Національна академія правових наук України
Національний юридичний університет
імені Ярослава Мудрого

ВІСНИК
НАЦІОНАЛЬНОЇ АКАДЕМІЇ ПРАВОВИХ НАУК УКРАЇНИ

Науковий юридичний журнал

Заснований у 1993 році
Періодичність випуску — 4 номери на рік

Том 26, № 4
2019

Харків
«Право»
2019

УДК 34
DOI: 10.31359/1993-0909-2019-26-4

ISSN 1993-0909
E-ISSN 2663-3116

Рекомендовано до друку вченою радою
Національного юридичного університету імені Ярослава Мудрого
(протокол № 5 від 20 грудня 2019 р.)

Свідоцтво про державну реєстрацію
Серія КВ № 23993-13833ПР від 11.07.2019 р.

Журнал внесено до Переліку наукових фахових видань України
(категорія «Б») у галузі юридичних наук
(наказ МОН України № 6143 від 28.12.2019 р.)

Видання включено до міжнародної наукометричної бази
Index Copernicus International
(Варшава, Польща)

Вісник Національної академії правових наук України / редкол.: В. Тацій та ін. – Харків : Право, 2019. – Т. 26, № 4. – 224 с.

Засновники:
Національна академія правових наук України
Національний юридичний університет імені Ярослава Мудрого

Видавець:
Національна академія правових наук України

Відповідальний за випуск
О. В. Петришин

Матеріали друкуються українською, російською та англійською мовами

Адреса редакційної колегії: 61024, Харків, вул. Пушкінська, 70, Національна академія правових наук України. Тел. (057) 707-79-89

Офіційний сайт: visnyk.kh.ua
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National Academy of Legal Sciences of Ukraine
Yaroslav Mudryi National Law University

JOURNAL

OF THE NATIONAL ACADEMY OF LEGAL SCIENCES OF UKRAINE

Scientific Legal Journal

Founded in 1993
Periodicity — 4 issues per year

Volume 26, Issue 4
2019

Kharkiv
«Pravo»
2019

UDC 34
DOI: 10.31359/1993-0909-2019-26-4

ISSN 1993-0909
E-ISSN 2663-3116

Recommended for publication by the academic Council
Yaroslav Mudryi National Law University
(Protocol № 5 dated 20 December 2019)

The certificate of state registration
КВ № 23993-13833ПР date 11.07.2019

Journal included in the List
of scientific professional publications
(category "B") in the field of legal sciences
(the order of MES of Ukraine No. 6143 dated on 28.12.2019)

Journal included in the international scientometric databases
Index Copernicus International
(Warsaw, Poland)

Journal of the National Academy of Legal Sciences of Ukraine / editorial board: V. Tatsiy et al. – Kharkiv : Pravo, 2019. – Vol. 26, № 4. – 224 p.

The founders:
National Academy of Legal Sciences of Ukraine
Yaroslav Mudryi National Law University

Publisher:
National Academy of Legal Sciences of Ukraine

Responsible for the release of
O. V. Petryshyn

Materials are published in Ukrainian, Russian and English

The Editorial Board address: 61024, Kharkiv, 70 Pushkinska Street, National Academy of Legal Sciences of Ukraine. Ph.: (057) 707-79-89

Official website: visnyk.kh.ua
e-mail: visnyk_naprnu@ukr.net

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УДК: 343.241
DOI: 10.31359/1993-0909-2019-26-4-14

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СОЦІАЛЬНО ПРАВОВИЙ АНАЛІЗ ПРИЗНАЧЕННЯ ТРИВАЛИХ ТЕРМІНІВ ПОКАРАННЯ ЯК АЛЬТЕРНАТИВИ ДОВІЧНОМУ ПОЗБАВЛЕННЮ ВОЛІ

Анотація. *Особливу увагу та науковий дискурс як науковців так практиків і представників громадських й релігійних організацій викликає питання щодо доцільності збільшення верхньої межі покарання у виді позбавлення волі на певний строк. Воно розглядається крізь призму двох паралельно протилежних підходів, що з одного боку прагнуть здійснити реформу в даному напрямку виключно з метою посилення покарання, а на противагу йому, з іншого боку, запроваджуючи таку ініціативу, розглядають можливість використання її як альтернативи, до довічного позбавлення волі. Об'єктивно, на даний момент, питання пов'язанні з довічним позбавленням волі, та особами засудженими до такого виду покарання в Україні найменш врегульовані по відношенню до норм міжнародного законодавства та світової в'язничної практики. Україна, чи не єдина європейська держава, де й досі не існує механізму умовно-дострокового звільнення для довічно засуджених, незважаючи на те, що це питання давно та успішно вирішується в інших країнах. Натомість, в українському суспільстві серед громадян спостерігаємо запит на кару (каральну політику), безпечне ув'язнення злочинців за високими парканами, без бажання усвідомлювати, що після відбуття покарання вони повернуться в суспільство, і без належної корекційної та реабілітаційної роботи, ефективної діяльності пенітенціарної пробації, підтримки з боку місцевих громад, вони будуть не готові до правослухняної поведінки. Все вищевикладене обумовлює актуальність даного питання та вимагає проведення послідовного та ґрунтовного наукового дослідження можливості підвищення верхньої межі кримінальних покарань за особливо тяжкі злочини, як альтернативу довічному позбавленню волі. Розумне запровадження такої ініціативи дозволить застосовувати покарання до особи, що вчинила злочин, з мінімальною шкодою*

для її особистості, сприятиме повноцінній ресоціалізації та поверненню особи до суспільства, й як наслідок, дозволить знизити рівень злочинності та підвищити стан національної безпеки в цілому.

Ключові слова: верхня межа покарання, ресоціалізація, кримінальна репресія, смертна кара, анкетування.

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SOCIO-LEGAL ANALYSIS OF THE IMPOSITION OF HEAVY TERMS OF IMPRISONMENT AS AN ALTERNATIVE TO LIFE IMPRISONMENT

Abstract. *Both scholars and practitioners and representatives of public and religious organizations give particular attention and focus scientific discourse on the matter of expedience of increasing the upper limit of punishment in the form of imprisonment for a specified period. It is considered through the lens of two antipodal approaches that seek, on the one hand, to carry out reforms in this direction solely for the purpose of adding greater punitive measures, and, on the other hand, by introducing such an initiative, consider the possibility of using it as an alternative to life imprisonment. Objectively, at present, matters connected with life imprisonment and persons sentenced to this type of punitive measures in Ukraine are the least regulated in relation to the provisions of international legislation and world prison practice. Ukraine is not the only European country where there is still no parole mechanism for life sentences, despite the fact that this issue has long and successfully been resolved in other countries. Instead, in Ukrainian society we see a demand for punishment (punitive policy) amongst citizens, the secure confinement of criminals behind bars, without the desire to realize that after serving their sentence, they will return to society, and without proper corrective and rehabilitation work, effective activities of penitentiary probation, support from local communities, they are not going to be ready to exercise law-abiding behaviour. All of the above determines the relevance of this issue and requires a consistent and thorough scientific study of the possibility of raising the upper limit of criminal penalties for particularly serious crimes, as an alternative to life imprisonment. Reasonable implementation of such an initiative will allow to administrate punishment to the perpetrator with minimal harm to their personality, facilitating an appropriate reintegration of the person into society, and as a result, will reduce the crime rate and improve the state of national security at large.*

Keywords: maximum punishment, reintegration into society, criminal persecution, death penalty, polling.

INTRODUCTION

Issues of parole for persons convicted to life imprisonment or of improving the mechanism for replacing life imprisonment with milder punitive measures are constantly being scrutinized by scholars and practitioners alike. An important step in the consideration of this matter was the decision of the European Court of Human Rights of April 12, 2019, in the case of Petukhov v. Ukraine (No.2). Thus, the European Court of Justice ruled that currently in Ukraine every life-term prisoner is suffering without the "right to hope" of ever being released. The current presidential pardon system is neither transparent nor predictable. Prisoners do not know what they need to do to hope for release[1]. As a consequence, Ukraine, being the number one person in Europe in terms of life sentences, violates the right of these persons not to be subjected to torture and other ill-treatment or punishment (Article 3 of the Convention). Academic community, practitioners, representatives of state and non-governmental organizations that have long been researching this issue, understanding this state of affairs, in 2017 have sponsored a Draft Law of Ukraine "On Penitentiary System" No. 2679-VIII dated February 7, 2019[2], which could solve this problem, but, unfortunately, it has not been yet considered or accepted for unknown reasons.

With that, in attempts to provide the courts of Ukraine with the opportunity to refer to the case of ECHR "Petukhov v. Ukraine" in their decisions, one of the innovations that is planned to be implemented is the draft law "On Regulation of Criminal Penalties for Extremely Grievous Crimes" [1]. This bill envisages amendments to the Criminal Code of Ukraine (hereinafter referred to as the CCU)[3] and the Penal Code of Ukraine (hereinafter referred to as the PCU of Ukraine)[4], aimed at streamlining the conditions of detention of persons in custody, serving sentences by convicts of imprisonment, imprisonment for a fixed term, and life imprisonment [2; 3]. Amendments to Articles 64 and 68 of the CCU[5] are designed to improve the sentencing procedure in the form of life imprisonment, eliminating the possibility of punishing women and persons accused of committing or attempting to commit a crime, including accomplices who did not directly participate in commission of a crime. This will ensure a more differentiated approach to the selection of punitive measure and adherence to the principle of fairness and protection of sensitive categories of offenders. It is also proposed to introduce the possibility of replacing a remanent in the form of life imprisonment with a

[1] Judgment of the European Court of Human Rights N 43374/02 The case of Petukhov v. Ukraine. Retrieved from https://zakon.rada.gov.ua/laws/show/974_638

[2] Draft Law of Ukraine "On the Penitentiary System" No. 2679-VIII. (2019, February). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62965

[3] Criminal Code of Ukraine (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14

[4] Criminal Procedure Code of Ukraine (2018, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1129-15

[5] Criminal Code of Ukraine. (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14

milder punitive measure and parole of such convicts (amendments to Articles 81, 82 of the CCU). The proposed wording of Article 18 and the proposal to exclude Article 152-2 of the PCU are intended to bring the provisions of this Code in line with other amendments. Amendments to Part 7 of Article 154 of the PCU establish a mechanism for reconsideration of issues of parole in the event of a prior refusal[1].

The necessity of this initiative is fuelled by the fact that nowadays there is a hyperbolized and subjective perception of punitive measures (which, according to the respondents, should be as severe as possible) and its real potential to influence the crime rate. Therefore, the state is trying to restrain the growth of crime with severe punitive measures [4-7]. On the surface it seems like a faster and cheaper way. However, even with increasing the number of sentences to more severe punishments, the positive effect is not observed [8; 9].

However, at the moment, society is ambiguous about such legislative initiative due to its overly tolerant attitude towards prisoners, as against a public request for punishment [10-14]. Nowadays, few people realize that penal law and the policy of executing sentences, including those not connected with imprisonment and further rehabilitation of persons serving sentences, cease to exist solely within the legal framework and the scope of responsibility of executive bodies implementing the national policy on execution of punitive measures and probation, and transcend into the socio-legal framework, becoming the responsibility of the entire society [15; 16].

Within the framework of such legislative initiative, at the meeting of the subcommittee on reform of the penitentiary system, activities of the bodies of execution of punitive measures and probation of the Verkhovna Rada of Ukraine Committee on Legislative Support of Law Enforcement together with the Ministry of Justice of Ukraine, on June 21, 2018, the decision was adopted to conduct an opinion poll of law enforcement workers, scholars, and the public so as to identify the expedience of aggravating the maximum punishment in the form of imprisonment for a specified period. The survey was carried out using the Google Forms Online Survey between July and August 2018.

1. THEORETICAL OVERVIEW

1.1 Current state of affairs upon the administration of a sentence of imprisonment for a specified period

As of the beginning of 2019 in Ukraine, according to statistics of various executive bodies, public, and international organizations, the number of persons sentenced to life imprisonment in Ukraine is approximately 2000 persons (absolute figure is impossible to indicate, since the data of different sources varies and the specified

[1] Explanatory Note to the Draft Law of Ukraine on Amendments to Certain Legislative Acts of Ukraine on the Administration of Life Imprisonment Sentence. Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=52660&pf35401=318463

indicators fluctuate from 1548 in one case to 1809 in the other; unfortunately, official statistics are not yet published). With such index, Ukraine ranks first among European countries [17–18]. For comparison, there are only four countries in Europe that have a situation similar to the one in Ukraine in terms of life imprisonment: Turkey (126 people are imprisoned for life), Lithuania (118), Hungary (41) and Bulgaria (24). That is, Turkey is the closest second, and even then it has 12 times less "futureless" lifers. At the same time, Ukraine is ranked in the top five by the same indicator in the world. Only the USA (53 290 convicts), Kenya (3676), Thailand (3176) and Argentina (2282) pass the country, which, in contrast to Ukraine, have already implemented a certain mechanism of early release [19]. By years, life imprisonment sentence was administered: in 2016 – for 27 persons, in 2017 – for 21 persons; pardoned: in 2006 – 1018 persons, in 2007 – 962 persons, in 2008 – 855 persons, in 2009 – 573 persons, in 2010 – 146 persons, in 2011 – 4 persons, in 2012 – 21 persons, in 2013 – 16 persons, in 2014 – 2 persons, in 2015 – 67 persons, in 2016 – 67 persons, in 2017 – 139 persons [20].

No proper conditions of detention have been created for this category of convicts yet. Currently, convicts sentenced to life imprisonment serve their sentences in 12 colonies (sectors) and 22 detention centres. And life imprisonment, unlike all other types of sentences, has a unique property – a constant increase in the number of convicts (an average of 100 persons per year). The punitive practices of the judiciary also contribute to the unjustified increase in the number of convicts sentenced to life imprisonment. The increase in this category of convicts will inevitably affect the views of the population, as more and more citizens from the closest social environment are actually drawn into the field connected with administration of this punitive measure. The revision also requires the existing possibility of applying life imprisonment to women, which has long been abolished in all European countries. There are currently 23 convicted women in Ukraine, meaning that this practice fails to perform significant proactive or preventive function.

Therefore, the separate issues of executing this sentence and considering the possibility of early release or replacement of the undeliverable part of the sentence with a milder sentence for life imprisonment convicts requires the search for new forms of implementation.

1.2 International practices of administering a sentence of imprisonment for a specified period

As defined by experts in international standards for treatment of convicts, the decision as to whether a life-term prisoner poses a threat to society is always controversial. One of the most important steps in identifying an effective life imprisonment policy is to develop a fair, well-considered and humane procedure that will evaluate the readiness of a life-long prisoner to be released. International documents, unlike

Ukrainian national legislation, do not contain any obstructions to the premature release of such a person. The idea behind such an initiative is consistent and falls in line with the requirements of international standards in this field. Since 1976, the Committee of Ministers of the Council of Europe has adopted a series of resolutions and recommendations on long-term and life sentences for prisoners, which include rules on the possibility of early parole of all categories of prisoners.

Furthermore, the requirement of a real possibility of early release is a component of the provision enshrined in the case law of the European Court of Human Rights regarding Article 3 of the European Convention for the Protection of Rights and Fundamental Freedoms (László Magyar v. Hungary, 20 May 2014 (claim no. 73593/10), (Vinter v. the UK (no. 66069/09, 130/10 and 3896/10), Kafkaris v. Cyprus (Grand Chamber, no. 21906/04), Léger v. France (19324/02) [1]. In these judgments, the European Court concluded that, when domestic legislation does not provide for a revision of a life-term imprisonment sentence or the possibility of an early parole, life imprisonment would not meet the standards of Article 3 of the Convention.

The requirement to provide for the possibility of early parole of convicts sentenced to life imprisonment is also contained in the standards developed by the European Committee for the Prevention of Torture (Memorandum on "Actual/Real Life Imprisonment" (CPT (2007) 55) and many other standards. This requirement is also justified from the standpoint of safety of society, which has been confirmed and validated by scientific research in the field of criminology. Life sentences are the only category of convicts who cannot be released on early parole, despite the fact that this issue has long and successfully been resolved in other countries. Thus, according to statistics published by Council of Europe experts, convicts sentenced to life imprisonment, who are subject to early parole, are least likely to be repeatedly put behind bars, as they are well aware that if they deviate from the straight line they are required to follow, they will be sentenced again, and this time to death. Furthermore, they are aging, and therefore it has to be considered that age also cures villainy [3].

In most countries where life imprisonment may be administered, there are established mechanisms of consideration of a proposal regarding the revision of a sentence after serving a minimum period of imprisonment established by law. Such mechanism is integrated within the framework of law and sentencing practice, is provided for in the legislation of thirty-two countries: Albania (25 years), Armenia (20), Austria (15), Azerbaijan (25), Belgium (15 – with an extension to 19 or 23 years for repeat offenders), Bulgaria (20), Cyprus (12), Czech Republic (20), Denmark (12), Estonia (30), Finland (12), France (usually 18, but 30 years for certain murders), Georgia (25), Germany (15), Greece (20), Hungary (20, unless adjudged otherwise), Ireland (preliminary examination by the Parole Board after 7 years, with the exception of particular cases of murder), Italy (26), Latvia (25), Liechtenstein (15), Luxembourg (15), Moldova (30), Monaco (15), Poland (25), Romania (20), Russia (25), Slovakia (25), Slovenia (25),

Sweden (10), Switzerland (15 years that are reduced to 10 years), the former Yugoslav Republic of Macedonia (15) and Turkey (24 years, 30 years for aggravated life imprisonment and 36 for the total sentence with aggravated circumstances of life imprisonment). In Scotland, upon sentencing to life imprisonment, the judge is obliged to set a minimum term, despite the likelihood that such a period would exceed the rest of the natural life of the prisoner [20].

Thus, it can be concluded that effective mechanisms of settlement of this issue have long existed in a number of foreign countries for a long time, and considering the peculiarities of the national model of the State Penal Service of Ukraine and probation may be integrated into the Ukrainian legislation.

2. MATERIALS AND METHODS

In accordance with the stated purpose and tasks, the author used a set of both general scientific and special methods and techniques of scientific cognition, the use of which allowed to thoroughly analyse the range of issues related to the purpose of punishment. The statutory basis for the study consists of the Constitution of Ukraine, the Criminal and Penal Codes[1], the current legislative acts and their delegated legislation, draft regulations governing relations in the field of execution and service of criminal sentences.

The methods of comparative law and documentary analysis were used to identify the shortcomings of the legislation governing the order of sentencing and relief from punishment in the form of life imprisonment, both in Ukraine and in the world. The statistical method enabled the analysis of statistics on persons sentenced to life imprisonment and the practices of administering the sentence in the form of life imprisonment. With the help of the analytical method, the results of the survey were analysed as to the expediency of increasing the maximum punishment in the form of imprisonment for a specified period. The method of statistical analysis allowed to examine the survey results in detail by each section, and the comparative law method allowed to compare them according to particular criteria. In this regard, the paper not only reveals the respondents' opinions on the questions asked, but also traces the relationship of the answer depending on a number of factors, such as the job title (line of work). The prognostic method is applied to forecast the legal regulation of this issue in the future. In addition, the method of legal forecasting is used, which forms the possibility to continue the study of this issue on the basis of previously obtained results, and as a consequence, the implementation of international provisions in the legislation. 804 specialists took part in the survey (Tables 1, 2).

[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80; Criminal Code of Ukraine (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14; Criminal Procedure Code of Ukraine (2018, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1129-15

Table 1. Number of respondents

Job title (line of work)	Number	Percentage
Advocacy	61	7.60%
Universities	6	0.70%
Public organizations	1	0.10%
Public activists	1	0.10%
State Penal Service	83	10.30%
National Police of Ukraine	165	20.50%
NGO	1	0.10%
Convicted	1	0.10%
Political party	1	0.10%
Prosecutor's Office	392	48.70%
Security Service of Ukraine	65	8.00%
Court	27	3.40%

Table 2. Respondents' length of service

Years	Number	Percentage
1–3	94	11.7%
4–8	223	27.8%
9–15	267	33.1%
over 15	220	27.4%

3. RESULTS AND DISCUSSION

On the basis of the Verkhovna Rada of Ukraine Committee on Legislative Support of Law Enforcement and the Ministry of Justice of Ukraine, in the task force on penitentiary reform, in order to study the expedience of solving the issue of increasing the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes, an initiative was proposed to research the opinions of scholars, representatives of public and religious organizations, lawyers and law enforcement officials [21]. In reacting to the question "In your professional opinion, is the maximum limit of imprisonment for a specified period of 15 years established by the Criminal Code of Ukraine sufficient?", respondents' answers are indicated in Table 3.

Table 3. Answer to the question: "In your professional opinion, is the maximum limit of imprisonment for a specified period of 15 years established by the Criminal Code of Ukraine sufficient?"

Answer options	Number	Percentage
Yes	231	28.7%
no, it's worth raising	495	62.3%
no, it's worth reducing	7	0.8%
difficult to answer	49	6.1%
No answer	5	0.6%
this is not a priority issue, crime prevention first	2	0.2%
Return the death penalty	1	0.1%
Increasing the punishment limit is impractical because of the negative conditions of serving the sentence for convicts, which aggravates their psychological state	2	0.2%
Increase for cumulative sentences	1	0.1%
The limit is acceptable because a punitive measure can be administered in the form of life imprisonment	2	0.2%
It depends on the totality of the circumstances: the type of crime, the gravity, the recurrence, etc., the personality of the offender, the circumstances in which the crime was committed	11	1.4%

The following question of the survey was posed to judges, prosecutors, advocates. In your activity, did a situation occur that, upon adjudging, sentencing to 15 years of imprisonment was considered to be insufficient due to the gravity of the crime committed, while life imprisonment was considered too harsh of a sentence? (Figure 1). Instead, answers to the question "Is it advisable to increase the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes in articles that provide for punishment in the form of life imprisonment?" formed as follows (Table 4).

