recover damages. For the right to claim recovery of damages caused by sports injury, the injury should be caused under abnormal circumstances such as intentional damage caused by negligence of the other party. However, it should be the evidences that the other party acted improperly which, resulted in injury.

Under certain circumstances, sports events can cause sports injuries among viewers. In particular, they may arise as a result of:

• Game disturbances (can lead to mass injuries);

• Use of gaming equipment (balls, pucks, etc. hit to fan stands, which can lead to serious injuries);

• Vehicles on auto-, moto-, cycling competitions.

As for athletes, sports injuries can be caused by:

• Incorrect decision (for example, inappropriate use of equipment);

• Poor coaching (wrong guidance of players by coach, who advises them to use tactics that can cause damage to another team);

• Unsafe stadiums and equipment (playing in unordered or poorly maintained areas and stadiums along with out-of-order sports equipment use can lead to serious injuries);

• Tough behavior (between players when playing).

Individual suffered from sports injury may claim to recover not only property loss but also non-pecuniary damage. According to the Article 1167 of the Civil Code of Ukraine, in case citizen suffered non-pecuniary damage (physical or moral suffering)

by actions that violate hsi/ her personal non-property rights or trench upon his/ her other non-materials values belonging to such citizen, as well as in the other cases stipulated by law, the court may impose on the offender liability for monetary recovery of the specified loss. In accordance with the Part 1 of the Art. 1168 of the Civil Code of Ukraine, moral damage caused by disability or other damage to health may be recovered with a lump sum or with monthly payments.

In determining the amount to recover non-pecuniary damage, the court takes into consideration the degree of fault of the offender and other circumstances that deserve attention. The court must also take into account the degree of physical and moral suffering associated with the features of individual subject to damage.

One of the key objectives of civil legal liability application in the field of sports is the protection of the violated right of the athlete with obligatory consideration of specific features of the sport and its characteristics. Therefore, it is necessary to provide for mandatory preliminary procedure for consideration by special sports arbitration institutions sports disputes, which are related to recovery of losses.

Furthermore, it is necessary to bear in mind that specific procedure for sports disputes settlement is one of the pending issues in domestic sports. Each sports organization independently establishes "rules of the game" and sanctions for their violation. In addition, the organizations of the most developed sports have their own "bodies of justice", which independently establish dispute settlement procedure. Being guided by their own rules, they decide, at their own discretion, who is to blame and what kind of punishment should be applied. At the same time, suits to the national courts for protection of rights are also encouraged. For a violation of this rule, sports organization may impose sanctions – from administering caution or charging fine to a ban to participate or exclusion from membership in such organization.

Therefore, tendency to "internal" settlement of disputes in the field of sports is clearly seen, including those related to damage infliction. As an example, we can recall the incident happened at sledge-bobsleigh track in Königssee. At that point of time the judge has not track the order of the start of Russian crews, and male deuce crashed and turned woman's at the track, resulting in severe bodily injuries of the female athlete who was within the ace of disability. Investigation has adjudged guilty of the tragedy an officer of the International Federation of Bobsleigh and Tobogganing (FIBT), who has released bob to the track, when traffic light signal was red. For the mistake employee held liable by the German Union of Bobsleigh and Tobogganing in the form of a fine, loss recovery and payment of medical assistance has been done by the GUBT without recourse to law enforcement agencies.

## CONCLUSIONS

Based on the study done, we can identify the key features of civil legal liability for damage to life and health in the sports field. According to the author, they are as follows:

– damage within the limits of special type of legal relationship existance - sports legal relations;

– possibility to distinguish subject matter of the tort liability;

– taking into account the fact that law rule infringement and the damage infliction to individual or property under certain conditions may not cause the occurrence of liability to compensate for inflicted damage;

– existence of such a factor as a gross violation of the rules of law and rules of certain sports, which causes the occurrence of civil legal liability;

– existence of the fault of individual caused the damage, which in accordance with the general rule is a condition of tort liability occurrence. However, unintentional fault may not have legal value provided that the damage is a consequence of injury risk of a particular sport;

– in addition to rule of law violation, civil legal liability occurrence is conditioned by significant deviations from the rules of a particular sport.

Taking into account the foregoing, tort liabilities in the field of sports can be defined as such civil legal relations, in which injured participant of the sports event considering the specifics of a particular sport, has the right to claim from another participant who caused the damage, the full recovery of loss resulting from the gross violation of legal norms and rules of a certain sport. While determining liability for damages caused at sports competitions, it is necessary to take into account the degree of fault of the person inflicted the damage and, depending on this, to make the decision on bringing him/ her to civil liability. An athlete may be adjudged guilty of civil offense in case it is determined that his/ her intentions are featured with gross negligence or intent to inflict damage to opponent's health. In case violation and the associated injury is of insignificant character, and no intention has been established in the acts of athlete, the acts of the participant to the sporting events, even if they inflicted damage shall be considered to be lawful.

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# ЩОДО ВИЗНАЧЕННЯ ПОНЯТЬ «ФІЗИЧНА КУЛЬТУРА» І «СПОРТ»

**Анотація.** *Сучасні поняття про якість життя нерозривно пов'язані з можливостями кожної людини зберігати своє здоров'я як вище і абсолютне благо. За загальноприйнятим сучасним поняттям, фізична культура сама по собі є унікальним засобом збереження і розвитку потенціалу здоров'я населення, що безпосередньо впливає на тривалість життя. Автором досліджено організаційно-правові особливості таких понять, як «фізична культура» і «спорт». Аналізуються різні точки зору, пов'язані з теоретичної інтерпретацією цих категорій, вказано їх відмінності між собою за соціально-функціональним призначенням. Обґрунтована необхідність щодо різниці предметів правового регулювання суспільних відносин у сфері фізичної культури та у сфері спорту. Тому основною метою статті є дослідження дефініцій «фізична культура» і «спорт» задля корекції законодавства України. В роботі були використані загальнонаукові та приватно наукові (порівняльно-правовий, формально-правовий тощо) методи дослідження. Встановлено, що українському законодавцю, задля уникнення перешкоджання правильному тлумаченню таких соціальних феноменів як «фізична культура» і «спорт» у правотворчій і в правозастосовчій практиці, слід відрізнити предмети правового регулювання суспільних відносин у відповідних сферах соціального буття людини.*

**Ключові слова:** спорт вищих досягнень, професійний спорт, фізичне виховання, спортивні змагання.

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# ON THE DEFINITION OF THE CONCEPTS OF "PHYSICAL CULTURE" AND "SPORT"

**Abstract.** *The modern concept of quality of life is inextricably linked with the ability of each person to maintain their mental and physical health. Human health today is the highest and absolute good. Today, the very concept of "physical culture" is a unique means of preserving and developing the potential of public health, which directly affects the lifespan of a person. In the article proposed by the author, the organizational and legal features of such concepts as "physical culture" and "sport" are explored. Various points of view related to the theoretical interpretation of these categories are analyzed, and their differences between them for their social and functional purpose are indicated. It justifies the need to distinguish the objects of legal regulation of social relations in the field of physical culture and in the field of sports. The aim of the proposed author of the article is to study the definitions of "physical culture" and*

*"sport" for the correction of the legislation of Ukraine. In this work, general scientific and private scientific (comparative legal, etc.) research methods were used. The author came to the conclusion that in order to avoid misinterpretation of such social phenomena as "physical culture" and "sport" in lawmaking and law enforcement practice, the Ukrainian legislator should distinguish the subjects of legal regulation of social relations in relevant spheres of human social life.*

**Keywords:** high performance sports, professional sports, physical education, sports competitions.

## INTRODUCTION

Currently physical culture and sport became multifaceted phenomena fulfilling a wide range of social functions, influencing both political, economic and cultural life processes in our society. Physical culture as a social institution covers a set of both material and spiritual values. They may include different types of sports facilities, inventory, special equipment, sports equipment and medical supplies. Spiritual values include different information, works of art, moral concepts, social, including legal norms regulating human behavior in the process of physical culture and sports activities, and others. Physical culture and sports in developed forms produce aesthetic values (physical culture parades, sports performances, etc.). [1, p. 73].

Sports, in the common sense, is understood as a specific form of human activities, which involve competition between process participants and is implemented to determine the best results of the regulated exercises or the most worthy participant in such relationships [2, p. 112].

Features of genesis (development) of the physical culture and sports determined their specific functional content. In many respects, their functions coincide, but the target orientation is different. In this regard, it is obvious why one and the same function, for example, is economical, has different content in physical culture and sports. In physical culture, it manifests itself primarily through increased working efficiency and stability of the human body, strengthening its health. More specifically, the economic function of the physical culture is expressed as follows: in increasing and sustainable retention of high labor performance, reducing production gap, morbidity and injury, and continuing creative longevity.

In order to effectively regulate these two quite different spheres of our life, a proper understanding of their main and initial categories and concepts, namely the definitions of "physical culture" and "sports" is essential. After all, these two concepts have many definitions that significantly differ one from another. Modern ideas about economic function of sport are more closely associated with its commercialization and revenue generation: from sponsorship, sale of TV rights to broadcast various competitions; advertising campaigns; sale of tickets, symbols, attributes, etc.; and contracts with athletes and coaches.

So, different content of economic functions of physical culture and sports can be considered as one of the most important arguments justifying their social independence. The following scholars devoted their scientific works to research such spheres of our life as physical culture and sports: S. V. Alekseev [3], M. A. Prokopets [4], I. M. Amirov [5; 6]. The works of the following scientists were devoted to research these two concepts: A. Solovyov [2] and M. H. Vulakh [1].

The purpose of this article is to study the definitions of "physical culture" and "sport" to correct the legislation of Ukraine.

## 1. MATERIALS AND METHODS

The methodological principles proposed by the author of the study were both general scientific methods of study and private scientific methods. So, using the methods of analysis and synthesis, the concepts culture →physical culture→sports were researched. Using the system and functional method, the above concepts were reviewed as separate subsystems that are the part of the "culture" system, which assisted to establish the place of such a social phenomenon as "sports" in the field of physical culture, which in turn formed a part of the sphere of culture. In addition to above stated, the system and functional method helped to clearly establish and differentiate the functions of the physical culture and sports. The comparative legal method was used to compare modern approaches to the legal regulation of the sphere of physical culture and sports in our country and a number of other countries – the Republic of Poland, the Republic of Latvia, the Republic of Kazakhstan, the Republic of Belarus, Algeria, the People's Republic of China, France and the Russian Federation. The formal legal method was applied in analysis of the regulatory legal acts regulating legal relations in the field of physical culture and sports in Ukraine and other countries.

The source study base of the research was as follows: The Law of Ukraine "On Physical Culture and Sports" [7], the Law of the Republic of Poland "On Sports" [8] and the Law of the Republic of Poland "On Qualified Sports" [9], the Law of the Republic of Latvia "On Sports" [10], the Law of the Republic of Kazakhstan "On Physical Culture and Sports" [11], the Law of the Russian Federation "On Physical Culture and Sports" [12], the Law of the Republic of Belarus "On Physical Culture and Sports" [13], the Sports Code of France [14], the report of the Interagency Task Force of the United Nations Organization on Sports for development and Peace [15], "European Sports Charter" [16].