Table 4. Answer to the question: "Is it advisable to increase the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes in articles that provide for punishment in the form of life imprisonment?"

Answer options	Number	Percentage
Yes	481	60%
No	245	30.5%
Difficult to answer	63	7.8%

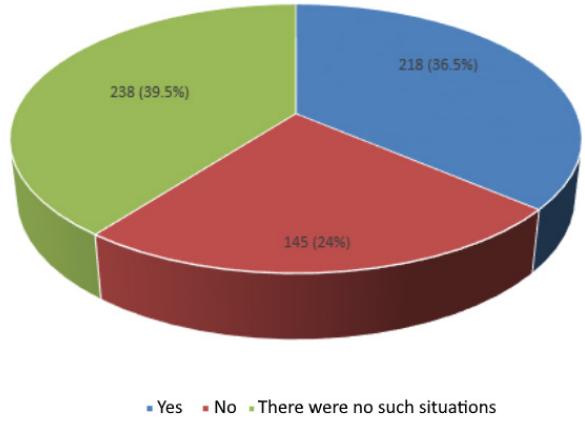

Figure 1. Answer to the question: "In your activity, did a situation occur that, upon adjudging, sentencing to 15 years of imprisonment was considered to be insufficient due to the gravity of the crime committed, while life imprisonment was considered too harsh of a sentence?"

Some respondents, upon answering "No" pointed out that this is connected with the fact that currently the state has absolutely no right to administer punishment in the form of life imprisonment, as there is no effective protection of the defence party and lack of trust in court. There are also answer options: not to increase maximum punishment, but to widen the range of crimes for which it would be possible to administer a punishment in the form of a life imprisonment. Some respondents supported the return of the death penalty. In contrast, an opinion was expressed that life imprisonment is a disguised version of a death penalty, and that is why life imprisonment must be abandoned and maximum punishment be increased. There are also propositions for the use of life imprisonment only in individual cases for crimes against a person. The range of such answers is 0.1% – 0.3%.

In turn, the range of answers to the question "What maximum period of imprisonment would be expedient?" was considerably wider (Table 5).

Table 5. Answers to the question: "What maximum period of imprisonment would be expedient?"

Answer options	Number	Percentage
15 years.	17	2.1%
20 years.	115	14.3%
25 years.	274	34.1%
30 years.	150	18.6%
up to 35 years.	1	0.1%

Answer options	Number	Percentage
35 years.	2	0.2%
40 years.	1	0.1%
45 years.	2	0.2%
50 years.	4	0.4%
60 years.	1	0.1%
Difficult to answer.	2	0.2%
Answer is "no"	22	2.7%
Life-term.	6	0.6%
Death penalty	5	0.5%

A number of respondents to this question stated that the punishment boundary was irrelevant; the penitentiary system requires to be reformed as it does not provide for correction as of today. There were also options that suggested a maximum period only for cumulative sentences, or for their particular type, or only for a specific category of persons. That is, a total of 52.7% of respondents suggested increasing the maximum period of imprisonment to 25 – 30 years. Answers to the question "Is it advisable to increase the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes in articles that provide for punishment in the form of 15 years of imprisonment?" were as follows (Figure 2):

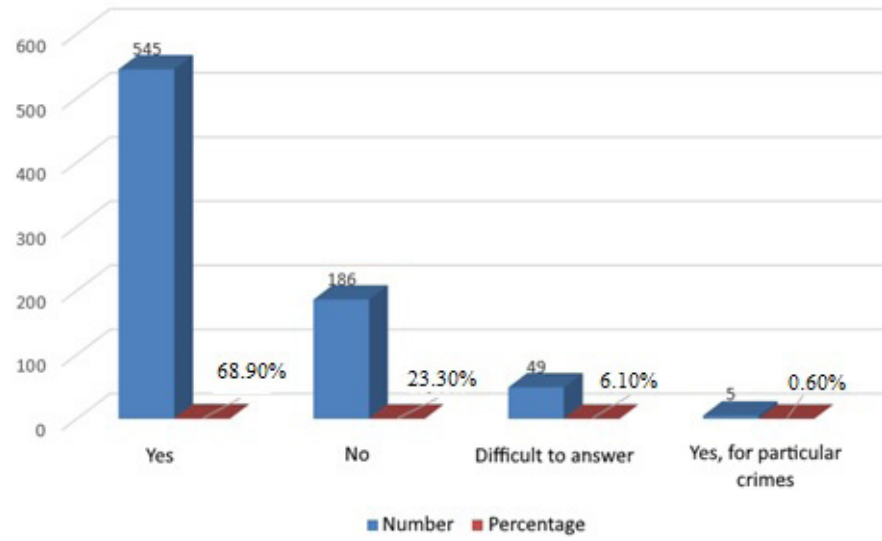

Figure 2. Answer to the question: "Is it advisable to increase the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes in articles that provide for punishment in the form of 15 years of imprisonment?"

A number of respondents, in answering this question, reiterated the above opinion that from a psychological standpoint a person is corrected or not corrected within three years, and therefore increasing the maximum punishment is inexpedient. Again, some noted that this issue was not a priority. Respondents were also able to propose a maximum period of imprisonment that would be appropriate (Table 6).

Table 6. Respondents' versions regarding the maximum period of imprisonment

Answer options	Number	Percentage
15 years.	19	3.03%
20 years.	169	26.9%
25 years.	263	42%
30 years.	142	22.6%
up to 35 years.	–	
35 years.	–	
40 years.	–	
45 years.	1	0.15%
50 years.	3	0.47%
60 years.	1	0.15%
Difficult to answer.	2	0.31%
Answer is "no" (not needed; not expedient)	24	3.83%
Life-term.	3	0.47%
Death penalty	1	0.15%
Total:	626	

Particularly noteworthy are the questions:

"I support the increase of the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes in articles that provide for life imprisonment because": (Table 7).

Table 7. Analysis of respondents' answers regarding the maximum punishment

Answer options	Number	Percentage
No (I do not support it)	52	15.3%
Not enough (15 years is too few and life-term is too long	106	31.2%
Difficult to answer	2	0.59%
Such an increase will promote individualization upon sentencing	13	3.83%
Increasing the maximum punishment will facilitate correction	40	11.7%

Answer options	Number	Percentage
This is fair	15	4.42%
For the purpose of complete isolation from society	5	1.4%
This will reduce recurrence rates	13	3.8%
This will be fair	21	6.1%
This will affect the crime rate	6	1.7%
I support it	6	1.7%
This is the experience and practice of European countries	4	1.1%
This will allow to administer alternative punitive measures	11	3.2%
This will allow to administer punitive measures depending on the gravity of the crime and the offender's personality	41	12%
Return the death penalty	4	1.1%

Many options were not justified in any way, such as, for instance, "such are the modern realities", "this is the way", "it is better this way", etc. "I do not support the increase of the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes in articles that provide for life imprisonment because": (Figure 3).

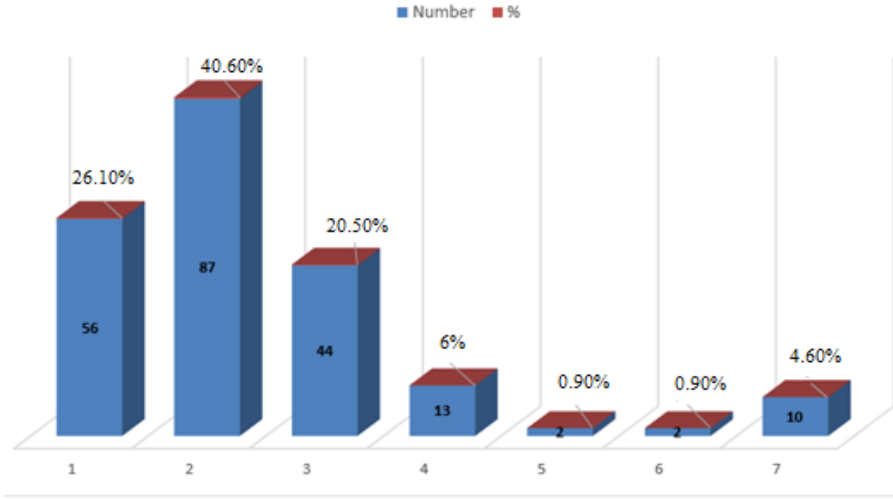

Figure 3. Response to the statement "I do not support the increase of the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes in articles that provide for life imprisonment because…": 1 – I do not support it (dash); 2 – 15 years is sufficient for correction; 3 – I support it; 4 – because there is already a higher limit which is life imprisonment; 5 – only if the moratorium on the death penalty is lifted; 6 – difficult to answer; 7 – the conditions of sentence and the judiciary require improvement.

"I support raising the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes in articles that provide for a maximum sentence of 15 years of imprisonment because": (Table 8). A number of respondents, upon answering the question, stated that any changes should consider the gravity of the crime and other specific cases. Some answers do not carry any scientific load and justification, such as "for God will forgive".

Table 8. Analysis of responses to the statement: "I support raising the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes in articles that provide for a maximum sentence of 15 years of imprisonment because..."

Answer options	Number	Percentage
I do not support (dash)	60	21.5%
15 years of imprisonment is not enough for correction	71	25.4%
I support it	25	8.9%
Possibility of individualization of punishment	7	2.5%
Only if the moratorium on the death penalty is lifted	2	0.7%
Difficult to answer	3	1.07%
The crime rate will change	10	3.5%
International experience	3	1.07%
The punishment must correspond to the gravity of the crime	17	6.09%
I think so	30	10.7%
Negative effect of Savchenko's law	5	1.7%
Will promote correction and reintegration in society	32	11.4%
Life imprisonment is too severe, while 15 years of imprisonment is not enough	14	5.01%

And with regard to the question "I do not support raising the maximum punishment in the form of imprisonment for a specified period for extremely grievous crimes in articles that provide for a maximum sentence of 15 years of imprisonment because" no detailed answer was given, which evidences that all 100% of the respondents conscientiously support the increase of the maximum punishment, which will lead to the possibility of creating a more differentiated approach to administration of punishment.

With regard to the question: "In your opinion, what are the consequences of increasing a maximum punishment in the form of imprisonment for a specified period?" (several options could be chosen), the answer options were as follows (Table 9):

Table 9. Answers to the question "In your opinion, what are the consequences of increasing a maximum punishment in the form of imprisonment for a specified period?"

Answer options	Number	Percentage
The number of convicts sentenced to 15 years of imprisonment or more will increase;	368	52.8%
The number of sentences to life imprisonment will decrease;	307	44.1%
Both options	5	0.7%
Nothing will change	14	2.01%
Difficult to answer	2	0.28%

A number of respondents indicated that the main negative consequences of increasing the maximum punishment are: 1) the convicted person will be unable to reintegrate into society after serving their sentence, 2) administration of punishment in the form of imprisonment for over 15 years for the totality of crimes committed may not be proportionate to the criminal offenses committed, 3) retribution will become the only purpose of the punishment. Some believe that this will only lead to additional costs.

Instead, when answering the question "Is it expedient to increase the maximum punishment for an accumulation of sentences for extremely grievous crimes in articles that provide for punishment in the form of life imprisonment?" the respondents noted as follows (Table 10):

Table 10. Answers to the question "Is it expedient to increase the maximum punishment for an accumulation of sentences for extremely grievous crimes in articles that provide for punishment in the form of life imprisonment?"

Answer options	Number	Percentage
Yes	488	62.6%
No	216	27.7%
Difficult to answer	71	9.1%
Punishment without limits.	4	0.5%

Other respondents believe that such actions are inexpedient, either because of the ineffective judiciary or due to poor conditions of imprisonment that do not facilitate correction. There are also unsubstantiated answers. Attitude towards the most appropriate period in such cases is as follows (Table 11):

Table 11. Analysis of the distribution of respondents regarding the most expedient term of sentence

Answer options	Number	Percentage
Gave no answer	4	0.7%
15 years.	9	1.6%
20 years.	10	1.8%
25 years.	215	38.4%
30 years.	152	
up to 35 years.	–	
35 years.	142	27.1%
40 years.	2	0.35%
45 years.	–	
50 years.	8	1.4%
60 years.	2	0.35%
70-75 years.	2	0.35%
200 years.	1	0.17%
Difficult to answer.	1	0.17%
Answer is “no” (not needed; not expedient)	5	0.89%
Life-term.	4	0.7%
Death penalty	2	0.35%

A number of respondents indicated that sentence may be adjudged by cumulative sentences, or by factoring in all the circumstances of the case. Therefore, the largest number of responses (215) relates to the increase of the maximum period of imprisonment for up to 25 years. However, the law already provides for such a period: “In the event of punishment in the form of imprisonment, the total period of punishment finally adjudged for an accumulation of sentences shall not exceed fifteen years, and in the event that at least one of the crimes is extremely grievous, the total period of imprisonment may be more than fifteen years, but it should not exceed twenty-five years” (Part 2 of Art. 71 of the CCU[1]). The same applies to the answers to the question “Is it advisable to increase the maximum punishment for cumulative sentences for extremely grievous crimes in articles that provide for a maximum sentence of 15 years of imprisonment?” (Table 12)

[1] Cirminal Code of Ukraine (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14

Table 12. Answer to the question: "Is it advisable to increase the maximum punishment for cumulative sentences for extremely grievous crimes in articles that provide for a maximum sentence of 15 years of imprisonment?"

Answer options	Number	Percentage
Yes	564	71%
No	144	18.7%
Difficult to answer	50	6.5%
Life-term imprisonment	3	0.39%
I do not support it	7	0.9%

A number of respondents indicated that punishment could be adjudged for cumulative sentences, or factoring in all the circumstances of the case. Accordingly, the respondents indicated the most expedient adjudication for cumulative sentences or factoring in all the circumstances of the case with such changes (Table 13):

Table 13. Maximum period regarding the adjudging for cumulative sentences, or factoring in all the circumstances of the case

Answer options	Number	Percentage
Gave no answer	1	0.16%
15 years	11	1.78%
20 years	15	2.43%
25 years	294	47.8%
30 years	139	22.6%
up to 35 years	-	
35 years	128	20.8%
40 years	1	0.16%
45 years	-	
50 years	7	1.1%
60 years	1	0.16%
70-75 years		
200 years		
Difficult to answer	6	0.9%
Answer is "no" (not needed; not expedient)	5	0.81%
Life-term	5	0.81%
Death penalty	2	0.32%

In addition, the answers given by the respondents to the question "In your opinion, what purpose of punishment, first and foremost, is being realized in Ukraine upon servicing long periods punishment in the form of imprisonment? Please indicate in order of importance:" should be noted, as, despite the humanization of the punitive process, the majority still believes that its main purpose is punishment (Table 14).

Table 14. Answers to the question: "In your opinion, what purpose of punishment, first and foremost, is being realized in Ukraine upon servicing long periods punishment in the form of imprisonment?"

Answer options:	Primary importance	Must be implemented upon executing the sentence	Not important
Retribution	479	179	40
General prevention	207	267	177
Special prevention	160	296	90
Corrections of convicts	274	320	71

The answers to the question "Do you support the opinion that long punishment sentences complicate reintegration into society for a convict in Ukraine?" are also quite debatable, as most respondents are aware of the criminal risks associated with the increase of the maximum term of imprisonment. However, they the increase maximum punishment is supported, and thus, by comparing the answers to this question and the answers to the question of increasing the maximum punishment in the form of imprisonment, their contradiction becomes apparent (Figure 4).

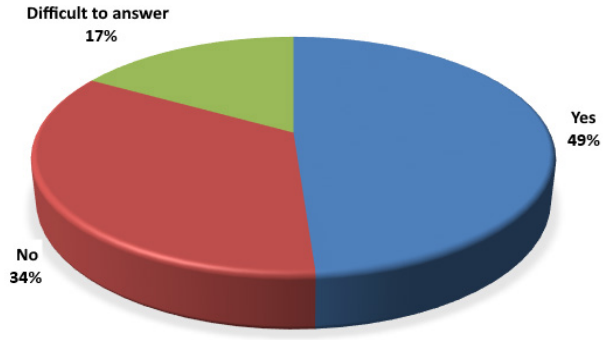

Figure 4. Answers to the question: "Do you support the opinion that long punishment sentences complicate reintegration into society for a convict in Ukraine?"

A number of respondents note that imprisonment of a person for any period would require them to reintegrate into society, regardless of the sentence period. Some say that if a person committed a crime, they have already "fallen out" of society, and some,

on the contrary, believe that the role of the sentence in the reintegration of a person into society is greatly exaggerated. There are also some who believe that the reintegration of individuals into society, regardless of the period of punishment, is the jurisdiction of penal institutions. (We should also highlight the opinion of those who state that the conditions in which a person serves a sentence and the national policy that comes into force after the release of a person from institution of confinement are also important for reintegration). A separate questionnaire block covered the study of the mechanisms of release of convicts sentenced to life-imprisonment. Answers to the question "Is the sole mechanism of pardons sufficient for convicts sentenced to life imprisonment?" were as follows (Table 15):

Table 15. Answers to the question "Is the sole mechanism of pardons sufficient for convicts sentenced to life imprisonment?"

Answer options	Number	Percentage
Yes	387	49.5%
No	300	38.4%
Difficult to answer	82	10.4%
Even the pardon is redundant	6	0.76%
Illness	3	0.38%
Not to release at all	3	0.38%

A number of respondents noted that the pardon mechanism is ineffective and new institutions need to be put in place for the release of persons sentenced to life imprisonment, but certain abuse may arise due to imperfect judicial and penitentiary systems. But the opinion of the ineffectiveness of the institution of pardon remains more than controversial. This, of course, does not mean that the said institution is immaculate and there is no need to improve the legal regulation of the pardon procedure. It also remains unclear what "new institutions should be introduced to release convicts sentenced to life imprisonment"? Do you support the provision of other possibility for release of persons sentenced to life imprisonment, except for pardon, having served a certain period and under certain conditions?" (Table 16)

Table 16. Answers to the question: "Do you support the provision of other possibility for release of persons sentenced to life imprisonment, except for pardon, having served a certain period and under certain conditions?"

Answer options	Number	Percentage
Yes	285	36.3%
No	430	54.9%
Difficult to answer	66	8.4%

Answer options	Number	Percentage
Only where the degree of involvement in the crime was small or partial. If such as in organized crime groups where the crime is committed by a serial killer, then no. If this is a crime of negligence or criminal omission, then yes	2	0.25%

Do you support providing life-term prisoners with the opportunity to change their conditions of detention after serving a certain period and under certain conditions? (Table 17):

Table 17. Answers to the question "Do you support providing life-term prisoners with the opportunity to change their conditions of detention after serving a certain period and under certain conditions?"

Answer options	Number	Percentage
Yes	442	56.8%
No	269	34.6%
Difficult to answer	66	8.4%

A number of respondents support the specified approach, but on the following condition: only after correction of such convicts, on the one hand, and upon overcoming negative consequences in the state (such as corruption and abuse of authority), on the other hand. In your opinion, is it appropriate to introduce a mechanism for reviewing sentences of persons convicted for extremely grievous crimes at any stage of serving their sentence? (Table 18):

Table 18. Answers to the question: "In your opinion, is it appropriate to introduce a mechanism for reviewing sentences of persons convicted for extremely grievous crimes at any stage of serving their sentence?"

Answer options	Number	Percentage
Yes	214	27.2%
No	474	60.3%
Difficult to answer	70	8.9%
Yes, but only after a certain period (10 years, 15 years, 25 years, 2/3 of the sentence)	25	3.1%
Review for newly discovered circumstances.	3	0.38%

Do you support the principle of saving repression and promoting the practice of applying alternative sanctions? (Table 19):

Table 19. Answers to the question "Do you support the principle of saving repression and promoting the practice of applying alternative sanctions?"

Answer options	Number	Percentage
Yes, because the minimum necessary punitive measure should be applied	45	6.1%
Yes, because the main thing is not to punish the criminal, but to protect and restore the rights and interests of citizens who were violated as a result of their criminal assault	197	26.8%
No, because the punishment must correspond to the gravity of the crime **and be as severe as possible**	349	47.5%
In part, because **imprisonment is the main way to influence crime rates**	143	19.4%

A number of respondents noted that the principle of saving criminal repression can take place, but without violating the basic principles of sentencing, guaranteeing the rights and freedoms of all participants, both criminal and penal legal relations, and ensuring the security of society [22].

CONCLUSIONS

Having considered the results of the study, the following conclusions were drawn:

1. Respondents, upon answering the questions asked, somewhat distort the notion of the purpose of punishment, placing the emphasis on the retribution. Furthermore, in their opinion, it is achieved by placing a person in penitentiary institutions for as long as possible, which is exactly the main purpose of punishment and is carried out solely with the aim of isolating socially dangerous elements until their reintegration into society in order to ensure the safety of latter.

2. That is why nowadays it should be emphasized that the decisive factor for determining the content and orientation of the doctrine of criminal law is the state's approach to understanding the essence of punishment, its purpose, system and types, grounds for release and other related issues. In evaluating the current situation, it should be acknowledged that in the future, the national penal policy should be based on the refusal from a correctional labour approach to punishment and the transition to a modern rehabilitation (restoration) system, which in the course of the corrective influence on the convicted person will induce them to first change their behaviour from unlawful to acceptable in the society. And in the future, such "law-abiding" behaviour could cause them to be psychologically prepared for future positive changes in their consciousness as well. The probation service, especially the penitentiary, lacks dynamic development, where volunteers, representatives of local self-government authorities, communities,

social educators, psychologists, etc., should work alongside the employees of the authorized body, facilitating the person's adaptation even after serving a long-term sentence.

3. Unfortunately, among the interviewed scope of persons, there are widespread anti-humanistic sentiments regarding penal legislation. Firstly, this is connected with the fact that the respondents are predominantly prosecutors, investigators, workers of the State Penal Service and Security Service of Ukraine (87.5%), they do not consider the global tendency (if we consider the legislation of developed democracies, of Western Europe in particular) and the direction of domestic criminal policy to humanize the criminal liability of persons convicted for commission of crimes. This refers to, for instance, the Law "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine Regarding the Humanization of Criminal Liability" dated April 15, 2008, including the introduction of the category of misdemeanour offense. In turn, there are also answers that state that even 15 years of imprisonment is too short of a term for reintegration into society, although multiple studies confirm that the longer a person is in places of incarceration, the more difficult it is for them to maintain socially meaningful relationships and return to the law-abiding lifestyle.

4. Respondents' answers to the main questions of the survey are often contradictory, they do not consider the current rules on the possibility of punishment in the form of imprisonment for up to 25 years. By the way, there are no examples of adjudging of such sentences in Ukraine. Furthermore, a number of respondents take the term "life imprisonment" too literally, which is actually a conditional title, since everyone should be aware of the possibility of release, which is now contained in many of the standards developed by the European Committee for the Prevention of Torture (Memorandum "Actual/real life imprisonment"(CPT (2007) 55) and many other international standards for life sentences, therefore it would be advisable to consider changing the title from "life imprisonment" to "unlimited term imprisonment". And instead of increasing the maximum punishment period, it seems expedient to consider imposing a sentence for a specific type of crime without being tied to a specific numerical term, and considering all the circumstances of the case and the possibility of a differentiated approach to reviewing the case, which will allow to continue the implementation of the Concept of humanization of the process of enforcement of criminal punishments, and take the Ukrainian legislative system one step closer to the international one.

5. Today, the system of punishment and probation should be human-oriented. It is the individual, whether the offender, the victim, or the employee, who must become the nucleus (cornerstone) of system reforms. And respect for human rights, the imposition of a just punishment, the system of release from it and recovery of damages, the correctional work, psychological support and social patronage must become the granite foundations of the doctrine of penal law.

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Suggested Citation: Barash, Ye.Yu., & Samosonok, A. O. (2019). Socio-legal analysis of the imposition of heavy terms of imprisonment as an alternative to life imprisonment. *Journal of the National Academy of Legal Sciences of Ukraine,* 26(4), 14–37.

Submitted: 17/07/2019
Revised: 25/09/2019
Accepted: 28/11/2019

УДК 34.03
DOI: 10.31359/1993-0909-2019-26-4-38

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КОМПЕНСАЦІЯ МОРАЛЬНОЇ ШКОДИ ЗА ПОРУШЕННЯ ПРИВАТНОПРАВОВИХ ЗОБОВ'ЯЗАНЬ

Анотація. *Незважаючи на певне вдосконалення судової практики з розгляду відповідної категорії справ, наразі залишається надзвичайно актуальним завдання виробити ефективні підходи до визначення справедливого обсягу компенсацій, що присуджуються учасникам приватноправових відносин за завдану їм моральну шкоду. Метою статті є аналіз правового аспекту у питанні компенсації моральної шкоди. Провідним методом дослідження був аналіз, що дозволив детально розглянути визначену проблему та зробити ряд висновків. Були охарактеризовані різні теоретичні і практичні підходи до проблеми компенсації моральної шкоди; розглянуті думки вітчизняних дослідників з цього питання. З аналізу наведених моделей підходів компенсації моральної шкоди, на нашу думку, у договірних відносинах є найбільш вдалим та таким, що відповідає принципу добросовісності, справедливості та розумності, є перший описаний підхід. Адже саме співвідношення завданої шкоди та розміру стягнення на морально вивіреній основі гарантуватиме додержання юридичної рівності сторін договірних відносин. Розглянуті аспекти компенсації моральної шкоди за договорами свідчать про велику схожість законодавчих підходів України та підходів іноземних законодавців, а також проблем, що виникають при застосуванні норм цього інституту. Законодавче закріплення компенсації (відшкодування) моральної шкоди лише за її завдання життю або здоров'ю учасників договірних правовідносин не забезпечує охорону їх немайнових прав. Цього можна уникнути внесенням відповідних змін до цивільного законодавства України, згідно з якими правовим наслідком порушення прав, в тому числі й споживачів послуг, що поставило під загрозу їх життя чи здоров'я, буде відшкодування матеріальної і компенсація моральної шкоди.*

Ключові слова: законодавство України, відшкодування, немайнові втрати, цивільне право, невиконання договору.

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COMPENSATION FOR NON-PECUNIARY DAMAGE FOR BREACH OF PRIVATE OBLIGATIONS

Abstract. *In spite of certain refinement of case law in dealing with the relevant category of cases, the task now remains to work out effective approaches to determining the fair amount of compensation awarded to participants in private relations for the non-pecuniary damage they suffered. The purpose of the article is to analyse the legal aspect of non-pecuniary damage. The leading method of research was analysis, which allowed to examine the identified problem in detail and draw a number of conclusions. Various theoretical and practical approaches to the problem of non-pecuniary damage were characterized; the views of domestic researchers on this issue are considered. From the analysis of the presented models of approaches to compensation for non-pecuniary damage, in our opinion, in contractual relations, the first described approach is the most successful and consistent with the principle of good faith, justice and reasonableness. Indeed, it is the correlation of the damage inflicted and the amount of recovery on a morally verified basis that will guarantee the legal equality of the parties to the contractual relations. The considered aspects of compensation for non-pecuniary damage under the treaties testify to the great similarity between the legislative approaches of Ukraine and those of foreign legislators, including the issues that arise upon applying the norms of this institution. Legislative consolidation of compensation (recovery) for non-pecuniary damage for the sole purpose of causing the life or health of the parties to a contractual relationship does not ensure the protection of their non-material rights. This can be avoided by introducing appropriate amendments to the civil legislation of Ukraine, according to which the legal consequence of violation of rights, including the consumers of services, which endangered their lives or health, will be repair for material damage and compensation for non-pecuniary damage.*

Keywords: Ukrainian legislation, compensation, non-pecuniary loss, civil law, non-performance of contract.

INTRODUCTION

The issue of non-pecuniary damage has always attracted the attention of not only lawyers [1] but also economists, sociologists, and others. After all, the intangible (ideal) content of non-pecuniary damage and the associated lack of a natural equivalent between the non-material loss of the victim and their material compensation create substantial difficulties in determining the specific amounts of the victim's proper

compensation [2]. Therefore, in spite of some improvement in the case law on the consideration of the relevant category of cases, it remains extremely urgent to develop effective approaches to determining the fair amount of compensation awarded to participants of private relations for the non-pecuniary damage they suffered.

In general, non-pecuniary damage means loss of non-material nature as a result of moral or physical suffering or other negative effects caused to an individual or legal entity by unlawful acts or inaction of other persons. The same position is expressed by R. O. Stefanchuk. Thus, according to the scientist, non-pecuniary damage is not the physical pain and suffering itself, but losses of non-material nature caused by them. In a contractual relationship, non-material losses do not arise through any act or inaction, but as a result of non-performance or improper performance of the contract; for a natural person such losses are accompanied by suffering, humiliation of honour, dignity, business reputation, and for a legal entity – only humiliation of business reputation [3].

In accordance with Art. 23 of the Civil Code of Ukraine[1], non-pecuniary damage lies, in particular: a) in the mental suffering experienced by the individual due to unlawful behaviour regarding them, their family members or their close relatives; b) in the mental suffering experienced by the individual due to destruction or damage of their property; c) in the degradation of honour, dignity and business reputation of an individual or legal entity. However, as noted in the legal literature, the provision of Art. 23 of the Civil Code of Ukraine[2] can be considered a legislative interpretation of the concept of non-pecuniary damage only with a caveat: it considers the specific features of non-pecuniary damage in terms of its origin and does not provide a comprehensive idea of the content of this concept [4].

That is, the definition of non-pecuniary damages that is consolidated in the Civil Code of Ukraine can hardly be called a universal concept that can be applied to any contractual obligations. Thus, for example, the collapse of the terms and conditions of the contract, including the right to compensation of non-pecuniary damage, is a negative reflection of development of civil relations, and cannot be considered as its normal stage. In the Civil Code of Ukraine, the legislator defines breach of obligations as a generic category by indicating its types, without defining its essence[3].

1. MATERIALS AND METHODS

Aristotelian and general scientific methods of scientific cognition, such as analysis, synthesis, concrete definition, etc. were applied in the research. An analysis of the legislation and case law suggested diversity of opinions in the literature and in the practice with regard to compensation for non-pecuniary damage in the events of

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[2] *Ibidem*, 2003.

[3] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

breach of obligations on tourist services rendering. Considering the different theoretical and practical approaches to the issue of non-pecuniary damage compensation, attention was paid to the idiosyncrasy of the solution of this issue in the countries of the Romano-German system of law.

Analysing the current legislation of Ukraine, it was noted that the right to compensation for non-pecuniary damages for non-performance or improper performance of contractual obligations, including in the field of services, is provided for in the Law of Ukraine "On Consumer Protection"[1]. An analysis of the current legislation governing consumer involvement and case law research has led to the conclusion that there are no clear and unambiguous provisions regarding compensation of non-pecuniary damage to consumers upon violation of their rights.

Using the synthesis method, we identified three main approaches to compensation for non-pecuniary damage in Ukrainian private law doctrine. The first focuses on the moral and legal evaluation of the offense and certain foreseeable consequences in the non-material field of the victim. Upon using such an approach to the issue of non-pecuniary damage, one should first and foremost determine the fundamental moral priorities, in particular, the public's confidence in judicial decisions and their ability to formulate a sustainable practice in resolving such a category of cases. This should also factor in the victim's fault, which is a key component in the fair amount of non-pecuniary damage. In addition, the cause-and-effect relationship between the offense committed and the expected loss in the non-material field should be optimally coordinated. Thus, the most morally validated understanding of the specifics of this function in the obligation to compensate for non-pecuniary damages will most fully reflect the non-proprietary nature of non-material damage.

In the second approach, the focus is on maximizing the specific non-pecuniary damage inflicted and, accordingly, eliminating specific manifestations. Such approach is implemented thanks to the compensatory mechanisms existing in tort liability for pecuniary damage. The third approach is to achieve fairness in the proportion of compensation awarded for violations of personal non-material goods of various kinds, including to determine certain limits of expected compensation

2. RESULTS AND DISCUSSION

2.1 Analysis of approaches to compensation of non-pecuniary (non-material) damage in national legislation

Upon referring to offenses in the field of private law, we shall note that they constitute legal facts that create legal relations between the subjects (clause 4 of Part 2 of Article 11 of the Civil Code of Ukraine[2]) and form certain requirements of the latter

[1] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

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

to the delinquent for damages caused by it in its unlawful acts. It is known that, for a long time, commonplace was the general rule, according to which, in the event of violation of the terms and conditions of civil contracts, only material damage was subject to compensation. Non-pecuniary damage was only possible in the event of tort. For example, S. E. Sirotenko states that moral damages can only be compensated in monetary or other tangible forms in the form of non-contractual obligations [5]. It is also known that courts have repeatedly tried to equate compensation for non-pecuniary damage caused to consumers by monetary compensation with a minimum wage or by equalizing compensation for non-pecuniary damage or improperly rendered service. The specified case law has not received adequate support in the doctrine of law.

Thus, for instance, M. M. Hudyma fairly states in his study that such judiciary practice is wrong, because determination of the amount of compensation for non-pecuniary damage should not in any way follow from the price of the contract for the provision of tourist services, and the amount awarded for compensation should reflect the real compensation of the consumer's psychological experiences and be determined by the tourist's age, social and financial status in connection with the cost of the service consumed, the availability of alternative services of the same consumer value, their accessibility. Upon determining the amount of non-pecuniary damage, the court should not set the amount depending on the material damage, cost of services, etc., and should be based on the nature and amount of moral and physical suffering caused to the consumer in each case [6].

At the same time Part 1, 4, 5 of Art. 23 of the Civil Code of Ukraine[1] stipulate that a person shall have the right to compensation for non-pecuniary damage inflicted as a result of violation of their rights; non-pecuniary damage shall be compensated irrespective of the pecuniary damage to be recovered and disregarding the amount of such compensation; non-pecuniary damage shall be compensated for on a one-time basis, unless otherwise stipulated by contract or law. Such legislative approach to the "compensation" of non-pecuniary damage has repeatedly been criticized in the doctrine of law. However, in our opinion, such a mechanism is correct, because the legislator allows the subjects of legal relations to regulate the procedure for compensation for non-pecuniary (non-material) damage in the contract at their own discretion. An example may be the court case No. 641/8022/17 [7].

Thus, the Komintern District Court of Kharkiv considered the case of PERSON_1 versus the Kharkivski Teplovi Merezhi Utility Enterprise on protection of consumer rights and compensation for non-pecuniary damage. In support of their claims, the plaintiff referred to the fact that they reside in the apartment at ADDRESS_1 and are consumers of the services rendered by the Kharkivski Teplovi Merezhi Utility Enter-

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

prise. Plaintiffs pay for the services rendered in a timely manner, moreover, they have overpayments as of May 1, 2017. However, from May 18 to October 20, 2017 (with the exception of two days only, August 22 and 29, 2017), the defendant breached its obligations and the terms and conditions of the Model Agreement on the Provision of Centralized Heating, Cold and Hot Water Supply and Drainage as approved by the Resolution of the Cabinet of Ministers of Ukraine No. 630 dated July 21, 2005 did not provide hot water services. For five months, the plaintiff was forced to provide themselves with hot water. The plaintiff stated that they were an elderly person (90 years old) and underwent inpatient treatment at the municipal institution "Kharkiv City Clinical Hospital No. 2". On discharge from the hospital on May 19, they were strictly forbidden to lift any objects weighing over 2 kg, especially in the postoperative period. [7].

Referring to these circumstances, including the requirements of the current civil legislation and Art. 1, 4 of the Law of Ukraine "On Consumer Protection"[1], the plaintiffs asked to collect from the Kharkivski Teplovi Merezhi Utility Enterprise 10,000 UAH in their favour for non-pecuniary damage. The defendant denied the claims, citing their groundlessness and lack of guilt of the Kharkivski Teplovi Merezhi Utility Enterprise in causing the plaintiff's non-pecuniary damage, since the hot water service was not provided from May 18 to October 20, 2017 (except for two days 22 and 29 August 2017) due to repair work. Having heard the arguments of the parties, the court concluded that the relationship between the economic entity whose subject of activity is the provision of housing and communal services (contractor) and the individual and legal entity (consumer) receiving or intending to receive services of centralized heating, supply of cold and hot water and drainage are regulated by the Resolution of the Cabinet of Ministers of Ukraine No. 630 dated 21.07.2005 "On Approval of the Rules for the Provision of District Heating, Cold and Hot Water Supply and Drainage Supplies and the Model Contract for the Provision of District Heating, Cold and Hot Water Supply and Drainage Services"[2]. The plaintiffs are registered and permanently reside at: ADDRESS_1 and are the consumers of the services provided by the defendant of the Kharkivski Teplovi Merezhi Utility Enterprise. The terms and conditions of cl. 18 of The Model Agreement establish an obligation for the contractor to compensate for the damage caused to the property and/or premises of the consumer and/or their family members, damage caused to their life or health as a result of improper provision or failure to provide services, including non-pecuniary damage in the manner and the amounts to be determined in accordance with the law and this agreement.

[1] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

[2] Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Rules for the Provision of District Heating, Cold and Hot Water Supply and Drainage Supplies and the Model Contract for the Provision of District Heating, Cold and Hot Water Supply and Drainage Services". (2005, July). Retrieved from https://zakon.rada.gov.ua/laws/show/630-2005-%D0%BF.

In view of the above, the court found that the defendant had not been provided with evidence of not providing hot water services to the plaintiff's place of residence and decided to satisfy the claim in part, in particular, to recover from the Kharkivski Teplovi Merezhi Utility Enterprise a compensation for non-pecuniary damage in favor of PERSON_2 in the amount of UAH 1,000 (one thousand). Other claims are subject to refusal [7].

Scientific literature often offers certain models of determining the compensation for non-pecuniary damage. Thus, P. Rabinovich and O. Hryshchuk propose to determine the non-pecuniary damage by factoring in the following: 1) proceeding from the joint evaluation of the facts of the case; 2) proceeding from the victim's subjective evaluation of the factual circumstances of the case, including the depth and duration of the psychological suffering that emerged through the unlawful acts; 3) a comprehensive approach that combines the previous two [8]. According to V. D. Prymak, the determining criterion for constructing and classifying various models of fair amount of compensatory penalties applicable in the event of violation of the personal non-material rights of the subjects of civil law, are: 1) a certain vision of the essence of non-pecuniary damage and the purpose of its compensation; 2) the focus of the proposed concept on the predominant implementation of certain functions of civil liability; 3) a particular attitude to the meaning and substantive interpretation of the individual terms of responsibility (primarily guilt and causation); 4) correlation of the proposed approaches with the legislative criteria for specifying the amount of compensation for non-material expenses; 5) determining the role of judicial discretion and the conditional legal weight of the various types of evidence that may be presented by the parties to a dispute over compensation of non-pecuniary damage [9].

Case law indicates that upon considering cases in a court of first instance or in the court of appeal, a violation of contractual obligations to render tourist services constitutes the basis for compensation for non-pecuniary damage. With that, non-pecuniary damage is reflected in the suffering caused by the non-provision or improper provision of services and the necessity of appealing to court to protect their rights. At the same time, the courts of cassation adhere to the approach set out in paragraph 2 of the Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of non-pecuniary damage" dated March 31, 1995, in the wording dated February 27, 2009[1], pursuant to which courts are recommended to consider such disputes only when the right to such compensation is expressly provided for in the Constitution of Ukraine[2] or enshrined in legislation establishing liability for non-pecuniary damage. Accordingly, the courts conclude that in the events where compensation for non-pecuniary damage is not stipulated by the contract concluded by the parties and there is

[1] Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of non-pecuniary damage". (1995, March). Retrieved from https://zakon.rada.gov.ua/laws/show/v0004700-95.

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

no law stipulating it in the legal relations between the parties, then the claim for non-pecuniary damage should be denied. The contractual relations arising between the parties may not be subject to the grounds of compensation stipulated in Art. 1167 of the Civil Code of Ukraine[1], which regulates non-contractual (tort) relations. Instead, the case law of the European Court of Human Rights has grouped the two main features by which there are:

– either expressive dominance of the moral factor in evaluating the circumstances of the case and determining a fair balance of interests of the parties, which implies a certain absolutization of the presentation of the subject of law enforcement regarding the adequacy of the compensation burden imposed on the offender;

– or the desire for the most reliable identification and subsequent elimination of the actual non-material consequences of the offense, determined on the basis of a detailed study of the individual features of the victim [10].

It should be noted that the positions expressed above by both scientists and practitioners are not convincing enough, because in this case, guided by paragraph 4 of Part 1 of Art. 611 of the Civil Code of Ukraine[2], the same requirements (prescriptions either by law or by contract) would have to be put forward to compensation for material damage, which, of course, would lead to nonsense. In our opinion, a kind of connecting link in the problem of determining the amount of compensation for non-pecuniary damage in cases of violation of contractual obligations should be those scientific models and separate legislative decisions aimed at ensuring equal, guaranteed justice in determining the amount of compensation for the non-pecuniary losses of the injured individual. However, this issue still requires further consideration.

2.2 Features of compensation of losses in national legal systems of other states

Considering the chosen course of Ukraine on the adaptation of national legislation to the EU standards, it can be argued that compensation for non-pecuniary damages caused by violation of civil contracts has certain specific features in Western states [11; 12]. Thus, the approach to this issue in Anglo-American law is noteworthy [13]. The doctrine establishes that English lawyers, upon studying the issue of damages, do not see any difference between material and non-material damage [14]. Any damages must be recovered if they are genuine and serious, without regard to whether the damage was caused by wrongful acts or breach of contract [15]. Having separated the grounds of liability, the English doctrine does not make the compensation for non-pecuniary damage dependent on compensation for pecuniary damage and, does not limit this compensation to the scope of torts only [16].

Thus, the court's refusal to recover damages cannot be an obstacle to satisfying a claim for non-pecuniary damage. This issue is especially relevant in the aspect of the

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[2] *Ibidem*, 2003.

service contract, as it usually does not end with a material result. This is directly pointed out in Part 4 of Art. 23 of the Civil Code of Ukraine[1], which states: "non-pecuniary damage shall be compensated irrespective of the pecuniary damage to be recovered and not related to the amount of such compensation". This means that non-pecuniary damage can be compensated even in the absence of material damage. An example would be a transfer contract when, as a result of the bus delay, the passenger was late for a meeting that was important for his personal development and informative enrichment. In such circumstances, material damage may not occur, but the fact of causing non-pecuniary damage is evident and must be compensated [17].