The theoretical and methodological basis of research was the works of the following scientists: S. V. Alekseev [3], M. A. Prokopets [4], I. M. Amirov [5; 6], A. Solovyov [2], M. H. Vulakh [1], V. Sutula [17], L. Matveev [18], N. N. Vitizei [19], O. V. Morozov [20], N. M. Lapina [21], V. D. Panachev [22], VG Nikitushkin [23], SV Vasilyev [24], where the issues of defining the notions of "physical culture" and "sports"

were reviewed, as well as social phenomena of physical culture and sports, legal basis of physical culture and sports, issues of responsibility in the field of sports, etc.

The works of the following scientists constituted the theoretical and methodological basis of research: S. D. Bezklubenko [25], V. S. Nersesyants [26], A. I. Bobylev [27], in which the concepts of culture and culture of concepts definition, theoretical issues of legal regulation, etc. were researched.

## 2. RESULTS AND DISCUSSION

### *2.1. Features of the "culture" concept*

The notion "culture" (from Latin cultura) has a lot of meanings in the different areas of human life. The researchers calculated that there are several dozen (according to I. M. Dziuba calculation – about forty) or even hundreds (according to St. Petersburg Cultologist L. Ariarsky – more than seven hundred definitions of "culture". Therefore, it is worth proving that the word "culture" is among the words used most often. [25, p. 6]. "Culture in general" – is an abstract concept, which defines everything the most significant, characterizing various specific phenomena, which are called by this word. ... Culture is not only a collection of the pieces of work, it is a collection of certain real "living" human knowledge and skills, "encoded" and "encrypted" presented in a "reduced" form, as a program in computer and in human brain (mind); culture is a continuing process of interchange, during which living people enrich and improve their knowledge and skills through development of everything created by their predecessors and, in turn, with their own creativity they replenish and enrich the cultural treasury of their people and ideally – humanity. ... Culture is a process: process of human development of the world: human development of the environment and people in the environment. ... ... "development" of an individual in the world is that it makes it "its own": changing, on the basis of well-known regularities, everything given by nature, adapting to their needs, or (or at the same time), changing itself (changes something in itself), adapts to real conditions" [25, p. 7–12].

Therefore, physical culture is a part of the general culture of society, one of the areas of social activity aimed at health strengthening, physical abilities development in people and their use in accordance with the needs of social practice. Basic indicators of the state of physical culture in society: level of health and physical development of people; degree of physical culture use in the field of upbringing and education, in production, life and structure of leisure time; nature of the system of physical education, development of mass sports, sports high achievements, etc. [20, p. 161]. Activities in physical culture are aimed at optimizing the physical human development, improvement of inherent physical qualities and associated abilities, motor skills and skills in unity by upbringing spiritual and moral qualities inherent in social active eternity [24, p. 17–18].

In other words, physical culture is a form of general culture, a qualitative aspect of development, improvement, support and rehabilitation of values in the field of

physical human perfection concerning realization of personal potential of its spiritual and physical abilities and socially significant results related to its duties in society. It is aimed at harmonious spiritual and physical human development, which is in its sphere not only the subject, but also the object of knowledge, evaluation and transformation. Physical culture is as an integrative link of culture, which contains a great potential for personality reproduction as integrity. Hence its equal place in the general culture of individual and society, where all types of culture (material, spiritual, physical), mutually interconnected, mutually support and interpenetrate each other [21, p. 153–164].

The sphere of physical culture performs a lot of functions in society and covers all age groups of the population. Multifunctional purpose of this sphere was manifested in the physical culture, which includes development of physical, aesthetic and moral qualities of the human person, organization of socially useful activities and leisure activities for people, prevention of diseases and education of the younger generation [22, p. 125-128], physical and psychoemotional recreation and rehabilitation, performance, communication, etc. [23, p. 51–69].

*2.2. Features of the physical culture and sports development*

Sport (English – sport, abbreviated from initial disport – game, entertainment; Fr. – sport; Sp. – deporte; Germ. – sport; Port. – esporte; It. – sport), as a multiple-aspect and polysemic (with the multiplicity of meanings) concept, is a part of the sphere of human culture and an integral part of social life, politics, media space, integral part of physical culture, acts as a means and method of physical education, system of competitions organization, preparation and holding, as a means of health improvement, moral and material satisfaction, and a desire for excellence and fame [2, p. 112].

The founder of the modern Olympic Games, Pierre de Coubertin, once defined the concept of sport: “Sport is a voluntary and steady cult of intense muscular exercises, associated with intentions of high achievements, with a desire and assumption to take risks for the sake of such achievements” [2, p. 112].

At the beginning of the last century, the concept of sport was revealed through the similarity of four elements: physical activity, research achievement, competitiveness and established rules. Later there were different approaches to the definition of this concept, some of them considered physical exercises as a keystone diminishing the role of competitions organization and rules, while others, on the contrary, promoted idea that the sports activity is so far, since it is established by the rules defining the limits of the competitions in which these physical achievements will be fixed [28].

Sport is a specific officially organized, systematically restored, and also built in accordance with the principle of “honest competition” activity, the social content of which is primarily stipulated by the fact that within its framework one of the basic aspects of procedural development of human consciousness and human subjectivity was intentionally reproduced: designation of itself as an individual through another

person and another person through itself [19, p. 80-81]. L. Matveev, revealing the nature of modern sports, offers two of his definitions – "in the narrow sense and in the broad sense". Sport, in the narrow sense, is actually a competitive activity, and in the broad sense (but not extremely broad), the concept of "sports" includes its own competitive activity, the process of preparation for achievements in it, and specific interpersonal relations and behavioral norms arising out of this activity [18, p. 21–22]. The same definition to sport was given by S. V. Alekseev [3, p. 82]. V. Sutula, while studying the concept of "sports" from the standpoint of active and resultant components of the term, came to a conclusion that sport, as a special social and cultural phenomenon, is a historically contingent human activity associated with the use of physical exercises aimed at training and participation in a specially organized system of competitions, and individual and socially significant results of such activity [17, p. 95].

Functions of sport are divided into general (inherent in physical culture) and specific. General functions of sport include: function of person-targeted education, learning and development; health and recreational function; emotional and spectacular function; function of social integration and individual socialization; communication function; economic and other functions. Specific functions include: Competitive and reference and heuristic and achievement functions. Competitive and reference function lies in the basis of the sports features which is actually a competitive activity, the essence of which is to maximum identify, consistently compare and objectively assess certain human capabilities in the process of competition aimed at the victory or high achievement of a personal sports result or places in the competition. Heuristic and achievement function lies in the fact that sport is characterized by creative search activity related to human knowledge of their capabilities, along with the study of effective ways to maximize implementation and their improvement. This function is most fully represented in the sport of high achievements, since it is necessary to constantly improve the system of training, to seek new means, methods of training, new samples of the most complex elements of technique and tactical decisions for sports struggle on this way [29, p. 274–275].

Educational functions of the physical culture and sports also have their own specific features. Therefore, concepts of physical education and sports upbringing appear in the modern theory of physical culture, which significantly differ one from another. So, the notion "physical education" includes the process of individual physical culture formation through the development of its value potential. The main indicators of physical culture as a personality are: human care about its physical condition; ability to effectively use physical education; "Sports mentality" of the person; level of knowledge in the field of physical culture; willingness to help other people in their recovery and physical development.

Sports education focuses on individual preparation for competitive activities. Sports education allows to prepare any person for extraordinary physical and mental loads. Sports take a special place in the system of self-education. Any person who

has finished the school of sports, as a rule, is organized and socially active. Sports education in its function and forms is largely similar to physical education, but its results create a new component of human culture – sports culture.

*2.3. Features of legal regulation of physical culture and sports*

In the context of our study of the concepts "physical culture" and "sports" it is important to determine the subject of legal regulation of relationships in these spheres, which is revealed just by determining the content of these two definitions. The subject of the legal regulation is officially established law order in the field of all regulated social relations [26, p. 434–436; 27, p. 10].

The report of the United Nations Inter-Agency Task Force on Sport for Development and Peace [15] notes that the term "sport" includes all forms of physical activity promoting good physical fitness, mental well-being and social interaction. It includes games, entertainment, recreational or competitive sports events, and sports and traditional games. The "European Sports Charter" [16], adopted in 1992 at the Conference of Ministers of Sports from Europe, provides for the following definition of sport: "Sport" means all forms of physical activity which, through casual or organized participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels".

The Sports Code of France does not establish the terms "physical culture" or "sports". So, in articles L100-1 it is only stated that physical and sports activities constitute an important element of education, culture, integration and social life. They contribute to combating measures related to underachievements, reduction of social and cultural inequality and health strengthening. Physical culture and sports activities promotion and development for all people, including those with disabilities, is of public interest [14, p. 33]. It means that French legislator has departed from the wording of these definitions.

Nor the Chinese legislator establishes the definitions of the concepts "physical culture" and "sports". In art. 3 of the Law "On Physical Culture and Sports" of the People's Republic of China it is stated that the State adheres to the principle that the physical culture and sport serve to economic building, national defense and social development [2, p. 113].

The same approach was applied by the legislators of Algeria, limiting to the general declarations: "Physical culture and sports, the fundamental elements of education, contribute to physical and intellectual development of the citizens and prevention of their health. They represent an important factor for the social and cultural situation improvement of the young people and for strengthening social cohesion" (art. 2 of the Law of the Republic of Algeria No. 04-10 dd. August 14, 2004 on Physical Culture and Sports). It was found that they paid a little more attention to the term "elite sports": "Elite sports and sports of a high level include preparation and participation in special competitions aimed at sports achievements implementation, which are

evaluated in accordance with the national, international and world technical standards" (art. 22 of above law of the Republic of Algeria) [2, p. 113].

Another way was taken by the legislator from CIS countries and Poland.

So, the legislator from the Republic of Belarus states that the sport is a sphere of activity representing a set of athletic disciplines developed in the form of sports competitions and preparation therefor (cl. 5 of part 1 of art. 1 of the Law of the Republic of Belarus "On Physical Culture and Sports" [13]), and physical culture is an integral part of culture, a sphere of activity representing a set of spiritual and material values created and used by society for the purpose of human physical development and its motor activity improvement aimed at strengthening its health and contributing to individual harmonious development (cl. 22 of part 1 of art. 1 of the Law of the Republic of Belarus "On Physical Culture and Sports" [13]).

The legislator of the Russian Federation states that the sport is a sphere of social and cultural activity as a set of athletic disciplines developed in the form of competitions and special human practical preparation therefor (cl. 12 of part 1 of art. 2 of the Law of RF "On Physical Culture and Sports" [12]), and physical culture is part of culture, which is a set of values, regulations and knowledge created and used by society for the purpose of physical and intellectual development of human abilities, its motor activity improvement and healthy lifestyle formation, social adaptation through physical education, physical training and physical development (cl. 26 of part 1 of art. 2 of the Law of RF "On Physical Culture and Sports" [12]).

The Law of the Republic of Kazakhstan "On Physical Culture and Sports" [11] in cl. 7 of art. 1 states that physical culture is an integral part of culture, sphere of social activity, which is a set of spiritual and material values created and used by society for the purpose of human physical and intellectual abilities development, its motor activity improvement and healthy lifestyle formation, social adaptation through physical education and development; and cl. 31 of art. 1 states that sport is a sphere of social and cultural activity as a set of athletic disciplines developed in the form of competitions and special human practical preparation therefor.