At the same time, the equally problematic issue of determining the amount of compensation for non-pecuniary damage was resolved in a rather peculiar way. It is stated that, as a general rule, when awarding compensation for pecuniary damage, the court is not obliged to be guided by the amount of the damage caused: seeing the unscrupulous violator, the court can impose liability on then, not only in the amount of damage caused, but also more than this amount. Balance in excess of actual damages is non-pecuniary damage [18]. In our view, the general approach of the English doctrine is a good one and one that could be used to compensate for non-pecuniary damage for non-performance or improper performance of the terms and conditions of civil contracts, since it does not make the institution of non-pecuniary damage derivative, minor, and such that deserves attention only because it is stipulated by a clearly defined legislative or contractual rule [19; 20].

The French doctrine traces the departure from the indecisiveness in using the institution of non-pecuniary damage for contractual liability. In the current context, the cases of non-pecuniary damage recovery are no longer a rarity for judicial practice. Decisions in such cases are justified by the courts in that the Civil Code of France[2] does not limit the claim for damages in contractual relations by material damage alone. The basis is Art. 1149 of the Civil Code of France[3], which establishes a general rule on compensation for damage. In addition, it is considered that there are no grounds to address the issue of non-pecuniary (non-material) damages depending on whether such claim is connected with a breach of contract or an offense (tort) [15]. A similar approach exists in Swiss legislation, where the possibility of compensation for non-pecuniary damage is provided in principle for tort obligations. At the same time experts note that the provisions of para. 3 of Art. 99 of the Swiss Obligations Act[4] allow to extend the possibility of compensation of non-pecuniary (non-material) damage and contractual obligations.

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[1] *Ibidem*, 2003.

[2] Code Napoléon. (1804). Retrieved from https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721.

[3] *Ibidem,* 1804.

[4] Swiss Civil Code. (1907). Retrieved from https://www.admin.ch/opc/en/classified-compilation/19070042/index.html.

A separate approach to compensation for non-pecuniary (non-material) damage exists in legislation of the Federal Republic of Germany. The general provision of § 253 of the Civil Law Book[1] stipulates that compensation for non-pecuniary (non-material) damage is possible only in cases expressly stipulated by law. As is evident, the law of Germany in this matter takes the most cautious position. Widely allowing competition of claims, the courts of Germany are guided by the rule that non-pecuniary damage for violation of contractual terms for the provision of services can only be compensated if the victim has grounds for tort claim at the same time [21]. Thus, by making the possibility of compensation for non-pecuniary damage dependent on a violation of absolute rights, the law of Germany significantly narrows the scope for applying the institution of non-pecuniary damage in violation of contractual obligations, in particular compared to French legislation.

To summarize the above, we come to the conclusion that the legislation of Ukraine, which is at the development stage, absorbs the possibilities of several of the approaches we have examined. As is evident, this somewhat resembles a similar situation in US law, namely, in cases where the law allows compensation for non-pecuniary damage, which so far come down to contracts under which one of the parties must provide personal services related to the welfare of the other party, and failure to provide or improper performance of the terms and conditions of such contracts entails physical or mental suffering [22]. Thus, part 3 of Article 23 of the Civil Code of Ukraine[2] stipulates that non-pecuniary damage shall be compensated by money, other property, or in another way. From this it follows that the legislator determines the dominant property form of compensation for non-pecuniary damage. According to R. A. Stefanchuk, monetary compensation is the only possible form of compensation for non-pecuniary damage [3]. Considering such approach, the given form of compensation for non-pecuniary damage is the most studied in the legal literature.

With regard to compensation for non-pecuniary damage caused by products dangerous to human life and health, we shall note that until recently, a special legislative act aimed at protecting consumer rights, namely, the Law of Ukraine "On Protection of Consumer Rights", provided for a rather controversial norm (part 1 of Art. 4 of the Law)[3], according to which the consumer had the right to compensation for non-pecuniary damage caused by products dangerous to human life and health in cases provided for by law. At the same time, it was this article that generated serious contradictions in matters of compensation of non-pecuniary damage to consumers in practice. For example, we provide the following case. On June 29, 2010, the Plaintiff and its subsidiary Travel Agency "Proland" (Respondent) entered into an agreement for tourist services,

[1] The Bürgerliches Gesetzbuch. (1896). Retrieved from http://www.gesetze-im-internet.de/bgb/.

[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[3] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

according to which the defendant undertook to provide them, as a tourist, with the provision of tourist services for organizing a tourist trip. The plaintiff performed his obligations in full, but the trip did not take place, since Karya Tour Ukraine LLC (tour operator) went bankrupt. The plaintiff filed a lawsuit against TA Proland LLC for the recovery of funds, in which they asked the court to oblige the defendant to pay UAH 25,000 in their favor for violation of the terms of the contract, 1500 UAH for non-pecuniary damage, 120 UAH for expenses connected with information and technical support of the proceedings [23].

By the decision of the Babushkinskiy District Court of Dnipropetrovsk dated January 24, 2011, the plaintiff's claim was partially satisfied: UAH 12,500 was recovered from the Proland SE TA as the cost of the travel services provided, UAH 1,000 for non-pecuniary damage and UAH 120 for legal costs. In addition, 133 UAH 50 kopecks of state duty were collected in favour of the state. However, the defendant filed a corresponding appeal to set aside the court decision and to refuse the lawsuit [23]. The panel of judges of the appellate court on claims for non-pecuniary damage established that the trial court referred to Article 23 Civil Code of Ukraine[1] and Art. 4 of the Law of Ukraine "On Protection of Consumer Rights"[2] and proceeded from the fact that the plaintiff, instead of the expected quality rest, found themselves in a stressful situation, not only failing to rest where they wanted, but failing to rest in the summer, as the defendant did not return the money. Furthermore, the plaintiff did not receive moral satisfaction from the tourist trip, which indicates that they suffered non-pecuniary damage through the fault of the defendant.

The Court of Appeal of the Dnipropetrovsk Region did not agree with this conclusion, according to which the trial court found that the defendant's failure to provide tourist services and the refusal to return the funds paid were dangerous to the plaintiff's life and health, therefore the court's decision to recover non-pecuniary damage in accordance with paragraph 4 part 1, part 2 of Article 309 of Civil Procedure Code of Ukraine[3] shall be subject to cancellation with the adoption of a new decision to refuse to recover non-pecuniary damage. Unfortunately, such justifications of a court decision to refuse to satisfy a claim for compensation for non-pecuniary damage to consumers are not rare [24], although there are isolated cases of satisfaction of claims for compensation for non-pecuniary damage. We shall cite a case as an example.

The plaintiff filed a lawsuit against the Defendant for compensation for material and non-pecuniary damage. The claims were justified by the fact that, according to the verdict of the Obukhov District Court of the Kyiv Region dated 06.06.2018, Person_5

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[2] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

[3] Code of Civil Procedure of Ukraine. (2004). Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15.

was found guilty of an offense under Art. 124 of the Criminal Code of Ukraine [1] and sentenced to restriction of liberty for a period of one year. In this criminal proceedings, the plaintiff is granted victim status. A civil lawsuit was not filed in criminal proceedings, so the plaintiff filed a lawsuit in the court and asked to recover pecuniary and non-pecuniary damage. The representative of the defendant at the hearing did not recognize the claim, provided a response to the statement of claim, wherein asked to refuse to satisfy the claim because of its unprovenness and groundlessness, believing that the defendant compensated the plaintiff for material and non-pecuniary damage by paying 200 US dollars, about which there is a receipt. After hearing the explanations of the representative of the plaintiff, the representative of the defendant, having examined the case file, the court found that according to the expert opinion No.84 of PERSON_3, INFORMATION_1, according to the medical documentation provided, injuries were found in the form of a penetrating wound in the chest on the right with damage to the diaphragm, liver. The detected bodily injuries were formed from the action of an object with piercing and cutting properties and in the complex are classified as severe bodily injuries by the criterion of danger to life at the time of infliction. During the investigation, the plaintiff PERSON_3 wrote a receipt on receipt of cash assistance in the amount of 200 US dollars, which is recognized by the parties, and confirmed during the consideration of the case. The plaintiff believes that the funds received from the defendant do not compensate for all the damage inflicted by the defendant [25].

On the basis of Art. 23 of the Civil Code of Ukraine[2] a person has the right to compensation for non-pecuniary damage, which consists, in particular, in the mental suffering that an individual has experienced in connection with unlawful behaviour against them, their family members or close relatives, including in connection with property damage. Non-pecuniary damage shall be compensated by money, other property, or in another way. The amount of monetary compensation for non-pecuniary damage is determined by the court depending on the nature of the offense, the depth of physical and mental suffering, the deterioration of the victim's abilities or the deprivation of their ability to actualize them, the degree of guilt of the person who caused non-pecuniary damage, if the fault is the basis for compensation, and also considering other circumstances of significant importance. In determining the amount of compensation, the requirements of reasonableness and fairness are factored in.

The plaintiff filed a claim for compensation for non-pecuniary damage caused by the commission of a crime against him and causing grievous bodily injury. According to the decision of the Plenum of the Supreme Court of Ukraine "On the practice of civil courts hearing claims for compensation for non-pecuniary (non-material) damage"[3]

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

[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[3] Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of non-pecuniary damage". (1995, March). Retrieved from https://zakon.rada.gov.ua/laws/show/v0004700-95.

it is mandatory to clarify when resolving a dispute for compensation for non-pecuniary (non-material) damage: the existence of such damage, the wrongfulness of the action of its causer, the existence of a causal relationship between the damage and the wrongful act of the causer and the guilt of the latter in causing it. Consequently, the court fairly satisfied the claims in full, noting that the plaintiff's claims for non-pecuniary damage must be satisfied, because as a result of the crime the plaintiff suffered mental suffering, suffered stress, was undergoing treatment for a long time, was forced to change their lifestyle and everyday behaviour [25].

Reflecting on the most reasonable approach to compensation for non-pecuniary damage in the event of violation of contractual obligations, we pay attention to the compensation model that is most often applied by the practice of the European Court of Human Rights (hereinafter referred to as the ECHR). Thus, the practice of the ECHR is based mainly on the fairness and reasonableness of the awarded compensation. That is, attention is drawn to the moral justification of compensation, and not to a certain kind of "calculated" component, while factoring in the most diverse circumstances of the case, in particular the nature of the offense and non-material expenses of the victim, as well as the duration of their experiences, suffering, etc. In this aspect, we consider it fair that the ECHR in many decisions relating to compensation for non-pecuniary damage does not lead to a single algorithm for this compensation and does not specify the applicant's non-material losses. At the same time, it reserves the right to resolve the issue of compensation for non-pecuniary damage at its discretion within the limits of justice and reasonableness [26]. Therefore, as noted by V. D. Prymak: "moral damage appears not only as non-material (when it is important to establish the nature of those expenses that an offense in the creditor's non-material field could objectively cause), but also as essentially moral, that is, a legal phenomenon caused by non-pecuniary factors" [9].

In accordance with Art. 16 of the Civil Code of Ukraine [1], the right to compensation for non-pecuniary damage refers to universal methods of protecting civil rights. Consequently, any participant in civil relations on the basis of this article of the Civil Code of Ukraine can apply to the court with a claim for compensation for non-pecuniary damage. And in the position, which was contained in paragraph 5 of part 1 of Art. 4 of the Law of Ukraine "On Protection of Consumer Rights" [2] it was said that a consumer can demand compensation for non-pecuniary damage only if it is caused by products that are dangerous to human life and health. Without a doubt, such an imperative interpretation is a restrictive right of the consumer. Therefore, it is completely justified to amend this Article by the Law of Ukraine "On Liability for Damage Caused by a Product Defect" dated May 19, 2011 [3], which reiterated this paragraph as follows: the con-

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

[2] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

[3] Law of Ukraine "On Liability for Damage Caused by a Product Defect". (2011, May). Retrieved from https://zakon.rada.gov.ua/laws/show/3390-17.

sumer shall have the right "to compensation for property and non-pecuniary damage, caused due to product shortocmings (product defect), in accordance with the law" [27].

However, in the legal literature there are other opinions on this matter. Thus, V. P. Paliyuk notes that the provisions of Art. 16, 23 of the Civil Code of Ukraine[1], consolidate the general provisions for compensation for non-pecuniary damage as a way of protecting subjective civil rights, have the highest legal force in relation to Part 5 of Art. 4 of the Law of Ukraine "On Protection of Consumer Rights"[2], which provides for such a right only if there is any damage to the life or health of the consumer [28]. Disagreeing with the given position, we note that in the ratio of general and special norms, priority is given to special norms. Moreover, the proposed V. P. Paliyuk's approach is impossible due to the problem of compensation for non-pecuniary damage as a result of violation of civil contracts, including as a result of violation of contracts for the provision of travel services lying in a different plane, as against the hierarchy of regulation. Indeed, sometimes the very fact of violation of a civil law contract can pose a threat to human life and health, for example, non-observance of safety procedures during blasting operations, etc. In this case, the lack of legislative provision for the possibility of compensation for non-pecuniary damage for violation of obligations that pose a threat to life or health of the customer or other persons leads to a decrease in the degree of implementation of the compensatory function of contractual liability [28].

However, the legislative consolidation in para. 2 of part 3 of Art. 23 of the Civil Code of Ukraine[3] of an inexhaustible list of possible criteria for "other circumstances" for determining the amount of compensation for non-pecuniary damage enables the assertion of the existence of any methodology for determining this size. After all, situations are not excluded when in a court case a certain circumstance acquires an independent legal significance, which, as a significant circumstance, will be significant for determining the size of compensation for non-pecuniary damage. In comparison with it, other, usually significant circumstances, will play a secondary role. Factoring this in, we support the opinion of V. D. Prymak, that in Art. 23 of the Civil Code of Ukraine[4] a model of fair, morally justified compensation is specified [9]. We are convinced that such a compensation model should be applied in contractual obligations should they be violated.

Thus, proceeding from the analysis of the above models of approaches to compensation for non-pecuniary damage, in our opinion, the first is the most successful and consistent with the principle of good faith, justice and reasonableness. Indeed, it is precisely the ratio of damage and the amount of recovery on a morally verified basis

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[2] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

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

[4] *Ibidem*, 2003.

that will guarantee compliance with the legal equality of the parties to the contractual relationship.

CONCLUSIONS

In summary, it should be noted that the considered aspects of non-pecuniary damage compensation under the treaties evidence to the great similarity of the legislative approaches of Ukraine and the approaches of foreign legislators, including the problems that arise when applying the provisions of this institution. First of all, it draws attention to the lack of detailed legislative regulation of the institution of non-pecuniary (non-material) damage not only in the countries of the Anglo-American system of law, where this is determined by the peculiarities of the legal system of these states, but also in the countries of the Romano-German legal system, including in Ukraine.

At the same time, it should be noted that judicial and doctrinal interpretations, in particular ECHR practices, play a major role in the development and improvement of this legal institution. Compensation for non-pecuniary (non-material) damages arising from breach of contractual obligations is used by the courts as a remedy for violations of essentially personal non-material rights and goods. It should be added that the list of goods protected by non-pecuniary damage has a constant tendency to increase through judicial interpretation. It is also important to note that the issue of the admissibility of non-pecuniary damage caused by the improper performance of contractual obligations has in principle been resolved in favour of certain types of contracts and, moreover, the list of such contracts is constantly growing. Therefore, the legislative fixing of compensation (compensation) for non-pecuniary damage for the sole purpose of causing the life or health of the parties to a contractual legal relationship does not ensure the protection of their non-pecuniary rights. This can be avoided by introducing appropriate changes to the civil legislation of Ukraine, according to which the legal consequence of violation of rights (including the rights of consumers of services) that endanger their life or health, will be compensation for material and compensation for non-pecuniary damage.

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Suggested Citation: Grinyak, A. B., & Pleniuk, M. D. (2019). Compensation for non-pecuniary damage for breach of private obligations. *Journal of the National Academy of Legal Sciences of Ukraine*, 26(4), 38–54.

Submitted: 26/05/2019
Revised: 28/10/2019
Accepted: 01/12/2019

УДК 340.12
DOI: 10.31359/1993-0909-2019-26-4-55

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ЮРИДИЧНЕ ЗАБЕЗПЕЧЕННЯ ПРАВ ЛЮДИНИ У ЄВРОПЕЙСЬКОМУ СОЮЗІ: СУЧАСНИЙ СТАН ТА ПЕРСПЕКТИВИ РОЗВИТКУ

Анотація. *Реалізація положень угоди про асоційоване членство з ЄС вимагає від України освоєння юридичних стандартів прав та свобод людини цього міжнародного формування. Система юридичного забезпечення прав людини у праві ЄС пройшла тривалий шлях становлення та розвитку: від первісного заперечення необхідності визнання таких прав до прийняття окремого міжнародного акта – Хартії ЄС, наділеною юридичною силою установчих договорів ЄС. Проте, незважаючи на значну історію свого становлення та розвитку, підстав констатувати, що нині система захисту прав людини у ЄС остаточно сформована і не потребує суттєвого удосконалення, немає. Європейський законодавець не обмежився наданням нормам Хартії ЄС сили установчих договорів, але й також включив до Лісабонського договору обов'язок ЄС приєднатися до ЄКПЛ, чим власне створив складну ситуацію юридичного дуалізму чинного та перспективного врегулювання статусу стандартів прав та свобод людини у ЄС. З одного боку, нині власне норми Хартії ЄС та встановлені на її основі Судом ЄС стандарти прав та свобод володіють вищою юридичною силою у правовій системі цього міжнародного формування, з іншого, – за умов виконання обов'язку приєднання ЄС до ЄКПЛ, вищим ступенем обов'язковості у питаннях визначення європейських стандартів прав людини у правовій системі ЄС володітиме ЄКПЛ, застосована у відповідній практиці ЄСПЛ. Для України відповідь на запитання, які ж тенденції у юридичному забезпеченні прав людини переважають у ЄС, впливатиме на вирішення проблеми пошуку оптимальних юридичних інструментів наближення законодавства України до права ЄС. Відтак, у статті досліджуються особливості становлення та розвитку інституту прав людини у Європейському Союзі. Аналізуються норми Хартії фундаментальних прав Європейського Союзу як головного юридичного інструменту гарантування прав людини у цьому формуванні, а також досліджуються перспективи удосконалення юридичного гарантування прав та свобод у Європейському Союзі з огляду на підготовку Договору про Приєднання Європейського Союзу до Конвенції про захист прав людини та основоположних свобод.*

Ключові слова: права людини, Європейський Союз, правозахисні принципи, Хартія основоположних прав.

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LEGAL SECURITY OF HUMAN RIGHTS IN THE EUROPEAN UNION: CURRENT STANCE AND PERSPECTIVES OF DEVELOPMENT

Abstract. *Implementation of the provisions of the Agreement on Association with EU requires Ukraine to master human rights standards of this international formation. The system of legal protection of human rights in EU law has come a long way of its formation and development: from the initial denial of necessity to recognise such rights to the adoption of a separate international act – the EU Charter, endowed with the legal force of the founding treaties of the EU. However, despite the considerable history of its formation and development, there are no grounds to state that the human rights protection system in the EU is now fully formed and does not need significant improvement. The European legislator not confined to giving the EU Charter the force of the founding treaties, but also included in the Lisbon Treaty the obligation of the EU to accede to the ECHR, which in itself created a difficult situation of legal dualism of the current and perspective regulation of the status of human rights and freedoms standards in the EU. On the one hand, the norms of the EU Charter and the standards established by the Court of Justice of the European Union today have the highest legal force in the legal system of this international formation; on the other, under the obligation of EU accession to the ECHR, the ECHR, which has been applied in the relevant ECtHR practice, will have a knack for defining European human rights standards in the EU legal system. For Ukraine, the answer to the question what trends in the legal protection of human rights prevail in the EU will influence the solution of the problem of finding optimal legal instruments for approximation of the Ukrainian legislation to the EU law. Therefore, the article explores the peculiarities of the establishment and development of a human rights institute in the European Union. The norms of the Charter of Fundamental Rights of the European Union as the main legal instrument for guaranteeing human rights in this formation were analysed, as well as the prospects of improving the legal guarantee of rights and freedoms in the European Union with a view to the preparation of the Treaty on European Union Accession to the Convention on Human Rights and Fundamental Freedoms.*

Keywords: human rights, European Union, human rights principles, Charter of Fundamental Rights.

INTRODUCTION

The crisis that Ukraine has faced over the last six years requires decisive steps in the final definition and, in the end, the real approval of the foreign policy development vector. On the European continent, for our country, the most promising and effective directions of integration into the community of European civilisation states are such international formations as the Council of Europe (hereinafter – the CoE) and the European Union (hereinafter – the EU). Ukraine has solemnly proclaimed the inten-

tion to take a proper place in the world community since the beginning of its state building, and the first step in this direction was the accession of Ukraine to the CoE and the corresponding mastering of human rights standards of this organisation. At a time when the CoE is a promising form of political integration of European countries, even greater opportunities for cooperation not only in the political sphere but also in the sphere of economic, social and cultural are opened for Ukraine in such an international integration association as the EU, an association agreement with which was signed in March 2014 after fatal events on the Maidan during December 2013 – March 2014.

The change in the top leadership of the Ukrainian State following the election of the President of Ukraine in May 2019, as well as the re-election of the Verkhovna Rada in July of the same year, gives hope that the course for Ukraine's integration into the EU will receive a new round of development. Moreover, the recent events in the international arena are convincing enough to show the futility of, it can be said, the danger of changing the European integration direction of our country's development.

The implementation of the provisions of the Association Agreement with the EU requires from Ukraine, among other things, the development of the EU legal system, in particular the legal rules on guaranteeing fundamental rights and freedoms. The human rights legal system in the EU has come a long way in development, with some caveats it can be argued that the complex of legal instruments for guaranteeing human rights in this international formation has evolved in accordance with the main stages of deepening the integration ties of European states. However, despite its considerable history of development, it is an exaggeration to say that the EU's human rights protection system is now fully established and does not need significant improvement. Therefore, the purpose of this article is to investigate the general laws, features and problems of the legal guarantee of fundamental rights and freedoms in the EU in order to bring Ukraine's legal system closer to the EU legal system.

1. MATERIALS AND METHODS

As is known, in the process of scientific activity, in order to obtain knowledge that objectively reflects reality, one must adhere to the basic tenets of methodology – the doctrine of the use of approaches and methods, ways and means of scientific research. The author examines certain contemporary aspects of international legal protection of human rights, which are related to the processes of legal guarantee of human rights in the EU – the international formation, with which Ukraine now seeks to build deep partnerships. As the human rights legal system in the EU has been being shaped for a long time under the influence of international and European human rights regulations, in particular the CoE legal acts, the case law of the European Court of Human Rights (hereinafter – the ECHR), the constitutional traditions of the Member States is still in the state of active formation; the methodological basis of

the proposed scientific intelligence is a number of general scientific and special legal methods of knowledge of political and legal phenomena.

This study is based on the hypothesis that the fundamental foundations, qualitative parameters of the human rights legal system in the EU have developed primarily under the influence of three human rights sources: the EU itself, the CoE (including ECtHR practices), as well as constitutional traditions of EU Member States. Therefore, dialectical, comparative legal research methods were applied in the process of studying the evolution of the establishment and current state of the human rights and freedoms institute in EU law. In order to study the patterns of influence on the development of the human rights guarantee tool in the EU, the main stages of development of this very unique international formation were the historical method of research. The sociological method of enquiry was used in the process of analysing the application by the Court of Justice of the EU of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] (hereinafter – the Euro Convention) in the decision-making process for human rights and freedoms before and after the granting of the EU Charter of Fundamental Rights[2] (hereinafter – the EU Charter) of a formal and binding nature in the system of sources of EU law.

Such methodological principles, it seems to us, will make it possible to evaluate and develop the appropriate program as much as possible to adapt the legislation of Ukraine to EU human rights standards.

2. RESULTS AND DISCUSSION

2.1 The role of the EU Court of Justice in the legal protection of human rights in the EU

Although in the early 1950s it was generally assumed that respect and protection of fundamental human rights was the sole responsibility of the CoE (since it was believed that the institutions of the so-called European Communities (the precursor to the EU, hereinafter – the EC) operated in certain sectors of the economy, cannot affect the implementation of the principle of protection of human rights), the realities of political and legal processes between EU Member States have shown that this is not true. In fact, from the first years of the functioning of the central judicial institution of the EC – the Court of Justice – it was proposed to decide on the conformity of the acts of the EU institutions with the constitutional provisions of the Member States in the field of human rights regulation [1].

For a long time, the principle of respect and protection of human rights has not been clearly distinguished in such fundamental, founding principles of the EU legal system

[1] Convention for the Protection of Human Rights and Fundamental Freedoms. (2013). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004

[2] European Union Charter of Fundamental Rights. (2000). Retrieved from https://zakon.rada.gov.ua/laws/show/994_524

as the *principles of freedom*, *democracy* and the *rule of law*. Initially, the founding documents of the EU did not guarantee respect for human rights and fundamental freedoms in the EU legal system [2]. Thus, until the second half of the 1960s, the Court of Justice refused to interpret the acts of the EC institutions on compliance with the constitutional provisions of the Member States in order to safeguard rights and freedoms. In 1959, four complaints were lodged with the Court of Justice in which the issue of the inconsistency of the decisions of the Supreme Authority was raised (a governing body established under the Treaty establishing the European Coal and Steel Community of 18 April 1951 (hereinafter – ECHR Treaty)) to the constitutional requirements for the rights of the nationals of the Member States. Having considered these four cases in a joint proceeding on 15 July 1960, the Court of Justice recognised its competence to decide the legality of acts of the Supreme Authority under the ECHR Treaty, but stated that it was not obliged to make such acts compatible with the national law of the members, except for their constitutional legislation. The Court also noted that "*Community law, as set out in the ECHR Treaty, does not contain any general principles that would guarantee fundamental rights*" [1].

However, further deployment of European integration processes inevitably raised the problem of ensuring fundamental human rights as one of the top-priority issues of the EU agenda, prompting the EU Court of Justice to change its position and finally begin the process of constitutionalisation of the Institute of Fundamental Rights and Freedoms. An important step in this direction was the *Loos* case, in which the Court of Justice stated that, regardless of the Member States, Community law not only establishes the duties of individuals but also consolidates fundamental rights as part of the European legal tradition [3]. In addition, the EU Court has stated that "the founding treaties should be construed as having direct effect and conferring individual rights which national courts must protect".

The principle of the supremacy of Community law over the internal law of the Member States has become particularly important in the field of cooperation mechanisms between the national courts of the EU Member States and the EU Court of Justice. This principle (first formulated by the Court of Justice in the *Costa* case) is the validity and bindingness of Community law rules (including judgments of the Court of Justice of the European Union as one of the sources of Community law) throughout the EU and of all European Union law subjects. Thus, the EU Court of Justice cooperates with the national courts of the Member States, explaining to them European law from the point of view of the interests of the whole Community and not of the individual Member States and of their objectives [4].

A further step towards ensuring fundamental human rights was the *Stauder* case (1969), in which the Court of Justice ruled that *human rights were the part of the general principles of Community law protected by it*. And later, in the case of *Nold* (1974), the EU Court stated that the Community law which it was to interpret was based *on the*

common constitutional traditions of the Member States and, when shaping the values of the Community, it would take into account conventions and agreements concluded with States, Members, as well as the 1950 Convention on the Protection of Human Rights and Fundamental Freedoms [5] It is worth agreeing with the scientific literature that the decision in this case is a new step in the development of the case law of the Luxembourg Court, since it provides for the possibility of that "when interpreting and applying Community law Court of Justice will be guided and referred to the norms of international agreements signed by Member States" [1].

Thus, analysing the case-law of the Court of Justice, it is possible to distinguish two periods of its operation, which are radically different from the approaches used: if in the first stage, the EU Court of Justice avoided to recognise the problem of the necessity to protect fundamental human rights (directly referring to the fact that the founding treaties do not contain provisions on human rights protection), whereas since the second half of the 1960s, human rights protection has been recognised as an integral principle of EU law [6]. Moreover, thanks to the work of the Court of Justice, the gaps in the founding treaties of the EU on guaranteeing human rights and freedoms have been partially overcome. However, even appreciating the progress made in the functioning of the Court of Justice towards ensuring fundamental human rights and freedoms in the EU legal order, other EU institutions did not hesitate to point out the limitations of the Luxembourg Court's approach in formulating "human rights" principles. In its memorandum of 4 April 1979, the EU Commission stated, "*Nonetheless, however satisfactory and worthy of approval the method (of human rights protection – author's note) developed by the Court may be, it cannot rectify at least one of the shortcomings affecting the legal order of the Communities through the lack of a written catalogue of fundamental rights: the impossibility of knowing in advance which are the liberties which may not be infringed by the Community institutions under any circumstances. The European citizen has a legitimate interest in having his rights vis-a-vis the Community laid down in advance. He must be able to assess the prospects of any possible legal dispute from the outset and therefore have at his disposal clearly defined criteria.*[1]*"*

2.2 The establishment of the Institute for Human Rights in the founding treaties of the EU

It was only 30 years after the founding of the European Community (hereinafter referred to as the EC) that the Single European Act first made reference to the principle of protection of human rights. Paragraph 3 of the preamble to the Act states that the EU Member States are "determined to promote a joint effort to develop a democracy based on the rights recognised by the constitutions and laws of the Member States, the ECHR and the European Social Charter" [7].

[1] Memorandum of the Commission of the European Communities adopted on 4 April 1979. Bulletin of the European Communities, 1979. Supplement No 2/79. Para 5. Retrieved from http://aei.pitt.edu/6356/

The further process of the constitutionalisation of fundamental human rights was continued by the Treaty of Amsterdam of 2 October 1997[1]. The provisions of this document have made significant adjustments to the system of treaties establishing the EU: this is how the principle of respect for human rights and fundamental freedoms, previously enshrined only in the preamble to the EU Treaty, has become the foundation of EU integration processes[2]. In other words, the Treaty of Amsterdam gave the EU Court of Justice the right to apply to all acts of the EU institutions *minimum standards that are related to the protection of human rights in the way* they follow from the common constitutional traditions of the Member States and international human rights agreements [8; 9]. In addition to the general changes in the respect and protection of human rights as an institution throughout the EU, the provisions of the Treaty of Amsterdam provided for the introduction of some new aspects, forms of application of the principle of non-discrimination. The Treaty of Amsterdam has become a qualitatively new step towards ensuring the principle of non-discrimination: supplemented by Art. 3 (formerly, Article 2) of the EC Treaty states that "ensuring equality between women and men as a whole, and not just in employment, is one of the objectives of the Community".

While assessing the importance of the Treaty of Amsterdam in terms of enhancing the legal certainty of the human rights institute in the EU, foreign scientists equate its innovation with the status of a genuine "reform" in the field of human rights in the EU legal system, clearly enshrining fundamental rights provisions that have now become part of primary law EU [1].

In general, sharing the opinion of foreign scientists about the importance of the Treaty of Amsterdam[3] in the process of completing the full legal "integrity" of human rights and freedoms, the author thinks that the problems that this treaty has not solved should be mentioned. Thus, in particular, the intensification of integration processes between EU Member States was accompanied by the strengthening of legal support, first and foremost, of socio-economic human rights, whereas in the case-law of the EU Court, the situation of violations of the same regime of guaranteeing personal rights with socio-economic rights was threatened [2].

The problem of the correlation of these regimes has arisen in cases where the EU Court has had to monitor the observance of fundamental human rights in cases of violations by States of economic freedom, which, in fact, belong to or indirectly affect one of the human rights. This could be the case, for example, in the event of an EU citizen being expelled from a Member State (for example, if he violated economic conditions), thereby destroying the unity of family life (Article 8 of ECHR); or in the case of restric-

[1] The Amsterdam treaty. (1999, May). Retrieved from http://studies.in.ua/ru/istoriya-gosudarstva-i-prava-zar-h-stran-shpargalk/3776-amsterdamskiy-dogovr-yogo-zmst-znachennya.html

[2] *Ibidem*, 2000

[3] *Ibidem*, 2000

tions on the free provision of information services by the media directly affecting the right to freely disseminate information, regardless of frontiers (Article 10 of ECHR) [5]. In other words, the problem was that the EU judiciary, in particular the activities of the Court of Justice affected human rights protected by the ECHR, which resulted in a conflict in international judicial protection of human rights: the same rights were guaranteed at the same time by two different international jurisdictions, members of which were the same EU Member States.

Thus, new issues of legal guarantee of fundamental human rights were raised in the EU legal order, which could not be resolved by further deployment of the EU Court of Human Rights jurisprudence or simply by adding amendments and adjustments to the system of founding treaties.

At various stages of the functioning of the EC, questions were raised regarding its possible accession to the ECHR's human rights protection system. However, following a judgment of the European Court of Justice [*Opinion 2/94 on Accession by the Community to the ECHR*] stating that this Court held that the ECT Treaty did not confer powers on the European Community to join the ECHR, there was a need to find new ways of qualitatively new guaranteeing human rights and freedoms in the EU. During Germany's EU presidency in 1999, it was suggested "at the present stage of the EU's establishment to develop a Charter of Fundamental Rights (hereinafter – the EU Charter) in order to explicitly guarantee the Union citizens the highest priority of rights and freedoms." Such a document was eventually developed and was "solemnly proclaimed" by the European Parliament, the Council of Ministers and the European Commission in Nice on 7 December 2000[1]. At first, unfortunately, the Charter was not incorporated into the system of institutions of the EU treaties, even though it was not published in the "C" series of the official journal and not in the "L" series reserved for law. Thus, after its proclamation in 2000, the Charter was not legally binding and was first mentioned by the Court of Justice in 2006 only in the case of the legality of the Family Reunification Directive.

The "revolutionary" step in the direction of radically overcoming the new problems of the legal protection of human rights was to be the Treaty establishing a Constitution for Europe, which contained a list of rights and freedoms proclaimed in the EU Charter[2]. However, without receiving support at the level of national referendums of EU Member States, it was replaced by the Lisbon Treaty, which entered into force in December 2009.

2.3 The place of the EU Charter in the system of EU law sources

With the entry into force of the Lisbon Treaty on 1 December 2009, the EU Charter[3] has gained legal force of the founding Treaties of the EU. It is worth noting that only

[1] European Union Charter of Fundamental Rights. (2000). Retrieved from https://zakon.rada.gov.ua/laws/show/994_524

[2] *Ibidem*, 2000

[3] *Ibidem*, 2000

in the first year of the EU Charter, the EU Court cited its rules more than 30 times, and in November 2010 for the first time applied the EU Charter as a legal basis for repealing a number of EU regulations due to their contradiction with the EU Charter [10]. Taking into account the system of sources of EU law, in particular the division of such sources according to the degree of their fundamentality into primary and secondary [11] already established in the scientific literature, it can be argued that for the EU Court – a body which consistently enforces the principle of priority of EU law on the national legal systems of the Member States of this formation – after the entry into force of the Treaty of Lisbon[1] in the field of priority, the EU Charter, and not the ECHR, has become of paramount importance, despite the latter is recognised by the EU as one of the general principles of its legal system which (principles) are also sources of EU law.

However, the European legislator not confined to giving the EU Charter the force of the founding treaties, but also included in the Lisbon Treaty the obligation of the EU to accede to the ECHR, which in itself created a difficult situation of legal dualism of the current and perspective regulation of the status of human rights and freedoms standards in the EU. On the one hand, the norms of the EU Charter and the standards established by the Court of Justice of the European Union today have the highest legal force in the legal system in this international formation; on the other hand, subject to the obligation of EU accession to the ECHR, The ECHR, which has been applied in the relevant ECtHR practice, will have a knack for defining European human rights standards in the EU legal system.

In such a situation, it is necessary to find out how the legal practice of the EU institutions, first of all, the ECJ, is moving. Because the answer to the question of finding effective ways to optimise the approximation of Ukrainian legislation to EU law will depend on the answer to the question of what trends in the legal protection of human rights prevail in the EU. Today, if the EU Court of Justice is of crucial importance to the norms of the EU Charter, and the EU Court of Justice implements even those EU Charter norms that implies the same human rights as the rights enshrined in the ECHR, there is a need for a fundamental adaptation of the human rights law of Ukraine to the standards of rights of EU person. However, despite formally binding character of EU Charter norms, the ECHR and the practice of its application by the retain high legal status in the case law of the EU Court of Justice – the priority given to Ukraine is the obligations arising from the ratification of the ECHR and the recognition of ECHR decisions as obligatory. The author will examine in more detail the human rights trends that are currently being pursued in EU law, notably the case law of the EU Court of Justice.

[1] Lisbon Treaty. (2009). Retrieved from http://radaprogram.org/infocenter/lisabonskyy-dogovir-dogovir-pro-reformuvannya-yevropeyskogo-soyuzu

2.4 Trends in the application of the EU Charter and the ECHR in the case law of the Court of Justice

The well-known American researcher on international human rights law, a Fellow at the Harvard University Grainne de Burka calculated the use of the EU Charter[1] by the EU Court of Justice from its solemn declaration in 2000 until 2009, when this act was made legally binding. According to the study, the EU Court of Justice referred to the EU Charter 59 times during the 9-year period. Moreover, the vast majority of such references were used as additional arguments. It should also be emphasised that during the analysed period, the EU Court of Justice applied the EU Charter provisions very systematically – mentioning the provisions of the EU Charter in some cases, and "forgetting" about them in similar cases. At the same time, according to similar calculations by the same researcher, during the 1998-2005 period, the ECtHR applied the ECHR provisions in its 81 decisions, indicating that the EU Court of Human Rights had made more frequent use of the provisions of this international human rights act before the EU Charter gained binding status [12].

According to estimates by another well-known British human rights researcher, Laurent Schek, during 1998-2005, the Court of Justice relied 7.5 times more frequently on ECHR provisions than on all other human rights instruments, including the EU Charter. The researcher also notes that the ECHR's provisions also prevailed in the activities of the Advocates General in the same period, and decreased sharply after the entry into force of the Lisbon Treaty [13]. Therefore, it can be concluded that for a long time the ECHR and the ECtHR's practice have been used by the Court of Justice as an important source of standards in the field of human rights and freedoms, even though the EU was not (and is not) a party to the ECHR, and therefore did not obliged to comply with its provisions. Adoption of the Lisbon Treaty[2] has made the EU Charter binding, giving it equal status with the founding Treaties of the EU.

According to the calculations of Grainne De Burke from the moment of the adoption of the Treaty of Lisbon until the end of 2012, the EU Court of Justice referred to the EU Charter 122 times, with 27 decisions giving a rather detailed analysis of the applicability of the EU Charter, and the remaining 95 decisions only mentioning this document. 10 of the 27 judgments where the ECJ applied the EU Charter also referred to ECHR provisions and ECtHR practices that were consistent with the interpretation and application of the EU Charter in specific cases. In the other 95 judgments where the EU Court of Justice has confined itself to formally mentioning the EU Charter, the ECHR has been referred to in a similar manner, generally only 10 times [12]. In other words, during the period 2009-2012 in 122 cases where the EU Charter was applied,

[1] European Union Charter of Fundamental Rights. (2000). Retrieved from https://zakon.rada.gov.ua/laws/show/994_524

[2] Lisbon treaty. (2009). Retrieved from http://radaprogram.org/infocenter/lisabonskyy-dogovir-dogovir-pro-reformuvannya-yevropeyskogo-soyuzu

the ECJ has referred to the ECHR only 18 times. Of these, in 10 cases, the ECJ analysed relevant ECtHR practices and analysed the feasibility of applying ECHR provisions and their substantive alignment with the relevant EU Charter provisions. Instead, in the other 8 cases, the EU Court of Justice limited itself to a formal citation of ECHR provisions, not comparing its content with that of the EU Charter.

The data, according to the author, however indicate that since the EU Charter has become binding, the frequency of ECtHR references to ECHR provisions and ECtHR practices has decreased, but instead the number of references to the EU Charter has increased. Moreover, as the figures above show, the EU Court of Justice today quite often interprets and applies the provisions of the EU Charter in isolation, refusing to interpret it through the lens of the ECHR, despite the fact that a considerable number of the rights enshrined in the EU Charter (their content and scope) have in fact been "transferred" from the text of the ECHR to the text of the EU Charter. In comparison to the ECHR, the EU Charter enshrines a much larger list of rights and freedoms, such as the right to the integrity of an individual (Article 3 of the Charter), freedom of creativity and science (Article 13 of the Charter), the right to asylum (Article 18 of the Charter), and a set of unique rights vested in EU citizens (Articles 39 – 46 of the Charter). In general, approving the importance of this document in the EU legal order, the question arises: can the process of constitutionalisation of human rights in the EU be considered as completed, and therefore the problems that have arisen at different stages of European integration have finally been properly addressed? In answering this question, in author's opinion, attention should be drawn to certain practical problems in applying the Charter to protect fundamental human rights.

First, EU Charter norms are binding only on the EU institutions in the exercise of their powers (in particular when adopting the relevant legal acts), and on the EU Member States when implementing Union law provisions. Whereas individuals as subjects of EU law enforcement have limited procedural capacity to challenge acts of EU institutions for violations of the most recent rights and freedoms enshrined in the EU Charter. According to Art. 263 of the Treaty on the Functioning of the EU, private individuals have the right to appeal against an act of an EU institution which is not addressed to them personally (and the vast majority of those acts are of that nature) only if such act gives rise to direct legal consequences for them and affects them personally [14]. These principles (*personal and direct nature of the act*) have been elaborated in detail in the case law of the Court of Justice, and, as the scientific literature indicates, the complexity of adhering to these criteria in practice makes it impossible for individuals to directly challenge acts of EU institutions based on the provisions of the EU Charter [15].

Therefore, it can be concluded that in order to make full use of the opportunities arising from the EU Charter, a fundamental liberalisation of the procedural legal status of private entities is necessary, which will directly enable them to challenge acts of the EU institutions for violation of fundamental rights and freedoms [16; 17].

Second, notwithstanding the fact that the Charter is an evolutionary treaty, both in terms of the nomenclature of human rights guaranteed by it and of their technical and legal formulation and structuring in different parts of this document, the unduly excessive abstractness of certain provisions is evident. On the one hand, the Charter relates to the evolution of constitutional law in Europe as a whole, and, on the other, to how European law itself has evolved. In particular, the Charter enshrines the fundamental rights identified on the basis of precedents, recognised by the EU Court of Justice as the unwritten general principles of law of this international entity. It should be noted that a number of provisions of this act are relatively defined, moreover, purely declarative in nature, which unreasonably broadens the scope of the institutions of the EU institutions in determining their directions of practical implementation of the provisions of the EU Charter.