According to cl. 10 of art. 1 Law of the Republic of Latvia "On Sports" [10] sport means all kinds of individual or team activities preserving and improving physical and mental health, and intended for success of sports events. Concerning the term "physical culture" in the Republic of Latvia shall mean the sphere of social activity, which is a part of culture and the main task of which is to promote well integrated personality development with the aim to strengthen nation health, and human physical possibilities development and application in different spheres of life [30; 31].

There are two laws in Poland related to sports: "On Sports" [8], "On Qualified Sports" [9]. According to art. 2 of the Law of the Republic of Poland "On Sports", the sport shall mean all forms of physical activity, which, using individual or team involved in it, affect physical and mental development or improvement, social rela-

tions development or sports achievements at all levels. Sport, along with physical education and physical rehabilitation, is a physical culture. According to cl. 3 of art. 3 of the Law of the Republic of Poland "On Qualified Sports", qualified sport shall mean the form of human activity related to participation in sports competitions organized or held in a particular sports discipline by Polish sports associations or organizations operating under its control. The concept "physical culture" is not provided by the legislator of Poland.

The Law of Ukraine "On Physical Culture and Sports" [7] defines general legal, organizational, social and economic basis of activities in the field of physical culture and sports and regulates social relations in establishing conditions for physical culture and sports development (Preamble of the Law).

Clause 11 of part 1 of article 1 of the Law "On Physical Culture and Sports" determines that the sport is an activity of the subjects engaged in the sphere of physical culture and sports, aimed at identifying and unifying human achievements comparison in physical, intellectual and other preparation by holding sports competitions and appropriate preparation therefor. Sport has the following directions: children's sports, children and youth sports, reserve sports, sports of higher achievements, professional sports, master`s sports, Olympic sports, non-Olympic sports, applied military sports, sports for people with disability, etc.

Clause 1 of part 1 of article 1 of the Law of Ukraine "On Physical Culture and Sports" determines that physical culture is an activity of the subjects in the sphere of physical culture and sports aimed at providing human motor activities for their harmonious and first of all physical development and healthy life style maintenance. Physical culture has the following directions: physical education of different groups of the population, mass sports, physical and sports rehabilitation.

## CONCLUSIONS

Due to both general scientific and private scientific research methods applied, we can make certain conclusions. First, when exploring three terms "sports", "physical culture" and "culture", it can be noted that "physical culture" and "sport" are not concepts-synonyms, they intersect, but perform different social functions. The term "sports" is absorbed by the term "physical culture", but not every "physical exercise" is a sport. In turn, "physical culture" is an integral part of the broader and deeper term "culture". Differences in functional purpose of physical culture and sports should affect their definition at the legislative level and in the field of legal regulation.

Second, the analysis and comparison of a number of regulatory legal acts regulating the spheres of physical culture and sports in our country and in a number of other countries – the Republic of Poland, the Republic of Latvia, the Republic of Kazakhstan, the Republic of Belarus, Algeria, the People's Republic of China, the Russian Federation – allow to make a conclusion on appropriateness to distinguish subjects of legal regulation of the social relations in the field of physical culture and in the field of sports to avoid preventing correct interpretation of these social phe-

nomena both in law-making and law-enforcing practice of our country. According to the author, it is not advisable to use in the same legislative act two separate areas spheres of legal regulation – "physical culture" and "sports", but it is reasonable to adopt the experience of the legislator from Poland and Latvia. After all, based on the content fullness of these terms and following their functional purpose it can be concluded that the sphere of physical culture tends to public regulation, but the sports, in turn, to the private legal mechanism of regulation.

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# СПОРТИВНІ ВІДНОСИНИ ТА ЦИВІЛЬНІ ПРАВОВІДНОСИНИ: ПИТАННЯ СУБЄКТНОГО СКЛАДУ

**Анотація.** *Розвиток професійного спорту сприяє ускладненню суспільних відносин, внаслідок чого зростає необхідність у їх чіткому правовому регулюванні. Тому основна мета роботи полягає в аналізі питань суб'єктного складу щодо вирішення спортивних відносин та цивільних правовідносин. Проаналізувавши спортивне право, виявлено, що різні види відносин, які пов'язані зі спортом, створюють на практиці незручності під час пошуку законодавчих актів та систематизації матеріалів із практики. Встановлено, що суб'єктом спортивних відносин можуть бути фізичні та юридичні особи приватного права і суб'єкти публічного права. Визначено, що до приватноправової сфери правового регулювання належать відносини, які пов'язані з реалізацією та захистом прав власності на спортивні об'єкти, відносини інтелектуальної власності, договірні відносини у сфері спорту.*

**Ключові слова:** професійний спорт, інтелектуальна власність, соціальна реалізація, цивільно-правовий статус.

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# SPORTS RELATIONS AND CIVIL LEGAL RELATIONS: THE QUESTION OF SUBJECTIVE COMPOSITION

***Abstract.*** *The development of professional sports contributes to complicating the social relations that increases the need for their clear legal regulation. Therefore, the main objective of the work is the analysis of the issues of subject composition related to the solution of sports relations and civil legal relations. Analyzing sports law it is found that different types of relations connected with sports, create in practice the inconvenience when searching for legislative acts and systematization of materials from practice. It is established that the subject of sports relations can be individuals and legal entities of private law and subjects of public law. It is determined that the relations connected with implementation and protection of the property rights on sports objects, relations of intellectual property and contractual relations in the sphere of sports belong to the civil sphere of legal regulation.*

**Keywords:** professional sports, intellectual property, social realization, civil legal status.

## INTRODUCTION

Sport can be treated as one of the most amazing phenomena of social life, the growth of which significance is associated with increased working efficiency and result-

ing human posibility to give more attention to yourself. Physical culture and sports take an important place in the life of a modern person, being a means and a sign of healthy life style, and also, in the opinion of some authors, an important factor in civil society development [1; 2].

At the same time, ambiguity of the term of sports does not allow to form a clear view of what is meant by sport, and it also results in statistical discrepancies regarding its popularity among the citizens. According to the Law "On Physical Culture and Sports" [3], mass sports or sports for all individuals shall mean "activities of the subjects in the sphere of physical culture and sports, aimed at ensuring motor activities of people during their leisure time in order to promote health." Moreover, sports, pursuant to the law, ensure another important factor, i.e. competition of the process [4].

Recently, "sports law" is widely used both by scientists and practitioners to determine the standards and regulations relating to the sphere of sports relations, where the generally recognized vision of the essence of this phenomenon in domestic jurisprudence has not yet been formed.

As to the sport laws , only two signs can be treated as the features of almost all the definitions offered by adherents of the "sports law" separation into a field:

1) sports law is a set (system) of norms;

2) these norms regulate "sports relations" (or relations "in the field of physical culture and sports").

"Sportsrelations" shall include a wide range of different relationships in the field of physical culture and sports, which are regulated by the norms of civil, economic, administrative, labor, tax, etc. legislation.

Accordingly, such a "wide approach" in the field of sports law, which is recognized as having clearly defined complex orientation, includes: physical culture and sports in Ukraine as an object of legal regulation; organizational and legal grounds of physical culture and sports state control; legal regulation of professional sports in Ukraine; legal regulation of the sphere of student sports in Ukraine; legal regulation of children's and youth sports; legal support to the social sports associations; legal status of athletes, coaches and other participants in sports activities; legal aspects of sports competitions organization and conduct; regulation of tax relations in the field of sports [5; 6]. It shall be distinguished the issue of right to be engaged into sports, the right of intellectual property in the field of sports activities, sports insurance; access to the sports events, advertising, athletes transfers, etc. The subject of sports law also includes social relations in the field of sports arbitration (mediation), sports responsibility as a specific type of legal responsibility, sports judging and international cooperation relations in the field of sports (R. B. Shishka) [7].

At the same time, the domestic scientists made a proposal (which seems rather rational and balanced) regarding maximum simplified meaning of the subject of sports

law – "sports relations" defined as social relations formed in the process of sports activities [8].

It should be noted that this definition of sports relations is rather "vague". However, quite acceptable idea of the circle of social relations that should be the subject of "sports law" can be obtained by systematically interpreting the terms "sports activities" and "sports".

Taking into account the foregoing, "sports relations" can be treated as a relatively integral "single" subject of legal regulation only with significant warnings, which in itself puts in doubt correctness of the issue to treat the "sports law" as a separate branch of law.

Assuming the possibility of above mentioned opinions, the author clarifies possible homogeneity of relations, which is the subject of legal regulation, and then consideres reasons for justification to distinguish relevant legal array and degree of its separation. After all, any efforts of the legislators to create a branch of law or legislation cannot be successful if diversified relations are the subject of regulation.

## 1. MATERIALS AND METHODS

Comprehensive study of theoretical and practical issues of contractual relations civil legal regulation in the field of professional sports based on systematic generalization of existing national legislation, legal practice and foreign legal experience allowed to study the goal set.

It was established that sports relations, outside theoretical structures, in real life are regulated by acts of not only and not so much of the "sports law", the existence of which is still the subject of discussions, first of all, as to the norms of civil and administrative legislation, as two main regulatory branches of domestic legislation. At the same time, civil law mainly applies the means of private law regulation, resulting in a relationship of a private law type, but in administrative one – public law type. Moreover, public law sports relations in its essence can be also made in the field of civil law. Considering this circumstance shall have a pragmatic meaning, since it means in practice that such relations are regulated by legislative acts and cannot be changed or terminated by agreement between their participants.

Using analysis methods it was established that the civil relations in professional sports are characterized by a number of features, one of which is the subject composition. Depending on the purpose and nature of activities undertaken, the subjects of said relations are: athletes-professionals, coaches, sports agents, spectators, professional sports organizations, etc. It can be concluded that professional athlete in domestic practice rarely often acts as an independent subject of entrepreneurial activity. This may take place, in particular, in the individual types of sports, where athlete-professional takes part in training and competition individually as an individual entrepreneur. It was established that sports club is a legal entity that provides commer-

cial development in sports by carrying out activities for training and competition processes organization, as well as provision of other sports services.

## 2. RESULTS AND DISCUSSION

*2.1. Characteristics of sports relations, serving as a subject of the sports law regulations*

According to A. Aparov, "sports law regulates social relations arising out and developing in the field of sports, and therefore are closely interconnected with such categories as sport, recreational and sports activities, as well as sports competitions. Generally name these types of public relations as "sports relations". Based on abovesaid, it can be stated that definition and outlining of such terms as sports, recreational and sports activities, as well as sports competions, is a key to sports law and legislation in this field. Moreover, these categories and terms are quite actively used in other branches of law, resulting in a more detailed review and analysis of their content, as further discussed in more details. Consequently, one of the main features of the field of sports law is that it covers and regulates a qualitatively homogeneous sphere of sports social relations.

Since this feature is one of the defining one to distinguish the sports law branch, it is advisable to characterize the sports social relations in more details. So, the sphere of sports social relations is a certain "social reality", which is the subject of sports law regulation and sports legislation. However, sports relations constitute rather complex and multifaceted legal category, the structure of which includes various elements, in particular: subject composition (subjects); various kinds of objects (including benefits that serve as a means meeting various subjects needs in sports, namely: needs of the population in sports events, needs of athletes in meeting their own intentions, needs of the state in the tasks forming physically and psychologically healthy nation, etc.), in terms of which subjects, as a rule, enter into relevant relations; content, among other things, includes legal and other elements (rights, duties, actions, acts, subjects behavior, etc.), which are the grounds for relevant relations appearance, change and termination. The subject of sports law is a relatively homogeneous set of social relations arising out due to certain organizational, social, economic and other aspects implementation in the sphere of sports and physical culture, as well as social relations arising out while creating conditions for sports and physical culture development and, in addition, related business (economic/entrepreneurial), property, civil, labor and financial social relations arising out due to targeted sports events organization and implementation. It is obvious that sports relations develop not by the rules of nature, and, therefore, objective need in their regulation and arrangement by various social institutions has appeared.