For example, justified criticism is the wording of Art. 37 and 38 of the EU Charter. Thus, Art. 37 states that "European Union policies should include an increased level of environmental protection and ensure that its quality is improved in accordance with the principle of sustainable development". On the one hand, it is important that this article provides not only the preservation of the environment, but the high level of its protection and improvement of the quality of the environment in accordance with the growing scientific and technological and financial capacities of the EU countries; on the other hand, the provision does not withstand any criticism in the light of the principle of legal certainty, in particular as regards the specific possibilities of human behaviour that would follow from the wording of this article. The lack of clearly articulated environmental human rights (such as the right to a safe environment, the right to reliable environmental information, the right to participate in environmental decision-making) is clearly a disadvantage of the Charter[1]. Similarly, the wording of Article 38 of the EU Charter, which also fails to verify the principle of legal certainty, deserves criticism.

Thirdly, the EU Charter (in particular Article 52 § 52) contains provisions under which the rights and freedoms enshrined in this document must, in the course of its application, have meaning and scope in accordance with the same rights and freedoms as enshrined in the ECHR[2]. This rule is intended to ensure that the principles of human rights protection enshrined in the ECHR and developed by the ECtHR will be properly and fully reflected in the case law of the Court of Justice.

2.5 Prospects for EU accession to ECHR

Since the provisions of the founding Treaties in the current version of the EU Treaty (Article 6) provide for the obligation of the EU to join the human rights protection system based on the ECHR, it seems that the above issues of inconsistency in the

[1] European Union Charter of Fundamental Rights. (2000). Retrieved from https://zakon.rada.gov.ua/laws/show/994_524

[2] The Amsterdam treaty. (1999, May). Retrieved from http://studies.in.ua/ru/istoriya-gosudarstva-i-prava-zar-h-stran-shpargalk/3776-amsterdamskiy-dogovr-yogo-zmst-znachennya.html

legal protection of human rights in the EU legal system could be more effectively solved after recognition of the ECtHR's binding jurisdiction. After all, the result of such a move would be to submit controversial issues to an independent, authoritative international arbitrator such as the ECtHR. In general, the idea of EU accession to the ECHR has been actively debated by politicians and lawyers since the late 1970s. However, as noted earlier, in its judgment of 2/94 of 28 March 1996, the Court of Justice stated that the European Community did not have the necessary powers to accede to the ECHR, and such a step required the amendment of the founding treaties. Following the promulgation of such a legal position by an EU court, for a long time (over 14 years), the process of EU accession to the ECHR did not take place until it became apparent that the accumulation of the case law of the Luxembourg Court in the field of human rights protection was based on the application of the EU Charter provisions (in particular those that fix the same human rights with the rights guaranteed by the ECHR) entails a gradual divergence of relevant human rights practices between the ECJ and the ECtHR. Consequently, negotiations on EU accession to the ECHR began in July 2010 and resulted in the development of a draft treaty.

Therefore, the author considers in more detail the legal rules that will mediate the EU accession process to the ECHR and that of particular relevance in the context of the study, will determine the limits of judicial review of the ECtHR by acts of the EU bodies after the signature of the relevant treaty (hereinafter referred to as the Accession Treaty).

Article 1 (b) of Protocol No. 8 to the Accession Treaty requires that such an agreement "provides for the mechanism necessary to ensure that complaints by non-member States and individual complaints of human rights violations are properly addressed against an EU Member State or the EU itself"[1]. At the same time, Art. 3 of this Protocol stipulates that "nothing in the Accession Treaty shall affect the application of Art. 344 of the Treaty on the Functioning of the EU (hereinafter referred to as the TFEU), and Art. 6 (2) of the EC Treaty states that "accession to the ECHR will not affect the powers of the Union as defined in the treaties" [18]. This article requires that "Member States undertake not to use any other means of dispute settlement concerning the interpretation and application of the Treaties than those specified in this Treaty." As explained by the EU Court of Justice in the MOX case, "this provision also applies to all disputes concerning secondary EU law" [19]. In other words, Art. 344 of the TFEU establishes a monopoly on the Court of Justice to resolve any dispute that arises between Member States and affects EU law.

What are the practical implications of the legal provisions that mediate the EU accession process to the ECHR? First, it is important that the prescriptions of Art. 344 of

[1] Draft legal instruments on the accession of the European Union to the European Convention on Human Rights. Retrieved from www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/CDDH-UE_2011_16_final_en/pdf

the TFEU actually serves as a legal basis for preventing the ECtHR from inviting one EU Member State against another Member State to violate its human rights as a result of the application of EU law. Therefore, the legal possibilities of recourse to the ECtHR for the protection of human rights in cases concerning the application by Member States of EU law are virtually nullified [19]. Second, a similar problem arises in the case of a hypothetical complaint of human rights violations guaranteed by the ECHR, an EU Member State against the EU itself, or the EU against its Member State. As the subject of such a complaint will be in one way or another the problem of interpretation and application of EU law, such categories of cases will also fall out the jurisdiction of the ECtHR.

What subjects will have the *real procedural capacity* to initiate the protection of human rights in cases arising from relationships initiated by acts of EU law? *Complaints of non-state actors*. With regard to individual complaints regarding human rights violations, they can be considered as effective means of protecting human rights from acts of the EU institutions and Member States, provided that such factors are taken into account. It is well known that the issue of human rights protection in the EU legal order has previously been the subject of consideration of the ECtHR in a number of cases, among which the case of *Boshorus v. Ireland* [20] and *Mss v. Belgium and Greece* [19]. In the first of these, the ECtHR formulated the principle of so-called "equivalent protection of human rights". In particular, when considering a complaint against an EU Member State that has fulfilled its responsibilities under one of the EU regulations, the ECtHR has stated, "The actions of a State taken to fulfil its legal responsibilities are justified as long as the organisation concerned is considered to protect fundamental human rights, both in terms of the material safeguards used and the mechanisms that ensure their observance in a way that can be considered at least equivalent to that afforded by the Convention" [20]. In several subsequent decisions, the ECtHR upheld and clarified its understanding of the principle of "equivalent protection of human rights", in particular with respect to the obligations under Art. 6 of ECHR (*Kokkelvisserіy v. The Netherlands*).

In the case of *Mss v. Belgium and Greece* The ECtHR considered the treatment of an Afghan national against Belgium under the Dublin II Regulation. The Belgian authorities took steps to expel the applicant to Greece, which, he said, should not have been expelled due to cases of inhuman and degrading treatment in Greece of asylum seekers. The ECtHR opposed Belgium because "EU regulations in this case give the state some autonomy in actions it has not use". The ECtHR, therefore, stated that "the approach developed in *Boshorus v. Ireland* cannot be applied" [21]. Therefore, if, at the stage of assessing the admissibility of an individual complaint of a human rights violation by an EU Member State in the context of fulfilling its obligations under EU law, the ECtHR concludes that the principle of "equivalent legal protection" should be raised

in the complaint, the issue of human rights protection remains in the domain of the EU Court of Justice. Will this approach contribute to the full protection of human rights? It seems that the answer to this question will not be difficult. With regard to individual complaints against the EU itself (despite the fact that such an opportunity to protect human rights is opened after the signing of the Accession Treaty), it seems that the number of such complaints, in view of the specific rule of law of the EU, in particular with regard to decision-making and the distribution of powers between EU Member States and its organs, will not be big.

The above analysis of the provisions of the EU Treaty of Accession draft, in author's opinion, allow the maximum consideration of the EU's interests in the area of maintaining the EU's unique (sui generis) legal order, the division of competences between its institutions and Member States, as well as any interference of "unwanted" entities in the EU legal system. Moreover, the Treaty of Accession draft, figuratively speaking, so far overlooks the weak issues of human rights protection by EU institutions and Member States that it seems like a document in the form of a protocol of intent rather than a treaty aimed at giving rise to specific legal consequences. In such a formulation, it would appear that the Treaty of Accession should have the force of res judicata in the near future and give the EU full legitimacy in discussing human rights issues with other countries. However, contrary to all expectations, on 18 December 2014, the Court of Justice adopted Opinion 2/13 on the incompatibility of the EU Treaty of Accession with the European Convention for the Protection of Human Rights and Fundamental Freedoms, with the result that the EU accession to the ECHR is postponed indefinitely [22; 23].

A detailed analysis of the ECJ Opinion 2/13 of 18 December 2014 clearly requires separate scientific research. However, it should be noted that the main arguments on which the EU Court of Justice has based its negative decision are, paradoxically, the very problems that the document developers sought to exhaustively anticipate and regulate: 1) ensuring the rule of law of the EU; 2) the principle of good faith cooperation and autonomy of EU law; 3) the principle of the ECJ's monopoly on conflict resolution; 4) the problem of involving the EU or Member State as co-responders [22].

CONCLUSIONS

The implementation of the provisions of the Association Agreement with the EU requires Ukraine, among other things, to master the EU legal system, in particular the legal rules on guaranteeing fundamental rights and freedoms. The system of legal protection of human rights in EU law has come a long way in its formation and development: from the initial denial of the necessity to recognise such rights to the adoption of a separate international act – the EU Charter endowed with the legal force of the founding treaties of the EU. However, despite its considerable history

of formation and development, it is reasonable to conclude that there is no ground to call the EU's human rights protection system fully established system without necessity for further improvements.

The European legislator not confined to giving the EU Charter the force of the founding treaties, but also included in the Lisbon Treaty the obligation of the EU to accede to the ECHR, which in itself created a difficult situation of legal dualism of the current and perspective regulation of the status of human rights and freedoms standards in the EU. On the one hand, the norms of the EU Charter and the standards established by the Court of Justice of the European Union today have the highest legal force in the legal system of this international formation; on the other, under the obligation of EU accession to the ECHR, the ECHR, which has been applied in the relevant ECtHR practice, will have a knack for defining European human rights standards in the EU legal system. For Ukraine, the answer to the question what trends in the legal protection of human rights prevail in the EU will influence the solution of the problem of finding optimal legal instruments for approximation of the Ukrainian legislation to the EU law. Today, if the EU Court of Justice is of crucial importance to the norms of the EU Charter, and the EU Court of Justice implements even those EU Charter norms that implies the same human rights as the rights enshrined in the ECHR, there is a need for a fundamental adaptation of the human rights law of Ukraine to the standards of rights of EU person. However, despite formally binding character of EU Charter norms, the ECHR and the practice of its application by the retain high legal status in the case law of the EU Court of Justice – the priority given to Ukraine is the obligations arising from the ratification of the ECHR and the recognition of ECHR decisions as obligatory.

EU accession to the ECHR as foreseen in the Lisbon Treaty could end the process of establishing a dual system of human rights standards in the case law of the Court of Justice and the ECtHR, even eventually lead to the harmonisation of the EC and EU human rights standards, but a negative decision of the EU Court of Justice 2/13 of December 18, 2014, halted this process indefinitely. The EU accession process to the ECHR can be continued, as it seems to the author, after substantially refining the Treaty of Accession and amending the founding Treaties of the EU.

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Suggested Citation: Dobrianskiy, S. (2019). Legal security of human rights in the European Union: current stance and perspectives of development. *Journal of the National Academy of Legal Sciences of Ukraine*, 26 (4), 55–72.

Submitted: 17/07/2019
Revised: 29/10/2019
Accepted: 03/12/2019

УДК 347.91/.95
DOI: 10.31359/1993-0909-2019-26-4-73

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ОСНОВИ ТА ПЕРСПЕКТИВИ ВПРОВАДЖЕННЯ ІНСТИТУТУ КОЛЕКТИВНОГО (ГРУПОВОГО) ПОЗОВУ В РЕСПУБЛІЦІ КАЗАХСТАН

Анотація. *У статті показано, що прогнозувати аспект того, в якій сфері права груповий позов знайде своє найбільш ефективне застосування, на даний момент вкрай складно. Автори показують, що слід виходити з того, що груповий позов за змістом введених новел є універсальним механізмом захисту. У статті показано, що імплементувати правовий механізм масового правосуддя можна застосовувати в будь-яких справах, підвідомчих судам загальної юрисдикції за правилами Цивільно-процесуального законодавства (за винятком справ окремого провадження). Автори виявляють, що груповий позов буде актуальний в споживчих, трудових і соціальних спорах, в суперечках про захист навколишнього середовища, суперечках, що випливають із заподіяння шкоди, суперечках в сфері антимонопольного регулювання, в суперечках між учасниками ринку цінних паперів. Висновки авторів засновані на тому, що в іноземних юрисдикціях груповий позов найбільш поширений саме в перерахованих вище суперечках. На думку авторів, та модель групового позову, яка закріплена в цивільно-процесуальному законодавстві, в малому ступені відрізняється від простої співучасті на стороні позивача і значного зиску для учасників групи не містить. В рамках процесуальної співучасті сторони мають право передати ведення своєї справи одному з сопозивачів, який і буде dominus litis («господарем спору»), що і відбувається зараз на практиці. До недоліків групового виробництва автори відносять встановлений восьмимісячний термін розгляду справи, рішення може в незначній мірі носити характер res judicata для осіб, які не брали участі у справі. Практична значимість дослідження визначається авторами в зниженні навантаження на судову систему і як наслідок підвищення якості судового розгляду. Це дозволить виділити також і соціально-суспільні форми підвищення сприйняття корпоративної соціальної відповідальності.*

Ключові слова: колективний позов, суд, предикація, розгляд, процедура.

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ОСНОВЫ И ПЕРСПЕКТИВЫ ВНЕДРЕНИЯ ИНСТИТУТА КОЛЛЕКТИВНЫХ (ГРУППОВЫХ) ИСКОВ В РЕСПУБЛИКЕ КАЗАХСТАН

Аннотация. *В статье показано, что прогнозировать аспект того, в какой сфере права групповой иск найдет свое наиболее эффективное применение, на данный момент крайне сложно. Авторы показывают, что следует исходить из того, что групповой иск по смыслу введенных новелл является универсальным механизмом защиты. В статье показано, что имплементированный правовой механизм массового правосудия можно применять в любых делах, подведомственных судам общей юрисдикции по правилам гражданско-процессуального законодательства (за исключением дел особого производства). Авторы выявляют, что групповой иск будет актуален в потребительских, трудовых и социальных спорах, в спорах о защите окружающей среды, спорах, вытекающих из причинения вреда, спорах в сфере антимонопольного регулирования, в спорах между участниками рынка ценных бумаг. Выводы авторов основаны на том, что в иностранных юрисдикциях групповой иск наиболее распространен именно в перечисленных выше спорах. По мнению авторов, та модель группового иска, которая закреплена в гражданско-процессуальном законодательстве, в малой степени отличается от простого соучастия на истцовой стороне и значительной выгоды для участников группы не содержит. В рамках процессуального соучастия стороны вправе передать ведение своего дела одному из соистцов, который и будет являться dominus litis («хозяином спора»), что и происходит сейчас на практике. К недостаткам группового производства авторы относят установленный восьмимесячный срок рассмотрения дела, решение может в незначительной степени носить характер res judicata для лиц, которые не принимали участия в деле. Практическая значимость исследования определяется авторами в снижении нагрузки на судебную систему и как следствие повышение качества судебного разбирательства. Это позволит выделить также и социально-общественные формы повышения восприятия корпоративной социальной ответственности.*

Ключевые слова: коллективный иск, суд, предикация, рассмотрение, процедура.

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BASICS AND PROSPECTS OF INTRODUCING THE INSTITUTION OF CLASS (GROUP) ACTION IN THE REPUBLIC OF KAZAKHSTAN

Abstract. *The paper demonstrates that at the moment it is extremely difficult to predict in which branch of law will a class action find its most efficient application. The authors display that one should proceed from the fact that the class action within the meaning of the introduced innovations is a universal defense mechanism. The paper reveals that the subordinate courts of general jurisdiction can use the implemented legal mechanism of mass justice according to the rules of civil procedure legislation in any cases (except for cases of special proceedings). The authors reveal that the class action will be relevant in consumer, labor and social disputes, in disputes on environmental protection, disputes arising from harm, disputes in the field of antitrust regulation, in disputes between participants in the securities market. The authors' conclusions are based on the fact that in foreign jurisdictions a class action is most common among the above-listed disputes. According to the authors, the model of class action, which is enshrined in civil procedure legislation, differs from simple complicity on the plaintiff only to a small extent and does not contain significant benefits for the group members. Within the framework of procedural complicity, the parties have the right to transfer the conduct of their case to one of the co-plaintiffs, who will become the dominus litis ("master of the dispute"), which is exactly what happens in practice nowadays. The authors refer to the established eight-month deadline for the consideration of a case as a shortcoming of group proceedings; for persons who did not participate in the case, the decision may be of res judicata nature to a small extent. The practical significance of the study is determined by the authors in reducing the burden on the judicial system and, as a result, improving the quality of litigation. This will also allow to outline social forms of increasing perception of corporate social responsibility.*

Keywords: class action, court, predication, consideration, procedure.

INTRODUCTION

This paper covers the concept of a class action and evaluation of the prospects for the development of this institution in the legislation of the Republic of Kazakhstan. Within the framework of the study, international legal documents and recognized global standards regarding the concept of collective actions and collective (group)

claims for protecting consumer rights (UNCTAD; OECD; European Union directives), experience in regulating collective (group) actions in selected jurisdictions were studied. An analysis of Kazakhstani legislation on the use of collective remedies for violated consumer rights and the Kazakhstani practice of applying statutory mechanisms and the Kazakhstani experience of using institutions of complicity and protection of the rights of a group of persons recognized by consumers was also performed. An important international source of regulatory standards is the OECD Recommendation of the Council on Consumer Dispute Resolution and Redress of July 12, 2007[1]. They were adopted so that governments can create a legal framework that assists consumers in resolving and settling disputes with entrepreneurs. Such a legal basis should apply both to transactions concluded within the same jurisdiction and to cross-border transactions. This also applies to transactions within e-commerce, including transactions within the framework of conventional methods and forms of purchases.

These OECD Recommendations[2] were prepared at the very moment when increased attention was paid to dispute resolution and redress mechanisms in the EU countries, especially with regard to mechanisms protecting the collective interests of consumers. The Recommendations address current practical and legal barriers to the use of remedies in consumer protection cases. In particular, they emphasize that at the level of national legislation, governments are expected to provide consumers with mechanisms to act independently (as alternative dispute resolution and simplified court procedures for small claims) or collectively (as action initiated by the consumer on his own behalf and representing other consumers). The Recommendations[3] note that this legislation should also regulate claims of consumer organizations representing consumers, claims of state bodies for the protection of consumer rights, acting as representatives of consumers. Such government consumer protection bodies can receive or facilitate compensation for damages on behalf of consumers, allowing them to apply for court orders in civil and criminal proceedings and act as a representative of the party claiming damages. In the context of cross-border disputes, Recommendations call on OECD countries to increase awareness of (as well as access to) dispute resolution tools and redress mechanisms, including increase in the efficiency of compensation for losses incurred by consumers.

The concept of class action (representative action) originated in the United States. This term is defined as the method used when a large group of persons interested in a particular issue, through one or more entities that files a lawsuit (or a lawsuit can be filed against them) as a representative(s) of this class (group) without having each member of this class (group) join the lawsuit. The procedure for filing and considering

[1] OECD Recommendation of the Council on Consumer Dispute Resolution and Redress. (2007). Retrieved from http://www.oecd.org/internet/consumer/38960101.pdf.

[2] *Ibidem*, 2007.

[3] *Ibidem*, 2007.

such a claim, applicable in federal courts and in the majority of state courts, is provided for by procedural legislation[1].

Thus, both of the mentioned English terms mean the same thing, but reflect two important aspects characterizing the features of class action lawsuits. In particular, the concept of "class action" is based on the concept of "class", meaning in American law a group of persons, things, qualities or activities that have common features (signs) or attributes [1]. That is, this term reflects the fact that the action is filed in the interests of the relevant group (class) of persons. In turn, the concept of "representative action" is emphasized by the fact that the interests of the corresponding group (class) of persons are represented by the separate representative(s) of this group. It's not clear from the Black's Law Dictionary whether another person (not part of this stakeholder group) can act as a representative of this stakeholder group [or of each member of this group] [2].

In American law, procedural legislation establishes general requirements for filing and maintaining any class (group) action. These requirements include the following: (1) the number of persons making up the group (class) must be in such a quantity that it becomes impractical for them all to appear before the court, and (2) the representative(s) mentioned must to be such as to ensure adequate representation of all those persons. Furthermore, (3) the group (class) of interested parties should be definable, and (4) their common interest should be well defined in terms of legislation and facts affecting the interests of the represented individuals. An important aspect is that it is the court that must certify (confirm) the claim as being a collective (group) claim [2]. Evidently, the indicated authority of the court is extremely important to avoid conflict with the general provision of civil law on actions in the interests of others without a mandate, their legal significance and their consequences [3]. The concept of a class action as a lawsuit filed by an individual, a group of individuals or an organization, but necessarily on behalf of persons of a certain category (united in the corresponding category/group according to the criterion of equal interest subject to judicial protection), is inherent in most common law jurisdictions. But it is not a legal tradition of most European states [4]. This concept is relatively new to the law of modern European states.

In particular, the existence of a special category of property interest subject to judicial protection, which was called collective interest, was recognized in the European Union [5]. This concept is broader than the concept of "individual interest", which must be protected through an individual lawsuit [6]. But it is narrower than the concept of "general interest" or "public interest" to be protected by special ways means of protecting public law and order. With that, upon adopting this concept in European countries, the term "representative action" was more favored rather than "class action" [7], proceeding from the fact that it is not as much about being able to go to court for protection of collective interest as about a clear understanding of who is entitled to file

[1] Federal Rules of Civil Procedure. Rule 23. Class Actions. (2018). Retrieved from https://www.law.cornell.edu/rules/frcp/rule_23.

such an action: in some jurisdictions this is provided to public groups, in others – this responsibility is assigned to a state body, and somewhere both are entitled to file such an action [8].

At the same time, regulation of the issue of who is entitled to be the representative of such a collective interest does not detract from the importance of identifying the corresponding group (class) of persons in whose interests such a representative is entitled to file a lawsuit. Furthermore, factoring in the fact that the right to claim and compensation for damages should be provided for in the substantive law and attributed to a specific subject there as an identifying term, it appears more appropriate to use the term "class action" and, among other things, to determine who has the right to file such actions. In addition, from the standpoint of the Russian language in the legal context, the concept of "representative action" may lead to ambiguity in its understanding. Based on the foregoing, it appears expedient, factoring in the predominant European approach ("class action"), to call such category of claims "group actions".

1. MATERIALS AND METHODS

The main method that conditioned the overall development of the study is the verification method, which determines what is primarily a compensation for damages in a class action, and what is the aspiration for public resonance. This is determined by the presence of mutually exclusive judicial acts that occur when the content of judicial acts is diametrically opposed. For example, decisions of different courts that recognize the ownership of the same object by different persons. It is clear that in such a case both decisions are discredited.

The contradiction of judicial acts may also be less noticeable, arising from their comparison and interpretation in the relationship (indirect contradiction). For example, one court recovered the debt for a separate period of validity of the contract, and another court refused to collect the debt for another period of validity of the same contract. In such case, it is necessary to investigate the motives of the adopted judicial acts. For example, if the judicial act of refusal is motivated by the passage of the limitation period, then there may not be a contradiction; if the "rejected" decision is motivated by the absence of a contract (its nullity, non-conclusion), then a contradiction can be apparent.

A method for investigating the integrity of a filed action is a method for finding contradictions. Legal inconsistency lies in opposing legal conclusions that are reached by different courts. Two competing judicial acts may, respectively, relate to the recognition of a right and the denial of a right, the existence of a duty and the absence of a duty, the guilt of a person and the innocence of a person, the existence of a legal relationship and the absence of a legal relationship. The actual contradiction follows from the meaning of the judicial acts and concerns the circumstances of the case. One court decision established the presence of certain circumstances, and another established the

absence of these circumstances. Legal and logical contradictions are interconnected in the same way as questions of law and fact are interconnected. A legal conclusion is made on the basis of established factual circumstances. It is logical that a contradiction in the circumstances will lead to a legal contradiction. An indirect contradiction can be so implicit that it is revealed only in the course the verification of a judicial act.

2. RESULTS AND DISCUSSION

2.1 Opt-in and opt-out models of joining the collective (group) actions

In Kazakhstan, there is currently a social demand for appropriate legislative regulation and the use of legal means to protect collective interests, that is, not only in the field of relations for the protection of consumer rights. In particular, it can be cases of compensation for harm caused to the life and health of individuals in connection with environmental pollution by industrial enterprises, including claims on the unlawful nature of the actions of state bodies, contractors and developers in connection with the creation of conditions that do not allow citizens to fully enjoy their constitutional right[1] to rest and leisure [9].

For example, there is information from the media on the intention of the residents of Temirtau to prepare and file actions in 2018 in connection with the massive damage to the health of citizens as a result of constant violations of ecological and environmental legislation by ArcelorMittal Temirtau [10]. There are also grounds for legal protection of the collective interests of citizens who suffered in connection with the night construction work in Astana in 2017 that interfered with the nightly rest of citizens of nearby houses and the inaction of law enforcement agencies [11]. On the whole, such unlawful activity of construction contractors and developers, which entails the impossibility of such a rest, detracts from the importance and effectiveness of national policy aimed at increasing the social responsibility of business in Kazakhstan.

2.2 The features of regulation of collective (group) actions in the territory of the European Union

In general, the concept of "class action" adopted in American law is perceived at the level of European Union directives and the legislation of developed Western European states [12]. However, in some jurisdictions the opt-out model of joining a class action is adopted, while in most other legal systems, the opt-in model of joining the model is applied [13]. It is also possible to choose a model by court order or even legislative regulation for mixed use following the example of Germany (where the opt-in model is used as the default rule, but plaintiffs who join in this model can withdraw from the class action before the end of the trial, including for the purpose

[1] Constitution of the Republic of Kazakhstan. (1995). Retrieved from https://www.akorda.kz/ru/official_documents/constitution.

of filing an independent action) [14]. Thus, in various developed legal orders of Western Europe, an individual experience in regulating the mechanisms of a collective (group) action has developed.

Currently, the European Commission has developed a draft new directive of the European Parliament and of the Council on class actions in consumer relations, providing for signs of a group of injured persons, thereby allowing the court to clearly identify the consumer group affected by the violation of the law should consumers be affected by the same practice and suffer comparable damage for a period of time or due to the acquisition of goods of inadequate quality[1]. This draft directive pays special attention to "qualified representatives" in class actions [15]. Such a representative should be an organization that (in the aggregate of features) is properly established according to the law of the state party, has a legitimate interest in complying with EU consumer protection legislation and has the status of a non-commercial organization, and its activities are not aimed at making profit.

It should be noted that, in general, in European jurisdictions, the rule on group actions is accepted to compensate only for actual losses incurred, consisting of real damage and lost profit [16]. There is also an example of application of a penalty in the Russian Federation paid by a manufacturer to a consumer in the event of refusal of voluntary compensation for losses and the award of such compensation by a court. At the same time, the United States has rules on multiple losses, as a result of which compensation increases sharply and there is a risk of bankruptcy of the defendant company.

European legislation pays particular attention to the out-of-court settlement of collective disputes by reaching an amicable settlement approved by the court (for example, in the Netherlands) [17].

2.3 Features of regulation of legal remedies for collective (group) interests and consumer rights in Kazakhstan

The legislation of the Republic of Kazakhstan provides for the possibility of protecting the rights of an unlimited (indefinite) circle of persons, including the grounds for the occurrence of procedural complicity, the conditions for its implementation and consequences. It is also possible to file an action in the interests of an indefinite number of people, however, such actions are possible only with the requirement to terminate illegal or other infringing practice (which is known as injunction relief in general legal systems), since, proceeding from the general provisions of civil law and civil procedure, stipulating the certainty of the subject and the content of the claim, a collective (i.e., group) action is not possible for damages to an indefinite

[1] Proposal for a directive of the European parliament and of the council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC. (2018). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0184.

number of persons (for example, Article 148[1] of the Civil Procedure Code and Article 350 of the Civil Code of the Republic of Kazakhstan[2]).

Kazakhstan law does not contain a general concept of "collective methods of protection" of civil rights or interests of a group of people and, accordingly, there is no clear (neither legislative nor doctrinal) classification of such methods, although some of these methods are regulated by legislation (for example, complicity, action in the interests of an indefinite number of persons, the resolution of labor disputes under collective labor contracts or acts of the employer and working conditions). Kazakhstan law does not regulate class actions at all as a collective way to protect property rights of a wide, albeit defined by subjects, circle of persons.

The legislation of the Republic of Kazakhstan provides for rules governing (allowing) the possibility of protecting rights by an unlimited (indefinite) scope of persons. Thus, according to the Civil Procedural Code of the Republic of Kazakhstan dated October 31, 2015 No. 377-V ZRK (hereinafter referred to as the Civil Procedural Code), state bodies within their jurisdiction, citizens and legal entities in the manner established by the Civil Procedural Code are entitled to apply to the court with a statement on the protection of violated or contested legitimate interests of an indefinite scope of persons. In addition, in accordance with the Civil Procedural Code, the prosecutor, pursuant to the legislation, has the right to file an action in court so as to restore violated rights and protect interests, in particular, of an unlimited scope of persons[3].

Apart from specially agreed ways to protect the interests of an indefinite scope of persons, the Civil Procedural Code contains general grounds for using the mechanism of procedural complicity. In particular, if several claims are brought against the same defendant, the court has the right to combine them into one proceeding if the subject or the reason of the dispute are related to the subject or the reason of the dispute of the case in the court proceedings, and the jurisdiction of such claims does not violate the jurisdiction of the case under consideration. With that, an action may be brought jointly by several plaintiffs against one or several defendants. Moreover, each of the plaintiffs or defendants in relation to the other side acts independently in the process. The parties may entrust the conduct of the case, respectively, to one of the co-plaintiffs or co-defendants on the basis of a power of attorney[4].

The participation of several plaintiffs or defendants is possible in cases where:

1) the subject of the dispute is the general rights and obligations of several plaintiffs or several defendants;

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[1] The Code of Civil Procedure of the Republic of Kazakhstan. (2015). Retrieved from https://online.zakon.kz/document/?doc_id=34329053#pos=2;-155.

[2] Civil Code of the Republic of Kazakhstan (General part). (1994). Retrieved from http://adilet.zan.kz/rus/docs/K940001000_.

[3] The Code of Civil Procedure of the Republic of Kazakhstan, op. cit.

[4] The Code of Civil Procedure of the Republic of Kazakhstan. (2015). Retrieved from https://online.zakon.kz/document/?doc_id=34329053#pos=2;-155.

2) the rights and obligations of several plaintiffs or several defendants have the same basis;

3) the subject of the dispute are the homogeneous (identical) rights and obligations of several plaintiffs or several defendants[1].

In this regard, it appears that the mechanism of complicity provided for by Kazakhstani legislation is not the collective action that is used in developed legal systems to protect consumer rights.

The Law on the Protection of Consumer Rights also provides for the possibility of protecting consumer rights in relation to an indefinite scope of persons. Thus, public associations of consumers, associations (unions) have, in particular, the right to sue in the interests of consumers, including in the interests of an indefinite scope of consumers[2].

Thus, Kazakhstani legislation provides an understanding of who the consumer is, defines their rights and obligations, guarantees protection of their interests (both independently and by contacting public associations of consumers, authorized state bodies and the court). At the same time, an analysis of provisions of Kazakhstani legislation does not provide a clear understanding of the mechanism for judicial resolution of disputes related to collective protection of consumer rights precisely through a collective (group) action, in connection with which the following can be distinguished as conclusions:

the absence of a general concept of a remedy for the collective interests of a scope of persons in Kazakhstan law;

accordingly, the absence of classification of such methods, although some of these methods are regulated by legislation (for example, complicity, actions in the interests of an indefinite scope of persons, resolution of labor disputes under collective labor contracts or acts of the employer and working conditions);

it is possible to file a claim in the interests of an indefinite scope of persons, but such claims are possible only with the requirement to terminate an illegal or other right infringing practice (injunction relief), since, proceeding from the general provisions of the civil process on the certainty of the claim, a class action on compensation for damage is not possible.

Thus, a collective (group) action, which allows to protect property rights, albeit of a wide, but a certain circle of persons, is not regulated in Kazakhstani legislation.

2.4 Features of the practice of applying legal methods provided for by Kazakhstan law

Group actions are a type of mass claims, that is, those filed and considered in defense of equally violated (by one entity or group of related parties in the same way

[1] *Ibidem*, 2015.

[2] The Law of the Republic of Kazakhstan No. 274-IV "On Protection of Consumer Rights". (2010, May). Retrieved from https://online.zakon.kz/document/?doc_id=30661723.

with the same content of claims for compensation for property damage or other harm) rights of a large group of persons not otherwise connected. Class actions are a powerful mechanism used in civil society, allowing to protect the property rights of individuals as a weak party in the relevant legal relations. Using this mechanism also provides the rule of law and is a powerful tool for social justice. Group actions are not limited to consumer disputes, they are a way of judicial protection of rights in a number of public relations and in relation to a number of defendants, including the state. There is no universal model for using the class action mechanism; each jurisdiction implements it with its own specifics. In perceiving the concept of class actions, it is advisable to continue to adhere to the approach that the right to claim, as well as to compensation for damage, should be provided for by substantive law. However, since the obligation to consider claims rests with the courts, it must be implemented in accordance with very detailed rules of procedure [18].

The potential risk of losses for any of the models for calculating such losses may lead to bankruptcy of the respondent organization. Due to the fact that there are still state enterprises and state institutions in the Republic of Kazakhstan that render utilities and other services related to consumption, the obligation to pay the amount of compensation under a class action will be transferred to the owners of property of enterprises and institutions, which are the akimats and the government of the Republic of Kazakhstan. For the purpose of preserving budget funds, we recommend reorganizing such enterprises and institutions into legal entities of public law [19–21].

Regulation of the grounds and consequences of satisfaction should be reasonable so as not to entail fatal consequences for the business. It is known that in the USA, factoring in the peculiarities of compensation for losses, the amount of compensation for class actions reaches unprecedentedly large amounts. For example, in 2005, WorldCom telecommunications company paid 6.2 billion dollars to its shareholders, who filed a false reporting action. In 2006, Nortel Networks, the leader in the supply of fiber-optic equipment for Internet providers, paid 2.4 billion dollars in a lawsuit against its investors for false financial statements [1]. In general, in the United States, about a third of companies against which class action suits are filed go bankrupt. Also, one cannot ignore the world-famous downfall of the asbestos industry in the USA, which was charged with hiding information about the dangers of asbestos [22].

US experience suggests that class action can completely ruin once-successful companies. On the other hand, the threat of bankruptcy after payments in a class action lawsuit may increase the level of companies' good faith and responsible conduct of their business [23]. In view of the growing negative effect from satisfying class actions, in 2005 the United States introduced the Law on justice in class actions[1], according to

[1] 28 U. S. Code § 1332.Diversity of citizenship; amount in controversy; costs. (2005). Retrieved from https://www.law.cornell.edu/uscode/text/28/1332.

which class actions and attorney fees shall be subject to closer scrutiny. Despite attempts by federal and state courts to limit class actions, some industries are constantly facing increased pressure from such actions. The most sued groups are consumer-related industries such as retail, automotive, insurance, pharmaceuticals, and financial services [24]. It is worth paying special attention to the fact that in the Republic of Kazakhstan many consumer sectors (gas, water, electricity, etc.) are represented by state organizations. If class actions are satisfied, even those demanding only direct losses to such organizations (and not multiple as in the USA), in the absence of funds, payments will have to be made from republican or local budgets in the manner of subsidiary liability [25]. Thus, as an effective solution to increase the responsibility of such companies for their activities and reduce the conditions for the use of collective consumer protection, it appears advisable to transform such organizations into legal entities of public law, as we recommended in the relevant publications [19-21]. In particular, this will allow to limit as much as possible the responsibility of local and republican budgets from reimbursement of large compensations for collective claims.

We shall separately mention the possibility of filing class actions against a group of defendants. Group actions against a large group of defendants shall be brought against a large group of defendants, united on the basis of an unlawful act and the existence of a causal link between the actions of the defendants and the loss or damage to the health of one or more plaintiffs [9]. It is also recommended to provide a substantive basis and create appropriate procedural rules for filing and considering class actions, including those filed in the interests of a wide range of consumers to receive compensation for losses incurred as a result of contractual relations between such consumers and business entities that are their counterparties under these agreements. In turn, the creation of consumer compensation mechanisms through class action is recommended by UNCTAD and OECD. To create cost-effective and efficient ways of compensation for property damage for consumers in accordance with the OECD recommendations[1] the possibilities of procedural complicity and filing lawsuits for the benefit of an indefinite scope of people, which exist in Kazakhstan's legislation are insufficient. Class action mechanism is the sought means.

Regarding the use of class actions to protect consumers' property rights, factoring in the public interest and legitimate interests of entrepreneurs, it is necessary, as recommended by the OECD[2], that upon regulating issues of compensation for economic harm in transactions between consumers and business, consumers should be limited in their ability to abuse their rights and use the possibility of filing group claims in the absence of property damage. We proceed from the generally accepted approach that the procedural rules for the protection of property interests should be based on substantive law.

[1] OECD Recommendation of the Council on Consumer Dispute Resolution and Redress. (2007). Retrieved from http://www.oecd.org/internet/consumer/38960101.pdf.

[2] *Ibidem*, 2007.

Therefore, appropriate amendments are also proposed in the Civil Code of the Republic of Kazakhstan. However, we limited ourselves only to this aspect, although for a more complete protection of consumers' rights, a much larger scope of new provisions should be introduced in the Civil Code [1] (for example, on consumer contracts and legislative mechanisms for preventing violation of consumer rights).

By introducing the concept of class actions in the legislation of the Republic of Kazakhstan, it will be possible to perform the OECD recommendation[2] that national governments should provide effective mechanisms for redressing damage through collective action [25].

Due to this implementation, rapprochement with the law of the European Union and the legislation of its member states will be ensured. The experience of the European Union in this matter is especially invaluable. Over the past 30 years, the most balanced decisions have been worked out therein on how to perceive the institution of class actions in the national civil law system, which arose and developed in common law countries so as to best ensure both the protection of collective consumer rights and the implementation of public interest, and also supporting and protecting the interests of private enterprise.

Furthermore, by introducing the institutution of class actions to protect consumer rights, an important step will be achieved in implementing the Treaty on the Eurasian Economic Union[3], which provides for the implementation of an agreed consumer protection policy by all member states, aimed at creating equal conditions for citizens of member states to protect their interests from dishonest activities of business entities. This is especially important in the context that, in accordance with the agreement, citizens of the EEU Member States can apply on an equal basis to state and public organizations for the protection of consumer rights, ... including courts and (or) perform other procedural actions on the same conditions as and citizens of other member states[4].

CONCLUSIONS

The idea of collective (group) claims is based on the classical institution of complicity, since in both cases the protection of the rights of several persons is carried out in the same process. When the number of persons in a similar legal and factual situation, who consider their rights violated and in need of judicial protection, exceeds the possibility of involving all these persons in one trial, there is an objective need to consolidate such persons and develop a unified legal position that the court must be represented by a representative elected by the group and authorized to conduct the

[1] Civil Code of the Republic of Kazakhstan (Special Part). (1999). Retrieved from https://online.zakon.kz/document/?doc_id=1013880.

[2] OECD Recommendation of the Council on Consumer Dispute Resolution and Redress. (2007). Retrieved from http://www.oecd.org/internet/consumer/38960101.pdf.

[3] Eurasian Economic Union. (2014). Retrieved from http://docs.cntd.ru/document/420205962.

[4] The Law of the Republic of Kazakhstan No. 413-IV "On State Property". (2011, March). Retrieved from https://online.zakon.kz/m/Document/?doc_id=30947363.

case. In such a situation, it is advisable that persons who have a material interest in the outcome of the case indirectly participate in the process, controlling the integrity of the actions of their representative and receive a personified positive result upon satisfaction of the claim.

In modern procedural science, such forms of joint participation as procedural complicity and the procedure of a collective (group) action are designated as forms of procedural multiplicity. With this in mind, class actions cannot be considered in isolation from the procedural institution of complicity. Class actions are filed at the request of consumers. For example, if this refers to an airline that violates the rights of consumers for some reason, then five or more people can approach this airline, for example, for compensation for non-pecuniary damage for violation of their rights. After that, information about the case is published, and anyone who wants to join this case, does so. Anyone who does not want – does not join, but this does not have much significance, because the court decision will apply to them as well. Repeated proof of the circumstances that will be set out in the court decision will no longer be necessary, since it will be of fundamental importance to the remaining participants, who did not even join the action. It will be enough to take the court decision, go to court and receive compensation almost automatically if it was discussed in an action filed earlier.

A person can choose a specific method of protection in business individually. Of course, the method of protection is related to the facts that are established in a particular case. Therefore, if the requirements and circumstances are formulated in such a way that it is possible, for example, only to recover some forfeit, then in such case it will not be possible to replace the goods or something else. Such claims will work quite effectively in relation to food producers, household goods, car manufacturers, airlines. Case in point would be the case of one well-known automobile manufacturer. The cars of this company used to have a structural defect in the steering. If at that time such a law existed and there was the possibility of class actions, then it would be possible for everyone to unite and subsequently not having to prove to everyone by examinations that the car was broken.

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Suggested Citation: Karagussov, F. S., Bondarev, A., & Pak, E. (2019). Basics and prospects of introducing the institution of class (group) action in the Republic of Kazakhstan. *Journal of the National Academy of Legal Sciences of Ukraine,* 26(4), 73–88.