Sports relations are some specific social relations arising out due to recreational and sports activities implementation and developed in accordance with the norms of sports law and legislation in this sphere. Moreover, the sphere of physical culture and

sports itself, within which the sports relations are developed, associated with the recreational and sports activities organization and implementation, covers a fairly wide range of components, in particular: physical education of different groups of the population, mass sports, physical and sports rehabilitation, children and youth sports, sports of higher achievements, professional sports, Olympic sports, etc." [9].

Since the literature refers to both "sports" and "physical culture", the author shall find out relation between these terms [10].

In our opinion, the main difference between them is that the "sports relations" cannot exist outside the sphere of sports (for example, relations related to sports events organization and conduct, recreational physical education, fitness, etc.), and, if exist, they acquire essential features in this sphere due to certain properties of the sphere (for example, life and health insurance, damage caused by the source of increased hazard during the competition, etc.).

Concerning "sports-related relations", they are relations of "universal" type, those that may arise in various spheres of being, obtaining "sports" name only due to their existence in the sphere of sports (for example, ownership to the sports equipment, alienation contracts, etc.).

Relation between "physical culture and sports relations" and "sports relations" looks like a partial imposition of circles, since not all "physical" relationships are "sports" ones, and not all "sports" ones are "physical culture" relations [11; 12]. At the same time, all "sports relations" are the part of a wider term "physical culture and sports relations".

From this standpoint, the assessment of "sports law", as a set of legislative acts (as well as separate regulations in general legislative acts), which regulate sports relations, can appear to be justified. Such a set of legislative acts and separate regulstions of various legislative acts can be called, to a certain extent, as "sports legislation" [13; 14; 15]. However, such assessment (as well as its name) gives practically nothing, as it is only a statement of a certain state of things.

In the meantime, it should be noted that the diversity of sports-related relations creates significant practical inconvenience in searching for legislative acts used to regulate one or another type of such relationships; search and systematization of practice materials; subsidiary application of legislative regulations, law analogy application, etc.

Relationships related to ownership exercise and protection to the sports facilities, intellectual property relations, contractual relations in the field of sports, inheritance of sports property by will, etc., refer to the private legal regulation. They can be sports relations, but more often there are reasonable grounds to qualify them as "sports-related relations".

Above it was stated about certain "vagueness" of the term "sports relations", due to the fact that it coverd actually the entire set of relationships in the field of physical culture and sports.

If to consider them as a subject of special "sports legal" regulation, it is necessary to consider such a feature of legal relationships, arising out in this sphere, as their "ambiguity".

On the one hand, if we recognize "sports law/legislation" existence, we shall also recognize "sports legal relations" existence. But, on the other hand, if we include civil, administrative, economic, labor, etc. regulations in the "sports law", we shall acknowledge that relations regulated by these regulations are, respectively: civil, administrative, economic, labor, etc. legal relations. Moreover, the type of legal relationships – private or public, are typical properties of specific legal relationships determined by the "basic" branch of law: civil or administrative law.

In its turn, civil legal relations are the priority type, since the essence of sports, as such, implies equality of participants in civil relations (except for administration/state control relations).

Such relations are generally regulatory, but may also be accompanied by civil-organizational relations (in case of legal entities establishment, etc.).

*2.2. Comparative analysis of the terms "civil relations" and "legal relations"*

According to art. 1 of the CC of Ukraine, the subject of CC regulation are personal non-property and property relations. The first ones do not have direct economic content. Their subject is: name, honor, dignity, business reputation, personal life, authorship for the works of literature, science and art, freedom of movement and other well-beings essential for the personality. Some personal non-property rights may be also owned by the legal entities: right to honor, dignity, business reputation, trade name, production mark, trademark, etc. Property relations are filled with direct economic content and made in relation to material values.

Civil legal relations are legally arranged civil relations, legal relations between legally equal entities that exercise civil rights and obligations.

Indicative signs of civil legal relations:

1) they are legal link between legally equal entities separated one from another in organizational, legal and property context;

2) these subjects exercise civil rights and obligations in respect of non-material and material values that are valuable to them as individuals;

3) relations of their participants are regulated on the basis of initiative given by the latter and their free discretion based on authorizing nature of the civil law regulations;

4) civil rights and obligations arise not only out of the grounds as provided for by legislative acts, but also on the basis of the general principles of civil law;

5) civil rights protection and incentive to perform duties shall be made using legal measures imposed by court or any authorized party in civil relations.

To clarify the issues of the categories relations – "sports relations" and "civil relations" – it is appropriate to mention the basic classifications of the latter, considering them in terms of suitability to be used in the field of physical culture and sports.

1. Depending on the purpose, functions and tasks they perform, civil legal relations can be divided into: a) regulatory ("constitutive"); b) organizational; c) protective.

Regulatory civil relations arise as a result of civilian authority function implementation, which creates prerequisites for self-regulation in the field of private law. Due to this specific civilian function, participants in civil relations can determine their own rules for behaviour, actually create regulations for local action, etc. Its conceptual basis is well-known in Roman private law maxim "Everything is permissible what is not prohibited". On this basis, if certain conditions are available, civil rights and obligations shall arise.

It should be noted that regulatory functions also perform administrative-legal relations, which by their nature are managerial. Therefore, we shall tale into account that regulatory civil and administrative relations differ not only by branch affiliation, but also by grounds of origin, extent of state influence, means and methods used to achieve the same overall goal – private person rights and interests protection.

Organizational civil legal relations arise, as a rule, due to legal entities establishment, preparation for the contracts execution and powers transfer.

Protective civil law relations are resulted form civil offenses committed. In the field of sports, they can be so-called "sports delicts" that reflect its specificity as the "risk zones".

2. Depending on the economic content, civil legal relations are divided into property and non-property.

Property legal relations have economic context. Their object is property (material values). In turn, they are divided into legal relations that mediate statics of social relationships (ownership legal relations, possession, etc.) and legal relations that mediate dynamics of social relations (commitments). In the field of sports, legal relations that mediate statics of public relations include ownership legal relations to the sport infrastructure, sports equipment, etc. Legal relations arising out of the sports facilities and sports equipment lease sgreements, insurance contracts, advertising, contracts with sports clubs and athletes, coaches, specialists, etc. are included in binding relations.

Non-property legal relations do not have direct economic content. They can be divided into those related to property rights (copyright), and those that are not related to the property rights (personal non-property rights, etc.). In the field of sports, they can refer to the rights to a trademark, honor, dignity, sports and business reputation, etc.

3. By legal content, civil legal relations are divided into absolute and relative.

In absolute legal relations right holder opposes to an indefinite number of obligated persons (abovestated ownership legal relations to the sports equipment, buildings, facilities, etc.). In the relative legal relations, the lawful person opposes to one or more specifically identified obligated persons (legal relations arising out of the sports facilities and sports equipment lease sgreements, insurance contracts, advertising, sports services rpovision, etc.).

4. Civil relations are divided into property and binding according to the object and nature of the right.

The object of the property legal relations are the things (property), and a legitimate subject can exercise its subjective rights independently, without contributing to the obligated person (ownership legal relations to the sports facilities, servitude legal relations to the sports property, land plots, etc.). Binding legal relations are the legal relations in which the object is an action (behavior), and therefore the legitimate subject requires assistance from obligated person to exercise its civil rights (obligations arising out of the contracts concluded with participants in the sports / civil relations).

Specific features of the various types of civil relations are reflected in its structure elements: 1) subjects; 2) objects; 3) content.

The central figure in civil legal relations is an individual – a person who acts as a participant in civil relations (art. 24 of CC), has civil legal status and capacity.

Civil legal status, as an ability to have civil rights and responsibilities, is a prerequisite for the civil rights and responsibilities appearance.

Capacity of individual is its ability to acquire civil rights for itself and exercise them on its own, as well as the ability to create by its actions civil obligations, to independently carry them out and bear responsibility in the event of their non-fulfillment (art. 30 of CC of Ukraine).

Elements of the capacity content of any individual are: 1) legal capacity; 2) delict capacity; 3) testing and mental capacity; 4) trans capacity; 5) business capacity; 6) marital and family capacity; 7) corporate capacity; 8) author's capacity; 9) cyber capacity.

It is also worth adding "sports capacity", which means the ability to be active participant in sports events, competitions, etc., the ability to systematically engage in a particular sport (sports), participate in sports competitions and other sports events.

The expediency to distinguish such an element of capacity is stipulated by the fact that special legislation on physical culture and sports, in particular, the Law of Ukraine "On Physical Culture and Sports", defines athlete as an individual who systematically engages in certain types of sports and takes part in sports competitions (article 1 of the Law), but does not determine how exactly they, as subjects from the sphere of physical culture and sports, differ from participants in other social relations. It is also mentioned in this regulation that subjects in the sphere of physical culture and sports are as follows: individuals engaged in physical culture and sports, including athletes; specialists in the sphere of physical culture and sports; establishments of the physical culture and sports; and relevant authorities. But in this case, the features of their legal status are not determined. The relevant aspect of the issue is not also reviewed in the publications known in the "sports law" [16; 17]. Hence, the need to distinguish suh element of civil capacity as "sports capacity", which characterizes individual ability to be a participant in sports relations.

*2.3. Features of the individuals capacity*

"Sports capacity" differs from legal capacity, first of all, by the ability to participate in sports events (to be a participant in sports relations), to take actions with legal consequences and to acquire relevant civil rights and obligations, which occurs earlier than legal capacity on a general basis. It is assumed that the minor person is aware of the possible risks of the competition, possible harm to it, its responsibility for causing harm to other participants in the competition, etc. This person could apparently acquire and exercise rights and obligations related to participation in the competitions, preparation for them and competition results, with the consent of its parents and guardians (under 14 years of age), parents and curators (at the age from 14 to 18). Obviously, it is appropriate to specially define the age of "sports capacity" in the civil law (CC of Ukraine). According to the author, such a limit could be the age of 7, the term when a child, entering the school, appears in quiate extensive network of sports and physical relations. It is worth noting that the age of 7 was given with a legal significance already in Roman law. So, children under 7 years of age (infantes) were absolutely incapacitated, but after this limit they gradually acquired civil capacity: girls from 7 to 12 and boys from 7 to 14 (impuberes) were partially incapacitated. They could make small dealings and cheap purchases, take small gifts, and do small exchange of things. But in case of dealings aimed at rights termination or any obligation establishment, then it was required to obtain guardian permission who could give its at the time of dealing. Any dealing made without guardian consent obliged the minor only within the enrichment obtained under this agreement; girls from 12 to 25 and boys from 14 to 25 (adulescientes) were recognized as adult and capable. They had a right to carry out any civil legal acts, but having made obviously unfavorable dealing, they could ask the judge to declare it as invalid and return the parties into original state in which they were before this dealing conclusion, i.e. to apply restitution. Productive forces and civilian circulation development, involvement of actually inexperienced, naive and unskilled persons into business life has posed a threat to stability of civil legal relations. From the 2nd century in order to avoid the threat, this category of persons were entitled to ask for a curator (trustee) and then such persons could conclude dealings only with its curator`s permission.

This piece of work does not propose to radically revise civil concept of minors differentiation, however, it considers the experience for determining the lower limit of the individual capacity can be useful in general, and during solving the issues of civil legal status of participants in sports relations in particular.

Legal entity can be also a subject in sports relations and hence civil legal relations in the field of physical culture and sports, which, according to art. 80 of the CC of Ukraine shall be considered as organization established and registered in accordance with the procedure established by law, which is enpowered with civil capacity and may be a plaintiff and defendant in court. This means that it: 1) is an "organization",

i.e. social entity established in a certain way organizationally and structurally; 2) shall be established and registered in accordance with the procedure established by law; 3) has civil capacity (legal standing); 4) may be a plaintiff and defendant in court.

The category "legal entity" is repeatedly mentioned in the Law "On Physical Culture and Sports". In particular, in art. 1 of this Law, the institution of physical culture and sports is defined as a legal entity that ensures physical culture and sports development by providing physical culture and sports services. Institutions of physical culture and sports, in particular, are: sports clubs, children and youth sports schools, specialized educational sports institutions, schools of high sports skills, centers of Olympic training, centers of student sports of higher educational establishments, physical culture and health institutions, centers of physical health for the population, centers of physical culture and sports for disabled; organizer of physical culture, health or sports events. The last one is a legal entity (-ies) or individual (-s) who initiated and held physical culture, recreational or sports events and carried out organizational, financial and other support in these events preparation and holding. In this regulation the subjects in the sphere of physical culture and sports determine individuals or legal entities which conduct their activities for the physical culture and sports development, and further specify that the subjects in the sphere of physical culture and sports are: individuals engaged in physical culture and sports, including athletes; specialists in the sphere of physical culture and sports; establishments of the physical culture and sports; and relevant authorities. Article 9 of this Law states that the founders of the sports clubs may be individuals and legal entities, and art. 15 of the Law states that founders of physical culture and recreational institutions cam be individuals and/or legal persons.

Moreover, in abovementioned and other regulations of the Law "On Physical Culture and Sports" (as well as in other instrument of sports legislation), legal standing of abovementioned legal entities, conditions required for its implementation, etc. are not determined.

This obviously predetermines the need to appeal to the civil law regulations, where, in fact, the structure "legal entity" was borrowed. The answer to the question of interest contains art. 91 of the CC of Ukraine, according to which legal entity is capable of having the same civil rights and obligations as an individual, except for those who by its nature may belong only to a person. In particular, art. 94 of the CC of Ukraine establishes that the legal entity has a right to inviolability of its business reputation, secret of correspondence, information and other personal non-property rights that may be owned by it. In this case, personal non-property rights of legal entity are protected on a general basis in accordance with Chapter 3 of the CC of Ukraine.

In addition, the extent of civil capacity of any legal entity is not unlimited, since it is determined by its constituent documents.

This raises the question reviewed earlier regarding individual capacity: what is the composition (elements) of the legal standing of any legal entity (since the terms "legal personality" and "capacity" are essentially interrelated, then it may be possible to speak about "legal standing of the legal entity" as an integral term)?

Types of legal standing of the legal entity can be divided as follows: 1) legal capacity; 2) delict capacity; 3) trans capacity; 4) business capacity; 5) cyber capacity.

When comparing the types of legal capacity of individuals and legal standing of the legal entities, we can see difference between general civil and legal status of individual and legal entity in differences between them, which is shown in the rule of art. 91 of the CC of Ukraine "legal entity may have the same rights and obligations as individual except for those the prerequisites for ownership of which are natural properties of a person. The ability to inherit and be a participant in family relations is precisely a manifestation of such natural properties of a person.

However, the list of the types of legal standing of the legal entity should also include the "sports capacity", the content of which can be defined in the same way as for individuals, but with certain warning that in certain cases it can be an element of special standing of the legal person.

## CONCLUSIONS

Summarizing our study, the authors made a conclusion that as to the legal regulation of the field of physical culture and sports one should speak about "sports relations", which, in fact, are the subject of legal regulation. Depending on the grouns and methd the legal regulation is made, one can speak about legal relations in the relevant branch affiliation: civil, administrative, etc. The significance of sports for modern society, the range and spectrum of difficulties in its legal regulation, the complication of its structure and the expansion of its functions stipulated the need for a new independent and integrated branch of law – sports law that would harmonize the isolated, but enormous by volume regulatory and legal acts array in the field of physical culture and sports.

In accordance with the type of legal relations, the requirements for the legal standing (legal personality) of its participants, elements of capacity, etc. are determined. In a view of these circumstances, the concept of civil and other relations regulation in the field of physical culture and sports should be formed, according to the author.

It was established that the sphere of social relations is a certain social reality, which is a subject of of sports law and sports legislation regulation. Sports relations, which are the subject of the sports law and sports legislation regulation, arise between various subjects in the process of physical culture, recreation and sports activities organization and holding and in the process of purposeful physical culture, recreational and sports events organization and implementation.

So, the issue to allocate sports law in a separate branch is closely linked to the level of sports movement development in Ukraine, which under normal conditions can provide economic, social-cultural and other development of the state. However, the development of sports in Ukraine is significantly complicated by the fact that the Verkhovna Rada of Ukraine has not ratified a number of international legal agreements in the field of sports law.

Constant development of sports in Ukraine requires legislation improvement and codification by which the sports legal relations are regulated. The absence of a codified and conceptual regulatory legal act, the validity of which would be able to regulate various spheres of sports legal relations, results in a large number of declarative regulations in the sports law. Today, dificulties in the rights and interests of the sports legal relations subjects implementation and law enforcement conflicts result in significant array of social relations in the field of sports in Ukraine to be outside the scope of legal regulations. There is an urgent need to fundamentally reconsider the importance of sports legal relations and to improve the system of regulations in this branch of law at a legislative level to the extent of the relevant codified acts creation. In general, legislative framework used today in the field of sports is general and does not consider specifics of sports legal relations.

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# ПРАВОВЕ РЕГУЛЮВАННЯ МАЙНОВИХ ВІДНОСИН У СФЕРІ БУДІВНИЦТВА ТА ЕКСПЛУАТАЦІЇ СПОРТИВНИХ ОБ'ЄКТІВ

**Анотація.** *Актуальність дослідження обумовлена поширенням випадків переходу в приватну власність спортивних об'єктів, що потребує визначення особливостей правового статусу власників або користувачів у відносинах з експлуатації спортивних об'єктів. Правове регулювання будівництва спортивних об'єктів також має свою специфіку, обумовлену особливостями використання таких об'єктів, зокрема, забезпечення спеціальних правил безпеки ще на етапі будування. З урахуванням вказаного, за мету цієї статті було поставлено дослідження особливостей правового регулювання майнових відносин, що виникають під час будівництва та комерційної експлуатації спортивних об'єктів. З використанням переважно догматичного методу, у статті проведено аналіз положень нормативних актів, які регулюють відносини у сфері будівництва та експлуатації спортивних об'єктів. За результатами проведеного аналізу виявлено особливості правового статусу власників та користувачів спортивних споруд, випадки обмеження прав власності та користування в інтересах суспільства, а також специфіку будівельних норм стосовно спортивних об'єктів, які спрямовані на забезпечення їх безпеки.*

**Ключові слова:** будівництво спортивних споруд, комерційні спортивні заходи, право власності, право користування, майнові права.

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# LEGAL REGULATION OF PROPERTY RELATIONS IN THE SPERE OF CONSTRUCTION AND EXPLOITATION OF SPORTS FACILITIES

**Abstract.** *The relevance of the note is caused by increasing range of cases when private persons become owners of sports facilities. This fact causes the need to determine the legal status of sports facilities owners and users in the relations on exploitation of sports facilities. Legal regulation of sports facilities construction also has its specifics caused by some special aspects of use of such objects, particularly, providing special safety rules at a construction stage. Taking into account above mentioned, the investigation of legal regulation of the property relations,*

*which arise during construction, and commercial exploitation of sports facilities was set as the purpose of this note. Using mainly dogmatic method, the analysis of legal provisions concerning the regulation of the relations in the sphere of construction and exploitation of sports facilities is carried out. As a result of the carried-out analysis, some features of legal status of sports facilities owners and users, cases of restriction of the property rights on sports facilities for the benefit of society and also specific provisions of sports facilities construction, aimed to provide their safety, are revealed.*

**Keywords:** construction of sports facilities, commercial sporting events, property right, right of use.

## INTRODUCTION

In case in the days of the Soviet Union revenue generation in sports field has been deemed as illegal business activities and has been subject to legal prosecution, nowadays practicaly the whole professional sports is commercialized and it is considered as variety of business. Sport industry has been formed, containing the following commercial directions: 1) transferring the exclusive rights to use the name of sports event and its symbol, transferring the rights to cover sports event; 2) advertising; 3) sports event admission tickets sale; 4) sports stuff and goods production and sale; 5) transferring the rights to intellectual activity results or to personalization means; 6) professional sports clubs share sale; 7) athlete transfers; 8) sports buildings and structures, sport appliances rent out/ lease out; 9) lottery arrangement and conducting; 10) professional sports clubs participation in international sports competitions [1].

Sports facilities commercial operation can be done through advertizing of sports events, etc., however major earner of revenue is sports buildings or sports facilities (appliances) rent out or lease out. According to statistics, 40-60% of stadium revenue is a rental fee received from football clubs that run training sessions and play matches on these sites. Sports facilities can also be used for other activities both sports ones, in particular, football, as well entertaining ones, for example, large-scale concerts. Stadiums operation revenue can also be obtained from business events conducted in the conference halls provided by infrastructure, or even in the field itself, due to office facilities, cafes, restaurants, fitness centers, etc. at sports facilities. Global statistics shows that profit-oriented stadiums can be used for more than 180 events per year, including weddings [2].

The prospect of commercial exploitation of sports facilities shows Both expansion of sports facilities and increase in the number of studies of specific features of legal regulation of relations in sports filed, including international level one are indicative of the prospects of sports facilities' commercial operation. Well, property rights issues, in particular property rights for sports facilities, are examined in the papers introduced by B. Hoffmeaister [3], L. Underkuffler-Freund [4], N. Blomley [5], W. Lucy & F. Barker [6], M. Aboud [7], A. Marmor [8], J. Nedelsky [9], K. Mackin-

non [10], L. Amsi [11], J. Kane [12], L Brilmayer and G. Chepiga [13], R. De Mendonca and P. Henrique [14], EJ. Stroz [15], . A. Flanagan [16], J. Gross [17], K. P. Braig [18] et al.

## 1. SPORTS FACILITIES AND STRUCTURE CHARACTERISTIC IN THE CONTEXT OF PROPRIETARY RIGHTS

Let's fix upon definition of the types of sports facilities and sports structures that are assets in use and which can be subject to the property rights. A wide range of athletic disciplinesfacilitates construction of the variety of sports facilities, being one of the types of material support for physical culture and sports.

The first definition is given by the Law of Ukraine "On Physical Culture and Sports", which defines a sports facility as immobility intended for physical education and sports activity.

Pursuant to the general rule, sports facilities can be owned by the state, local government authorities, and individuals. However, according to the Law, it is impossible to change the intended use of privatized sports facilities and the existing network of state and municipal institutions of physical culture and sports may not be reduced without the consent of the central executive body, which ensures state policy formation in physical culture and sports area. The law states that sports facilities shall be located on land plat having recreation purposes intended use.

Construction, sanitary and other norms and rules in health protection field and sports facilities attendants' safety observation shall be established in accordance with the law.

Concerning building codes in force as of 2018, DBN, V.2.2-13-2003 "Sports and physical culture and recreation facilities".

In accordance with DBN, sports and fitness buildings and structures are classified according to the nature of their use into:

– training – intended for beginners' training and unskilled athletes training;

– sports-demonstrational – intended for high qualification athletes training and holding competitions with at least 600-5000 spectators (depending on the kind of sport);

– sports and leisure – intended for sports events demonstration along with cultural- entertainment and public events.

– physical culture and recreational – intended for general physical training and outdoor activities of various age groups' population.

Training and physical culture and recreational facilities can cooperate with sports and leisure and educational institutions.

Sports and fitness and recreational facilities by their functional profile are distributed into complexes and groups:

– major – directly intended for sports and fitness activities;

– accessory – intended for persons who train, coaches and judges, along with medical, administrative staff, storage rooms, etc.;

– complexes for viewers.

In particular, the following facilities can be distinguished:

– sports building is the building containing one or several sports halls with auxiliary premises. Sports buildings containing two or more halls, one of them may also be a room with a bath, or a synthetic ice rink, or the indoor pool premises;

– sports complex is a group of sports buildings (possibly together with outdoor structures), united by common territory;

– stadium is a complex of buildings intended for educational, training work and sports competitions demonstration in single or several kinds of sports. It may include: sports core or an arena with viewers' seats, various premises for viewers, training field and grounds, along with other outdoor and indoor sports facilities with auxiliary premises and territories.

According to the list of sports facilities and fitness and recreational buildings and structures listed in Annex A of DBN V.2.2.-13-2003, the following are distinguished:

– summer and winter outdoor sports facilities (including volleyball, football, basketball courts and sites, race tracks and lines, swimming pools);

– roofed sports facilities (also allocated by kind of sports);

– stadiums (universal or specialized by kind of sports);

– facilities for training the kinds of sports that depend on natural-landscape conditions (water sports clubs, yacht clubs, beach volleyball courts);

– winter sports facilities (skiing, skating, etc.).

## 2. ANALYSIS OF THE REGULATIONS ON THE UNIFIED ELECTRONIC ALL-UKRAINIAN REGISTRY OF SPORTS FACILITIES

"Sports facilities" concept is extensively explained in the Regulations on the Unified Electronic All-Ukrainian Registry of Sports Facilities, approved by the Order of the Ministry of Ukraine for Family, Youth and Sports. In accordance with this order, sports facility is specially designed and equipped building, sports and fitness complex, a swimming pool, other facility dedicated for physical culture, recreation and / or sports activities.

According to fitness and ports services, sports facilities are divided into physical training – educational, fitness and recreational, sports and recreational, sports training, sports-entertainment, rehabilitative physical culture.

The following types of facility are marked separately in the Registry: aero clubs and aviation sports clubs, biathlon shooting facilities, swimming pools, irregular size pools, basketball courts, cycling tracks, water-race canals, rowing-sports facilities, water sports facilities, volleyball courts, gymnastic courts, skiing facilities, trampolines, handball courts, youth athletic centers, wrestling halls, equestrian clubs, equestrian

sports bases, municipal facilities, athletics arenas, mini football fields, playgrounds for sports games (volleyball), playgrounds with non-standard fitness equipment, playgrounds with fitness equipment, irregular size sites for playing mini-football, irregular gyms, irregular sports grounds, sports palaces, golf courses, fitness premises, premises with gym equipment, gyms, sports grounds , sports facilities, sports fields for workout, sports complexes, structures with artificial ice, stadiums, shooting ranges and stands, tennis courts, open air gym facilities, football fields, chess and checkers clubs, other playgrounds.

However, it should be noted that definition of certain items is non-systemic, since we find sites for the same types of sports in the Registry, however indicated with different order of words.

Entries of all sports facilities in the state and municipal ownership shall be mandatory done to the Registry. Privately owned facilities are included to the Registry on voluntary basis.

The Registry is formed by the Ministry of Family and Youth on the basis of administrative information (data) submitted by regional structural divisions of physical culture and sports on territorial principle through information systems combining on unified methodological basis with a view to:

– keeping records of available sports facilities in Ukraine;

– conditions creation to provide for optimization of sports facilities number and use irrespective of the form of ownership;

– monitoring of sports infrastructure facilities' structural and qualitative changes;

– control over efficient use of sports infrastructure facilities;

– prevention of reduction of the network of physical culture and sports institutions, sports facilities, rehabilitation and sports facilities.

Based on application and documents attached to it, entry is formed consisting of an address and reference, and information parts.

Address-reference part contains identification code and the full name of the legal entity, information about its location, form of ownership, organizational and legal form, major type of economic activity, state registration data, territorial and departmental allegiance;

Information part contains:

– concerning legal entity – information on the head, founders, status (if occupies monopoly (dominant) position at commodity markets, is of strategic importance to the economy and security of the state), privatization status (not subject to privatization, not subject to privatization, howevert can be corporatized, subject to privatization), bankruptcy status, change of status (liquidation, restructuring), separated divisions, indicators of financial and statistical reporting, participatory interest of the state in business partnership;

– concerning immovable property (buildings, structures, land plots, enterprises, their associations, institutions, organizations acting on the state ownership basis in

accordance with the State Registry of Title to Real Property and their Restriction) – data on facility code (cadastral number), facility name, property value, facility location, land plot size, area of development, indication of lease out, rent out, granting for concession, mortgage creation;

– regarding the state property which was not included into the authorized capitals of business companies created in the process of privatization and corporatization – the code, name, location of the item, property value, land plot size, indication of lease out, rent out, granting for concession, mortgage creation.

## 3. SPORTS FACILITIES COMMERCIAL OPERATION FEATURES ANALYSIS

In accordance with the current statutory enactments, sports facilities, swimming pools, stadiums, sports grounds with gym equipment, recreational and fitness facilities and other sports facilities located in cities, district centers and other settlements of Ukraine are listed in the Registry of sports facilities. Users can find information about the types of fitness and sports services provided by sports facilities, their address, telephone number, etc.

The procedure for mass sports, cultural and entertainment events at sports facilities is regulated by the Decree of the Cabinet of Ministers of Ukraine "On the Procedure for Sports Facilities and Other Specially Designated Places Preparation for Public Sports, Cultural and Entertainment Events" dated December 18, 1998 (hereinafter referred to as "the Decree" ). Paragraph 4 of the Decree provides that the events are ranked into international, national, regional and commercial.

Commercial measures include measures taken at the initiative of sports federations, sports and physical culture societies, legal entities and individuals, and which do not require the adoption of appropriate decisions by central executive authorities and / or local state administrations or local self-government bodies. Commercial measures are funded from extra-budgetary resources.

In accordance with paragraph 6 of the Decree, the events are conducted only in sports facilities and in specially designated sites accepted for operation by the commissions to monitor the state of sports facilities and other specially designated sites designed for public sports and cultural events, judicial panels, subject to strict observance by all subjects of the current norms and rules of buildings and places of the participants of the event operation and use, along with public circulations, engineering systems and alarm systems, sanitary and hygienic support of the premises, arenas and territories; the standards for fire-extinguishing equipment readiness and availability, sports equipment and inventory use; rules of sports competitions in various kinds of sports, rules of conduct of participants and viewers, fire safety rules, other regulatory enactments.

Owners of sports facilities with the participation of the National Police and the bodies and departments of the SSNS develop appropriate instructions and rules for

each sports facility, taking into account local conditions and its intended use, based on the standard instructions and rules approved by the Ministry of Youth and Sports, providing the procedure to be followed to arrange and conduct the events, to ensure public order, to provide security of participants and viewers, fire safety, medical assistance in case of accidents and the procedure for evacuation in case of emergency. These instructions and rules are approved by the review board.

The basis for conducting public event is the decision (order) of the appropriate body, on the initiative (or under the patronage) of which it is carred out, an agreement between the organizers and owners of the sports facility on the conditions for conducting the event, indicating funding sources and cost estimate.

The events are normally conducted in off-working (evening) time, weekends and holidays. Event beginning and end shall comply with public traffic schedule. In case necessary under agreement with local state administrations, public transport work hours may be prolonged.

While conducting commercial events of fire safety is done for consideration based on the respective agreement made between the organizers of event and bodies and departments of the State Emergency Service of Ukraine on the terms and in accordance with the procedure provided by law. Agreements provide for: hourly pay for the State Emergency Service of Ukraine units' and bodies' personnel; reimbursement of depreciation costs for the use of motor vehicles and property; compensation payment for loss of property and damages in case suffered by the State Emergency Service of Ukraine units' and bodies' personnel in the course of fire safety provision. Medical support of commercial events is carried out for consideration by making the respective agreements between the organizers of events and health care institutions.

The p. 15 of the Decree provides that events organizers shall provide for:

– coordination of places and terms of the events with appropriate local state administrations, sports facilities owners, National Police authorities and bodies and State Emergency Service of Ukraine units and bodies; conditions for advertising arrangements and sale of tickets for sports events: international – in 3 months; national – in 2 months; regional ones – in 1 month prior to their conducting, and in case of pop performers concernts, theatrical shows and other cultural and entertainment commercial events at sports facilities and in the other specially designated places, location and terms of their conducting coordination, along with number of viewers – in 1 month prior to their conducting;

– information furnishing on the number of tickets sold, issued passes, in particular for motor vehicles;

– access control arrangement, participants and viewers placement in the arenas and stands in accordance with the places indicated in tickets and passes;

– reviewing observance of rules and regulations on prohibition to sell alcoholic beverages, soft drinks in glass containers at sports facilities during the events and passage with such beverages at sports facilities site;

– submission to the authorities of the National Police, units and bodies of the State Emergency Service of Ukraine and owners of sports facilities Regulations on holding public event containing technical specifications, program, regulations, other special information for the development of measures in public order protection, participants' and viewers' safety ensurance: international, national events – in 2 months; regional events – 1 month prior to their conducting;

– familiarization of participants of event, judges and personnel with the requirements of the Regulations on public event carrying out;

– timely arrival of participants of the event, observance of the rules of competitions, norms of behavior in public places and fire safety requirements.

Rather important item of income from sports facilities commercial operation is their use for training camp arrangement. Such use shall be done on the basis of a services provision agreement. The agreement shall mandatory specify the cost of services and, as a rule, payment procedure. Under the agreement contractor undertakes to provide training activities, opportunity to purchase necessary sports equipment, effective use of sports equipment, provision of other material and technical means, and the customer, for its part, undertakes to carefully use provided property, maintain appliances, and other valuables in the proper condition.

In case municipal or state-owned institution is the customer of the services for training sessions and exercises conducting, the agreement is made on the terms of an agreement on services purchase in sports facilities and halls provision. The subject matter of such an agreement is sports facilities and sports halls provision for training camps / training sessions conducting. The agreements shall also specify the cost of services and payment procedure. It is recommended to describe performances of the sports facilities submitted for operation. For example, it may be stated that the sports facilities and halls that are being used shall meet the requirements ( heat, water and electricity availability). It is also important to specify the responsibility of the parties, in particular, to indicate that the customer is liable for the misuse of the sports facility (in this case, services provision may be restricted for the time of existence the circumstances indicating property use in violation of the terms of the agreement), as well as for damage the property of contractor, which occurred due to customer's fault, in accordance with the current civil law of Ukraine.

## 4. SPORTS FACILITIES' OWNERSHIP FORM PARTCULARITIES

Sports facilities may be state, municipal, privately (both by legal entities and individuals) or collectively owned. Certain facilities of sports infrastructure, namely those included in the list of the state property right items are not subject to privatization. One can recall the headline-making proposal of the Ministry of Economic Development and Trade of Ukraine on the privatization of sports infrastructure facilities of national importance. In particular, Ministry of Economic Development and Trade put to the list of facilities subject to privatization state enterprise "Directorate

for sports facilities' reconstruction", "Avangard" and "Athlete" sports complexes, "Palace of Sports", "Ice Stadium". The proposal provoked indignation of the Ministry of Youth and Sports of Ukraine, however it has not been taken into account [19]. Let us also recall the provisions of the Art. 48 of the Law of Ukraine "On Physical Culture and Sports", in accordance which it is not allowed to reduce the available network of state and municipal institutions of physical culture and sports without the consent of the central executive body, which provides for state policy formation in the field of physical culture and sports.

According to the same Article, even in the case of privatization, it is prohibited to change the intended use of the privatized sports facilities.

In order to keep records of existing sports facilities in Ukraine; create conditions for optimization of the number of sports facilities and their use irrespective of the form of their ownership; structural and qualitative changes monitoring of sports infrastructure facilities; control over the effective use of sports facilities; preventing the reduction of physical culture and sports facilities network, sports facilities, rehabilitation and fitness institutions Ministry of Youth and Sport of Ukraine maintains electronic Registry of sports facilities. The procedure for keeping the Registry was regulated by the Order of the Ministry of Youth and Sports of Ukraine "On Approval of the Regulations on the Unified Electronic All-Ukrainian Registry of Sports Facilities" dated April 22, 2009. Also in accordance with the Art. 48 of the Law of Ukraine "On Physical Culture and Sports" central executive authority which implements state policy in the field of physical culture and sports, relevant structural divisions of the local state administrations and local self-government bodies within the limits of their power reviews the efficiency of sports facilities use.

Owners of sports facilities, irrespective of ownership form, are first of all governed by the general rules of civil law regarding property owners' liabilities. Thus, in accordance with the Art. 319, 322 of the Civil Code of Ukraine, the owner is obliged to maintain the property belonging to him/ her/ it, unless otherwise specified by the contract or by law; the owner may not use the title for the property to the detriment of the rights, freedoms and dignity of citizens, interests of society, worsen the environmental situation and natural qualities of land.

In addition, special laws and regulations have been set up special requirements for sports facilities' owners and users. In particular, persons who own or possess sports facilities shall provide appropriate technical equipment for physical culture, recreation or sporting events in accordance with the requirements of technical regulations, national standards and fitness events sites in compliance with the requirements of the technical regulations, national standards. norms, rules and requirements established by state control bodies, sanitary rules , and bear responsibility under the law for causing damage to the life or health of persons engaged in physical culture and sports at such facilities.

Thus, in accordance with the Art. 48 of the Law of Ukraine "On Physical Culture and Sports", organizers of physical culture, fitness and recreational or sports events, sports facilities', sports equipment' and alliances' owners are obliged to provide safe living and health conditions for visitors and users of sports facilities, users of physical culture and sports equipment and appliances, as well treat safely the environment and undertake appropriate measures for protection and safety in compliance with the rules established by the Cabinet of Ministers of Ukraine in accordance with the law.

Duties are specified in detail, in particular, in the paragraph 8 of the Decree of the Cabinet of Ministers of Ukraine "On the Procedure for Preparation of Sports Facilities and Other Specially Designated Places for Public Sports, Cultural and Entertainment Events Conducting" dated December 18, 1998, are detailed. Sports facilities' owners each year within the terms agreed with the appropriate local state administrations, carry out technical survey of the sports facilities that are used for events. Surveys are carried out by the review boards under engineering services participation along with engineering and construction organizations, the authorities of the National Police and units and bodies of the State Emergency Service of Ukraine in order to establish the operational reliability of buildings and building structures stability, evacuation routes conformity with approved regulatory requirements, and fire safety measures implementation. In accordance with the paragraph 16 of the said Decree, sports facilities owners provide as follows:

– preparation and proper technical condition of the building, compliance with technical regulations, training of full-time and non-staff personnel. The fulfillment of these requirements shall confirmed by the relevant act, which shall be submitted to the working committee for operational-technical review of the facility (site) in at least 4 hours prior to the commencement of the event. This working committee determines facility readiness for the event;

– together with the organizations selling tickets information submission to the National Police concerning estimated number of viewers in one day prior the event;

– conducting educational and awareness-raising work with visitors, especially with youngsters and teenagers, fire safety rules explanation, safe behavior of participants and audience using billboard campaign, local radio broadcasting network, etc .;

– placing in the sports facilities warning signs, signs, fire safety rules and norms of viewer behavior, evacuation plans and instructions;

– catering, medical care, traffic, parking places, other types of services, as well as work of wardrobes and luggage cameras at sports facility' territory arrangement;

– appropriate conditions for information centers activities in events' advertizing, participants and viewers informing about the rules of conduct, sports facilities operation rules and fire safety rules observance.

Physical culture and sports facilities which owns sports buildings or uses them, shall have inter alia, as follows:

– sports building Conformity Certificate issued in accordance with the law following the procedure established by the Cabinet of Ministers of Ukraine;

– log book of sports building use accounting; log book keeping procedure shall be determined by the central executive authority, which provides state policy forming in the field of physical culture and sports.

Owners and users of sports facilities are not allowed:

– to design, construct new and reconstruct existing pre-school, general education, vocational and higher educational establishments without meeting the requirements stipulated by regulatory documents for sports facilities and functional premises;

– to restrict access to sports facilities for individuals with disability.

According to the Art. 13 of the Law of Ukraine "On Physical Culture and Sport", funds from the state budget and local self-government budgets are allocated to finance physical activity, recreational and sports events for individuals with disabilities, to creat and expand their sports base.

Support to owners and users of sports facilities can be also provided in the other cases. According to the Art. 48 of the Law of Ukraine "On Physical Culture and Sports", local state administrations and local self-government bodies may provide advantageous rate in accordance with law to physical culture and sports institutions, which own or use sports facilities, to pay for utilities and electricity, as well as provide financial support from relevant budgets. Business entities that manufacture sports equipment and appliances may be granted preferential conditions for lending and taxation in accordance with the law.

Local self-governing authorities may regulate the prices for sports events attendance, renting sports facilities being in their ownership, selling season tickets for such facilities, allow to conduct classes for people with disabilities, orphan children, preschool children, children from the financially disadvantaged families and families with multiple children, as well as provide privileged conditions for retired people and, in case necessary, provide for compensation for expenses incurred by sports facilities at budget expense and from other sources not prohibited by law.

Special rules for registration, accounting, operation and supervision of the use and technical condition of sports facilities, such as floating means, such as sports vessels, sports cars, sports motorcycles, sports aircraft, are established by the Cabinet of Ministers of Ukraine.

Special regime is also established for sports weapons, ammunition to it, etc. In particular, acquisition, storage, transportation, and use of sports weapons, ammunition, open ranges and stands keeping shall be carried out in accordance with the law by entities of physical culture and sports field developing kinds of sports recognized in Ukraine, competitions rules of which involve fire-fighting (except combat) or pneumatic weapons, hand weapons, whittled and cold weapons use by athletes. The accounting and certification of sports weapons is carried out following the procedure established by law.

## 5. LEGAL REGULATION PARTICULARITIES IN SPORTS FACILITIES CONSTRUCTION FILED

Special legal regulation exists also in sports facilities construction. Construction is carried out in accordance with the general norms established for contractor agreements by the Civil Code of Ukraine, the Commercial Code of Ukraine, as well as by special Laws of Ukraine "On the Fundamental principles of Urban Development", "On Urban Development Regulation", "On Physical Culture and Sports", General provisions for contracts making and performance in the fixed assets construction, approved by the Cabinet of Ministers of Ukraine. Special technical specifications for sports facilities construction are provided in the DBN, B.2.2-13-2003 "Sports and fitness and recreation facilities, approved by the Order of the State Building Committee of Ukraine No. 184 of November 10, 2003". The Law of Ukraine "On Physical Culture and Sports" specifically emphasizes that sports facilities construction, reconstruction and maintenance in rural areas shall be done in accordance with the law. However, unfortunately for the time being there is not separate law adopted to regulate such construction.

Irrespectively of sports facility complexity, prior to its construction beginning, land plot is selected taking into account the requirements of the general plan of the settlement and taking into consideration its intended purpose. Sports and recreation centers and sports facilities shall be located on the territory of the village, population leisure areas and on other specially allocated land plots equipped with convenient entrances and approaches from public transport stops, with mandatory observance of noise regime norms for the adjacent territory of residential development and providing sufficient distance to residential and public buildings in accordance with sanitary requirements. In order to provide construction land plot should be owned by the customer of construction or it should be transferred to him/ her/ it for rent providing the right to construct sports facility.

However, sports facilities are not always built as separate buildings. The current law permits the design, construction of new and reconstruction of existing preschool, general education school, vocational and higher educational establishments without requirements to sports facilities and functional premises provided by regulatory enactments.

To provide construction agreement is made for design and prospecting works. To prepare the project, construction project owner submits to design organization the data concerning the intended purpose of the sports facility, premises (grounds) and inventory, number of athletes and spectators, and other necessary information. Buildings profile by the kinds of sports and the number of places for the spectators is established in basis of design depending on local conditions, population size and town-planning significance of the sports facility or complex. The requirements for sports facilities with regards to to construction norms and rules, sanitary norms, other norms

in the field of health care and safety of visitors established in accordance with the law are mandatory to be taken into consideration when drafting project.

Legislator has repeatedly emphasized the necessity to ensure access of persons with disabilities to sports facilities and inadmissibility of limiting such access both during the design of facility as well as during its operation.

On the basis of developed design, construction project owner makes general contract for construction works and obtains the permission for their conduct (depending on the complexity category of the sports facility) in architectural and construction control authority.

Under a general contractor agreement for sports facility construction the contractor undertakes to construct and hand over sports facility within the established time limit in accordance with the design specifications and estimates, and the customer undertakes to provide the contractor with the construction site, to submit the approved design specifications and estimates, provided that obligation is not assigned to the contractor, to accept the facility or completed construction works and pay for them. However, the current legislation does not establish any differences for contractor agreement, in case the subject matter of it is sports facility construction, the same requirements are laid down to it.

Based on the results of construction sports facility shall be accepted for operation in accordance with the Procedure for the acceptance into operation of completed construction facilities, approved by the Cabinet of Ministers of Ukraine dated April 13, 2011, No. 461, and depending on complexity class of facility, declarations shall be Registryed or certificate shall be issued to certify sports facility readiness for operation.

Further operation of sports facilities is provided by the owner according to the intended purpose.

Entities operating sports facilities shall have a properly issued Conformity Certificate of the sports facility and shall keep log book accounting sports facility use; the form of which log book is approved by the Order of the Ministry of Youth and Sports of Ukraine "On Approval of the Form of Log Book of Sports Facility Operation and Log Book Keeping Procedure" dated February 13, 2018 No. 663. In accordance with the Order No. 663, log book must contain records of the time of sports facility use, customer of the event, type of sports or other event, the nature of sports facilities use (educational and training camps, international, national, regional, municipal and other events), the number of participants.

Organizers of fitness, recreational or sports events, owners of sports facilities, sports equipment and appliances shall provide safe living and health conditions for attendants and users of sports facilities, users of physical culture and sports equipment and appliances, as well as avoid negative impact on environment and take appropriate measures for protection and safety meeting the rules established by the Cabinet of Ministers of Ukraine in accordance with the law.

Special legal regime has the bases of Olympic, Paralympic and Deaflympic training – institutions of physical culture and sports, which own or use sports facilities and are designed to provide conditions for living, meals, conducting training sessions of the athletes of national teams and equipped with sports equipment, inventory for athletes preparation to national and international competitions, the Olympic, Paralympic and Deaflympic Games, Global Games of athletes with intellectual disabilities. The bases of the Olympic, Paralympic and Deaflympic training are entered to the list subject to approval by the Cabinet of Ministers of Ukraine following the procedure established by it.

The central executive authority, implementing the state policy in the field of physical culture and sports, the relevant structural divisions of local state administrations and local self-governing authorities, within the limits of their powers monitor technical condition and effective use of sports facilities of the Olympic and Paralympics centers (bases), environmental requirements observation during their use, along with safety norms and rules satisfaction at the enterprises, institutions and organizations governed by the Ministry.

Legislator makes special emphasis on sports facilities procurement. Fitness and sports equipment and appliances include sports uniform (special clothing and footwear), sports equipment (apparatuses), inventory and equipment for sports facilities and sports events support shall be manufactured in compliance with the standards (rules and norms) approved in accordance with the law.

The Cabinet of Ministers of Ukraine establishes the rules for registration, accounting, operation and supervision of the use and technical condition of the sports vessels, sports cars, sports motorcycles, and sports aircrafts.

## CONCLUSIONS

Sports facilities are featured with special legal regime related to their assignment and intended use. The issue arises of reconciling private and public interests in the course of sports facilities' operation. For this reason, the specificity of the legal status of owners and users of sports facilities is manifested in the fact that the owners of sports facilities, irrespectively of the form of ownership, are subject both to the general norms of civil law concerning obligations of property owners, and the requirements of special legislation. In particular, the persons who posess or own sports facilities shall provide appropriate technical equipment for the sites of physical culture, sports, recreation or sporting events in accordance with the requirements of technical regulations, national standards, norms, rules and requirements established by the state control authorities, sanitary rules, and such entities/ persons are bears responsibility in accordance with the law for causing damage to life or health of individuals engaged in physical training and sports activities at such facilities.

Legal regime of sports facilities specificity is also manifested in the fact that certain items of sports infrastructure, namely those included in the list of state property right items, are not subject to privatization (in particular, these are national im-

portance sports infrastructure facilities). In addition, the available network of state and municipal establishments of physical culture and sports may not be reduced without the consent of the central executive body, which provides state policy formation in the field of physical culture and sports. Even in cases when such establishments privatization takes place, it is not allowed to change the intended use of the privatized sports facilities.

An important item of revenue from commercial operation of sports facilities is their use for training sessions conducting, however in practice rather often problems occure while determining what kind of agreement should be made in such a case and what should be the terms of such an agreement. In such a case pursuant to general rule services agreement shall be made, which mandatory indicates the cost of services and, as a rule, settlement procedure. In case the customer of the services for training sessions and exercises is municipal or state institution, the ageement is made based on the contract to purchase services in sports facilities and sports halls provision. It is advised to mention in such contracts characteristics of the sports facilities granted for operation (heat, water and electricity availability), parties' liability issues, in particular, responsibility for sports facility misuse, as well as liability for pecuniary damage to the property of contractor, which occurred through the fault of the customer.

Legal regulation of sports facilities construction also has its own specificity, due to such facilities use issues. In particular, the fact that public events are taking place on such sites requires compliance with the special safety rules that must be ensured in the course of construction. Pending issue of sports facilities construction regulation is the fact that, despite the statutory requirement to carry out sports facilities construction, reconstruction and maintenance in rural areas in accordance with the law, unfortunately, special law to regulate such construction has not been adopted for the time being.

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# CURRENT EDITION OF THE CRIMINAL EXECUTIVE LAW
## (Criminal Executive Law of Ukraine: textbook (in 2 volumes))[1]

The reforms implemented in the State Penitentiary Service of Ukraine and adaptation of domestic Criminal Executive Law to the European standards have created new challenges for the Criminal Executive Law and lawyers training. Nowadays there is a change of accents, i.e. the main task of the penitentiary system is to return the convicted person who served a sentence to a normal life. It fully complies with the purpose of the Criminal Executive Law of Ukraine, which regulates the procedure and conditions for the criminal sentences execution and servicing, protecting individual, society and state interests by creating conditions for convicted correction and re-socialization, preventing new criminal offenses both by convicted and others persons, and preventing tortures and inhuman or degrading treatment with convicted persons (Section 1 of art. 1 of CEC of Ukraine) [1].

The issue on educational books availability that meet contemporary requirements and considers legislative changes and modern European tendencies is extremely relevant under such conditions. In this sense, the textbook "Criminal Executive Law of Ukraine" [2; 3], under general editorship of the Doctor of Law, Professor Y. Y. Barash, relates to the fundamental educational and scientific works, which largely eliminate the gaps in domestic law books.

The textbook is prepared in accordance with the curriculum program "Criminal Executive Law", taking into account changes and amendments introduced into the law. The contents of the textbook and its structure correspond to requirements related to the law educational books. Learning materials explanation is systematic, reasoned and logical; the text is written in understandable language, which is required for its digestion by the students (cadets or listeners). An obvious advantage of the academic and scientific work is its division into 2 volumes, respectively, into General and Special Parts of the Criminal Executive Law. Its structure allowed the authors to fundamentally outline all the key issues and issues of the Criminal Executive Law of Ukraine, taking into account the latest tendencies in modern penology.

[1] Muzyka, A. A., Konopelskyi, V. Ya., Pysmenskyi, Ye.O., Sokalska, O., Steblynska, O., Kyryliuk, V., Isakov, P., Mykytas, I., Zalialova, I., Rudnytskykh, M., Kislov, O., Bezorchuk, O. (2018). *Criminal Executive Law of Ukraine. Volume 2.* Kyiv: National Academy of Internal Affairs, SP T. P. Kandyba.

The first volume outlines the following issues: concepts and principles of the Criminal Executive Law, modern aspects of state policy in the field of sentences execution, stages of criminal executive system formation and relevant legislation, system of international legal acts in the field of sentences execution and Criminal Executive Law, criminal executive legal relations and legal status of participants in the penal enforcement process, system of penitentiary bodies and facilities, control and supervision over their activities. The second volume of the textbook covers the key issues of the various types of punishment, classification of convicted to imprisonment and their distribution among the penitentiary facilities, prisoners direction, acceptance, placement and transfer to imprisonment, regime and conditions of detention, medical care of convicted, release from service of punishment, etc.

The authors could logically, fully and consistently set out learning material, without breaking the ties between the subjects. Also it is worthy taking into account carefully developed and clearly formulated conceptual apparatus, which is distinguished by argumentativeness. This eliminates the possibility of contradictory interpretations stipulated by different understanding of the same terms.

A methodically correct wording of issues is given at the end of each section intended for self-control, which will help to increase the level of material digestion, and the list of the main recommended literature related to the subject.

At the beginning of Section I (volume 1), interesting information is provided concerning the first Ukrainian Code that regulated public relations in the field of sentences execution and servicing. It was not called corrective labor. So, on October 23, 1925, at the 2nd session of the VUTSVK of the IXth convocation, in particular, Resolution "On enforcement of Correctional Labor Code of the USSR" was approved. This information is apparently well-known, but the textbook is rightly stressed on another issue: "It is amazing but in domestic legal literature the actual Code title, "Correctional Labor Code of the USSR" has not been used, although officially it has never undergone any changes for almost forty-six years (unless considering only replacement of capital letters into small letters in some words that form the title of the Code). Even in six-volume "Legal Encyclopaedia" (1998, p. 404) article was called "Correctional Labor Code of the USSR 1925". This Code (with current title) is no valid on the basis of the Decree of Presidium of the Supreme Council of USSR "On the recognition of certain legislative acts of the USSR as became invalid in connection with Correctional Labor Code of USSR entry into force" dd. June 30, 1971, No. 3 794-VII" [4].

It should be noted separately. Introduction to the learning books (textbooks and manuals) on Criminal Executive Law evidences that stated sources, in fact, have no even elementary provisions on dividing Criminal Executive Law into a branch of law and a branch of legislation. In peer-reviewed textbook, this gap was eliminated. In this regard, it is quite reasonable to refer to the international legal document on as-

sessment of the principle of rule of law in Ukraine - "Rule of Law Checklist" (there is a translation into Ukrainian "Mirylo pravovladdia").

The issues of state policy in the field of punishment servicing are well covered (Section 2), in particular: place of criminal executive policy in the state policy in the field of combating crime, its relationship with the criminal law, criminal procedural and criminological policy of the State; directions of the criminal executive policy; concept and content of the criminal executive policy; purpose and tasks of the criminal executive policy; principles of the criminal execution policy; factors influencing the criminal executive policy formation and implementation; subjects of the criminal executive policy formation and implementation; strategy and current tendencies in Ukrainian criminal executive policy development; and levels of the criminal executive policy: doctrinal, scientific, program, regulatory and law enforcement.

Comparing with other textbooks in the peer-reviewed publication organizational and managerial structure of the State Penitentiary Service of Ukraine has been structurally outlined, taking into account changes taken place in the recent years, detailed provisions determining peculiarities of the sentences execution not related to imprisonment, and organizational principles of Probation Service of Ukraine activities (Section 13).

Provisions on specific features of sentences servicing in the form of imprisonment in the prison camps of different security levels and changes in convicted living conditions before imprisonment, aspects of dynamic security implementation are quite relevant.

It is appropriate to refer in the textbook (Section 34, volume 2, p. 561 - 563) to so-called "law of Savchenko" (in particular, its application to convicted to life imprisonment Pukach). It is about the need to use this law when calculating the terms of the sentence serviced.

In my opinion, author's (critical) attitude to the current legislation, but not just a mechanical statement of its provisions shall be in the modern textbook. In general, I am convinced that the textbooks should be different, but not carbon copied. It is necessary to overcome positivism in this case.

The textbook will be useful for cadets, students and listeners of the higher law institutions when they study such discipline as "Criminal Executive Law", special courses "Penitentiary Systems" and "Probation Service", etc. It will be also useful for scholars, practitioners, judges, lawyers, human rights activists and public figures interested in the issues of the Criminal Executive Law. Certainly, peer-reviewed publication has some disadvantages. However, they cannot deteriorate overall positive impression this work made.

Thus, it can be stated that the textbook "Criminal Executive Law of Ukraine (in two volumes)" fully meets requirements related to educational and methodological books, is original and timely publication prepared by the qualified team of authors.

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