Submitted: 28/05/2019
Revised: 27/10/2019
Accepted: 29/11/2019

УДК 343.131
DOI: 10.31359/1993-0909-2019-26-4-89

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ЗАСТОСУВАННЯ НАЛЕЖНОЇ ПРАВОВОЇ ПРОЦЕДУРИ ЯК ЗАВДАННЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ: ДО ПИТАННЯ ПРО СУТНІСТЬ ТА ПРАКТИЧНЕ ЗНАЧЕННЯ

Анотація. *Актуальність дослідження полягає у тому, що концепт належної правової процедури хоча і є одним із найзагальніших і водночас фундаментальним явищем будь-якої демократичної правової держави сучасності, проте для правової системи України він є доволі новітнім та недостатньо дослідженим. Метою дослідження є з'ясування сутності та змісту застосування належної правової процедури як завдання кримінального провадження. Методологічну базу дослідження склали загальнонаукові та спеціальні методи, а саме діалектичний, герменевтичний, телеологічний, логічний, історичний, статистичний, формально-юридичний та порівняльно-правовий методи. Автором розглянуто генезис концепту «належної правової процедури», зокрема в правовій системі Англії та Сполучених Штатах Америки, а також на рівні чинних міжнародних договорів. Проаналізовано поняття «належна правова процедура», виведено авторське визначення, за яким це такий порядок здійснення юридично значущих дій, який втілює на практиці верховенство права шляхом застосування до кожної особи тих норм права, що цілком відповідають усім важливим об'єктивно існуючим обставинам та дозволяють недвозначно та заздалегідь спрогнозувати таке застосування і його результати. Надано короткий огляд нормативних положень, що складають зміст належної правової процедури. Визначено, що сутність належної правової процедури пов'язана із забезпеченням сталості суспільного договору. Належна правова процедура складає основну гарантію недопущення свавілля влади, протиправного примусу та тиску з боку останньої на населення держави. Проаналізовано відмінність «застосування належної правової процедури» від «забезпечення правильного застосування закону» як завдань кримінального процесу в різні історичні періоди. Запропоновано відносити застосування належної правової процедури до завдань-гарантій, яке спрямоване на лімітацію генерального завдання – забезпечення швидкого, повного та неупередженого розслідування і судового розгляду. Охарактеризовано значення застосування належної правової процедури у кримінальному провадженні, зокрема, при існуванні прогалин чи колізій норм права. Визначено, що Верховна Рада України, Конституційний Суд України, Європейський суд з прав людини, Верховний Суд є інституціями, що формалізують зміст належної правової процедури. Результати дослідження можуть використовуватись як у практичній діяльності задля забезпечення фактичної реалізації застосування належної правової процедури, так і в науково-навчальній діяльності.*

Ключові слова: кримінально-процесуальний закон, due process, правильне застосування закону, запобіжник протиправності, кримінальна процесуальна форма.

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DUE PROCESS IN CODE ENFORCEMENT AS CRIMINAL PROCEDURAL TASK: TO THE ISSUE ON ESSENCE AND PRACTICAL USE

Abstract. *The relevance of the study is that the concept of due process, although it is one of the most general and at the same time fundamental phenomena of any democratic state of law of the present, however, for the legal system of Ukraine, it is quite recent and under-researched. The aim of the study is to ascertain the essence and content of the application of due process as a task of criminal proceedings. The methodological basis of the research was general scientific and special methods, namely dialectical, hermeneutic, teleological, logical, historical, statistical, formal legal and comparative legal methods. The author examined the genesis of the concept of "due process", in particular in the legal system of England and the United States of America, as well as at the level of current international treaties. The concept of "due process" was analysed, the author's definition was derived, according to which this is an order of implementation of legally significant actions, which embodies in practice the rule of law by applying to each person those norms of law that completely correspond to all important objectively existing circumstances and allow and predict in advance such application and its results. A brief overview of the regulatory provisions that make up the content of due process was provided. It was determined that the essence of due process is related to ensuring the sustainability of the social contract. Due process of law is the basic guarantee of preventing the arbitrariness of power, unlawful coercion and pressure on the population of the state. The difference between the "application of due process" and "ensuring the correct application of the law" as a task of criminal proceedings in different historical periods was analysed. It was proposed to attribute the application of due process to assurance tasks, which is aimed at limiting the general task – to ensure prompt, complete and impartial investigation and trial. The importance of applying due process in criminal proceedings, in particular, when there were gaps or conflicts of law, was characterised. It was determined that the Verkhovna Rada of Ukraine, the Constitutional Court of Ukraine, the European Court of Human Rights, and the Supreme Court are institutions are the bodies, which formalise the content of due process. The results of the study can be used both in practical activities to ensure the effective implementation of due process of law and in scientific and educational activities.*

Keywords: criminal procedural law, due process, correct application of the law, fuse of wrongdoing, criminal procedural form.

INTRODUCTION

Due process of law is a procedure for the implementation of legally significant actions that the rule of law embodies by applying to each person those rules of law that are fully consistent with all important objectively existing circumstances and allow for an unambiguous and advance prediction of such application and its results. The concept of due process originated in England and the due process ("the due Process

of the Law") was first used in King Edward Palantagenet's 1354 Statute of Liberty[1]. Due process of law has also transposed from the common law into the legal system of the United States (amendments 5 and 14 to the Constitution of the United States of America[2]). The key provisions of due process are embodied in the International Covenant on Civil and Political Rights of 1966[3] and the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[4].

Novelties of criminal procedural law often do not fully comply with the previously established system of the relevant field of law, sometimes the latest changes directly contradict previous amendments, and in some cases, provisions that directly and unambiguously contradict the imperative norms of the Constitution of Ukraine[5] come into force [1]. The non-systematic approach of the legislator to the regulation of criminal proceedings was manifested, for example, in changing the procedure for involving an expert in criminal proceedings with a subsequent (*in 2 years*) return to the previous state. It is also significant that, from December 2017 to the present, four provisions of the Criminal Procedure Code of Ukraine[6] (*hereinafter referred to as the CPC*) have been declared unconstitutional by the Constitutional Court of Ukraine, two of which (*concerning the non-alternative determination of a precaution in the form of detention in relation to certain serious and particularly serious crimes and the granting of pre-trial investigation authority to the State Criminal Enforcement Service of Ukraine*) were introduced relatively recently (in 2014 and 2016, respectively). That is, statistically every tenth decision of the Constitutional Court of Ukraine for the period from 2017 was one that declared the provisions of the CPC[7] unconstitutional (one decision out of three in 2017, one out of 13 in 2018 and two out of 16 in 2019) [2].

At the same time, the institutional component of the criminal process is subjected to repeated purification, filtration and alteration (*the staffing of the Judicial Corps, the Prosecutor's Office and the pre-trial investigation bodies, their structures*), the effectiveness of which is to be evaluated. Against this background, the issue of applying the due procedure to every participant in criminal proceedings is never more urgent. This is the assurance task referred to in Article 2 of the CPC[8]. The disclosure of the content

[1] Liberty of Subject. (1354). Retrieved from http://www.legislation.gov.uk/aep/Edw3/28/3.

[2] Constitution of the United States. (1787). Retrieved from https://www.senate.gov/civics/constitution_item/constitution.htm.

[3] The International Covenant on Civil and Political Rights. (1966). Retrieved from http://zakon.rada.gov.ua/laws/show/995_043/.

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from http://zakon3.rada.gov.ua/laws/show/995_004.

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

[6] Criminal Procedural Code of Ukraine. (2012, April). Retrieved from http://zakon.rada.gov.ua/laws/show/4651-17.

[7] Criminal Procedural Code of Ukraine. (2012, April). Retrieved from http://zakon.rada.gov.ua/laws/show/4651-17.

[8] *Ibidem*, 2012.

and legal nature of the application of due process will not only enhance the understanding of nature of the criminal process through a teleological (targeted) approach, but will also be useful for drafters and lawmakers.

With regard to the state of development, it should be noted that the topic is underdeveloped in the national context; since the adoption of the current edition of Art. 2 of the CPC[1], only some attempts were made to investigate due process in criminal proceedings, namely: by V. V. Gorodovenko [3], S. O. Kasapoglu [4], O. A. Panasiuk [5], M. V. Savchyn [6], V. M. Trofymenko [7] and others. At the same time, the concept of due process was mentioned in the research of Ukrainian scholars in the fields of theory of law, constitutional law, civil process, international law, etc., namely: A. A. Andreichenko [8; 9], S. P. Pogrebnyak [10], N. Yu. Sakara [11], S. V. Shevchuk [12] and others.

Therefore, the concept of due process, although one of the most common and at the same time fundamental to any democratic rule of law of the present, is, for the Ukrainian legal system, rather recent and under-researched, particularly in the science of criminal law.

The aim of the study is to explain the essence and content of the application of due process as a task for criminal proceedings. The tasks are to generalise the use of the concept of due process in non-national legal systems (*in the legal systems of England, the United States of America, as well as in international law, in particular in international human rights law*); to analyse the concept of due process; to compare the analogues of the analysed problem of criminal proceedings with similar ones in the previous editions of the criminal procedural law, in particular with the task of the correct application of the law; to clear up the place of application of due process in the system of criminal proceedings; to determine the importance of applying due process as a task for criminal proceedings.

1. MATERIALS AND METHODS

The methodological basis of the research was general scientific and special methods, namely dialectical, hermeneutic, teleological, logical, historical, statistical, formal legal and comparative legal methods. The dialectical method was the basis for the work; it allowed the author to consider the due process of law as the abstract, while proceeding to study the specific manifestations of such; to assume that legal reality is in constant development characterised by the unity and struggle of opposites and the transition of quantitative changes into qualitative ones; to make the transition from simple (definition of legal procedure and due process) to complex (concept of due process).

The author, using the limited use of the hermeneutical approach in determining the nature of due process, analysed the textual consolidation of this phenomenon in the Ukrainian language – "due process" and attempted to interpret the literal understanding

[1] *Ibidem*, 2012.

of the relevant English-speaking concept. Also, the hermeneutic method was manifested in the attempt to grasp the system of criminal proceedings and to identify the guarantees.

The teleological (target) method in the work was used in the analysis of approaches to the content of the rules of law with regard to the "legislator", i.e. the creator of the relevant rules (both in the past, including the Soviet and present). At the same time, the analysis of the norm-problems (Article 2 of the CPC[1]) is extremely important, since the latter serve as the basis for the application of the teleological approach by the law-enforcers in interpreting all other norms of the relevant branch of law.

The logical method was to resort to methods of analysis and synthesis: thus, in constructing the notion of due process of analysis, both the lexical component of the concept of due process in the Ukrainian language and scientific doctrinal texts and national and foreign primary sources that mentioned due process were subjected; the synthesis allowed to propose the author's determination of due process and to formulate conclusions and follow up causation; the scientific texts of Ukrainian scientists were analysed for their approaches to understanding the due process of law, as well as the normative regulation of criminal justice tasks in various editions of the procedural law; reception of induction allowed to distinguish perspective directions of positive influence of due process in practice: after having analysed various problems of enforcement of the rules of criminal procedural law in Ukraine by induction, it was determined that the concept of due process can be an effective means of overcoming existing contradictions.

Applying the historical method, the author gave a brief description of the chronology of formation of the concept of due process. To this end, some primary sources were addressed, namely the Grand Charter of Liberties of 1215[2], the Statute of Liberty of the Subjects of 1354[3], the French Declaration of Human and National Rights of 1789[4], Amendment 5 of 1791 and Amendment 14 of 1868 to the United States Constitution of 1787[5], the Code of Criminal Procedure of the Ukrainian Socialist Soviet Republic of 1927[6], and the Code of Criminal Procedure of the Ukrainian Soviet Socialist Republic of 1960[7]. This made it possible to trace the genesis of the due legal procedure from the beginning of its inception in the 13th century and to the present time in order to know the essence of this phenomenon, the stages of its formation.

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[1] *Ibidem*, 2012.

[2] Magna Carta. (1215). Retrieved from http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents.

[3] Liberty of Subject. (1354). Retrieved from http://www.legislation.gov.uk/aep/Edw3/28/3.

[4] Déclaration des Droits de l'Homme et du Citoyen. (1789). Retrieved from https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789.

[5] Constitution of the United States. (1787). Retrieved from https://www.senate.gov/civics/constitution_item/constitution.htm.

[6] Code of Criminal Procedure of the Ukrainian Socialist Soviet Republic. (1927, October). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP270014.html.

[7] Code of Criminal Procedure of Ukraine: from Article 1 to Article 93-1. (1960, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1001-05

The author used the statistical method to analyse the quantitative indicators of the activity of the Constitutional Court of Ukraine in establishing the proportion of decisions which have been declared unconstitutional by some provisions of the CPC[1] in respect of all decisions of this Court during the last three years. This made it possible to identify trends in the work of the body of constitutional jurisdiction, as well as certain correlations about the quality of the laws that amend the CPC[2] in present time.

The formal legal method was used in determining the place of application of due process in the system of criminal proceedings, the disclosure of the content of due process in criminal proceedings, which allowed to trace the link between the form of the phenomenon (the text of Article 2 of the CPC[3]) and its content; on the basis of legal techniques, with the assistance of logical techniques, the internal structure of the legislative fixing of the tasks of criminal proceedings was elaborated and the place of such a task as the application of the due procedure to each participant of criminal proceedings was identified. The formal legal method also played a key role in the study in identifying a number of practical problems of legal regulation or law enforcement, and provided an opportunity to propose possible solutions using the concept of due process. With this method, a systematic generalisation of institutions that formalise the substance of due process in the context of criminal proceedings was carried out.

The use of the comparative legal method in the work allowed to carry out a diachronic binary comparison in the formulation by the legislator of the tasks of criminal proceedings in different criminal procedural codes, namely, a comparison of the normative content of the tasks of criminal proceedings enshrined in Art. 2 of the CPC[4] of 2012, and the tasks of criminal justice enshrined in the Criminal Procedure Code of 1960[5] in the context of the concept of due process. Using this method, it was concluded that the task of correct law applying was the most similar in content to the task of applying of due process of law. At the same time, particular attention was paid to the significant differences that exist between them.

2. RESULTS AND DISCUSSION

2.1 The concept of "due process" in non-national legal systems

In the scientific literature, there is the established idea that for the first time the concept of "due process" originated in England [8; 9; 12]. Its formal embodiment is Article 39 of the Grand Charter of Liberties[6], according to which "No free man shall

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

[2] *Ibidem*, 2012.

[3] *Ibidem*, 2012.

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

[5] Code of Criminal Procedure of Ukraine: from Article 1 to Article 93-1. (1960, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1001-05.

[6] Magna Carta. (1215). Retrieved from http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents.

be arrested, or imprisoned, or deprived of his property, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, unless by legal judgment of his peers, or by the law of the land (*"by the law of the land"*)" [13]. According to V. N. Safonov, judicial review "by the law of the country" allowed free people to defend their rights and freedoms in the royal courts using the necessary procedures [14].

According to clause 3 of the Statute of the twenty-eighth year of the reign of Edward III of the "Liberty of the Subjects" of 1354[1] it was found that "no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law (*"being brought in Answer by due Process of the Law"*)". In medieval England, the terms "by the law of the land" and "due process of law" were regarded as synonymous [14].

For the first time the issue of consideration of due process arose in English law and not only in procedural but also in substantive aspects [15;16]. Thus Volodimir Safonov gives the views of the famous English lawyer E. Kock, who stated that in a substantive legal sense the proper legal procedure is connected with the right to livelihood, the right to free economic competition, to the free exchange of goods; in procedural terms, Kock linked the rule of due process to a jury, or more precisely, to the right to indictment by a grand jury and to hear by a petty jury [14].

S. V. Shevchuk identifies two aspects of substantive due process that are specific to the law of the Anglo-Saxon countries: first, it is an identification with the concept of the rule of law, including legal requirements for state legal acts. That is, the authorities must act not only in accordance with the law, but also in accordance with the criteria of natural law, morality, reasonableness, justice, as well as the general principles of law established by the bodies of justice. Second, another aspect of due process is seen as a proportionate remedy for the protection of constitutional rights and freedoms – state acts must be legitimate, optimal, effective, and the means they envisage should be proportionate to the pursued goals and minimally restrict the guaranteed constitutional rights and of freedom [12].

The foregoing understanding of the concept of "due process" is also characteristic of United States federal law. Under U. S. According to the amendment 5 of 1791[2], no person should be compelled to testify against himself or be deprived of his life, liberty, or property without due process of law, and pursuant to paragraph 1 of amendment 14 of 1868 no state shall deprive any person of life, liberty or property without due process of law. V. N. Safonov states that the prohibition contained in amendment 5 is addressed to the federal government, and the relevant provision of the 14 amendment is interpreted as a prohibition for states [14].

[1] Liberty of Subject. (1354). Retrieved from http://www.legislation.gov.uk/aep/Edw3/28/3.

[2] Constitution of the United States. (1787). Retrieved from https://www.senate.gov/civics/constitution_item/constitution.htm.

Most lawyers agree that if to consider the concept of due process as common law, it is only a procedural understanding to limit ourselves by mistake. Richard Fallon points out that "substantive due process reflects one simple but far-reaching principle: the state cannot be arbitrary. This intuitive idea is not mystical: public officials must protect public rather than self-interest under the influence of individual motivation for their actions, so there must be a rational or reasonable relationship between state goals and the means to achieve them" [17].

V. M. Trofimenko points out that the systematic analysis of the concept of "due process" shows that in its substantive content and functional purpose it approaches the category of "criminal procedural form" [18]. It is distinctive that the concept of due process has not only procedural (the existence of guarantees of human rights in criminal proceedings) but also the material aspect (ensuring the quality of the law governing relevant social relations) [7].

In one form or another, the principles and norms that make up due process have been characteristic of most states of today. S. V. Shevchuk notes that the first charters of free cities in Italy and other European countries were directed against, predominantly, royal arbitrariness, in particular against illegal detention indefinitely [12]. This is how a standard has emerged today that clearly limits the length of detention without the sanction of a competent impartial body (first used in the Habeas Corpus Act of 1679 in the UK). According to Article 7 of the French Declaration of Human and National Rights[1], "no person may be charged, arrested or imprisoned in any other way than in the cases provided for by law and in the forms prescribed by it".

Due to the spread of the relevant concept of due process, it has also been reflected in regulations of international law [19]. The norms that give birth to the principle of due process are primarily contained in the International Covenant on Civil and Political Rights of 1966[2]: p. 1-4 Art. 9, Art. 14, 15. At the pan-European regulatory level, due process of law is embodied in Art. 5, 6, 7, 8, 9, 10, 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[3] – each of them, in addition to the positive obligation of the state, contains a reference to the "procedure" or other circumstances which must be established by law.

The norms that make up some of the content of the concept of "due process" (habeas corpus, ne bis in idem, nullum crimen sinae lege, etc.) have long been characteristic of national forms of law – today they are all constitutional norms [20].

In Anglo-American legal doctrine, "due process" has the character of a systemic category. For example, in a fundamental article, "Two Criminal Procedure Models"

[1] Déclaration des Droits de l'Homme et du Citoyen. (1789). Retrieved from https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789.

[2] The International Covenant on Civil and Political Rights. (1966). Retrieved from http://zakon.rada.gov.ua/laws/show/995_043/.

[3] European Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from http://zakon3.rada.gov.ua/laws/show/995_004.

[21], Herbert Packer contrasts the first model – the crime control model (in the other interpretation, the crime control model) with the proper due process model. Moreover, the notion of "due process" is a novelty in Ukrainian criminal procedural legislation.

2.2 Analysis of the notion of "due process"

The notion of "due process" is mentioned in the current version of the CPC[1] only once – in Art. 2. Paragraph 1 of Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2] mentions the "procedure established by law" ("in accordance with a procedure prescribed by law") in the context of ensuring the right to liberty and security of person. However, no other act of criminal procedural legislation in Ukraine mentions "due process of law".

To some extent, this state of affairs is understandable, since due process of law is a common law concept. Some constitutionalist scholars have attempted to determine due process. According to S. V. Shevchuk proper legal procedure is "the application of law by the bodies of justice (courts) in accordance with the established legal principles and procedures for guaranteeing and protection of constitutional and individual human and citizen rights, including legal entity" [12]. At the same time, the notion of "due process" is rather unexplored in the science of criminal procedural law.

The analysis of the concept should begin with a linguistic interpretation. In Ukrainian, the phrase "due process of law" literally sounds like "due legal procedure". Therefore, it consists of three words: the generic "procedure" and two adjectives "due" and "legal". A procedure is an officially established or customary order for the implementation, execution or exercise of anything; this is a series of actions, the course of doing anything [22]. Legal – one that relates to law. Due – necessary, needed or appropriate; in the sense of the adverb "due" – as it should be [23]. Apparently, linguistic methods alone cannot delineate the concept. Therefore, each of the following elements should be considered using a special legal interpretation.

V. P. Belyaev and V. V. Sorokin understand the procedure as an order (sequence) of actions enshrined in the rules of law to achieve the goals of the legal process [24]. However, there are also positions to identify the concepts of "procedure" and "process". V. M. Trofimenko, generalising various approaches to understanding the concept of "procedure", concluded that the more fruitful approach to understanding the concept of "procedure" is the one based on its formal side, because it is, in fact, an external, provided by law, a form of legal activity, whereas the activity itself constitutes the internal content of the process; unlike the procedure, both the process and the single procedural action or proceedings have at their core certain procedural actions or a combination of them, which proceed solely in the form of relevant legal relationships [7].

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

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from http://zakon3.rada.gov.ua/laws/show/995_004.

In author's opinion, the use in the analysed construct of the word "procedure" clearly indicates the following circumstances: first of all, it is about compliance with formalised rules, the appropriate stage, methodology, the order of action; secondly, the procedure should be seen not in the narrow sense (*only as procedures carried out in the framework of criminal proceedings*) but also in the broad: procedures of pre-procedural actions (*inspections or audits, which obtain relevant materials or acts, etc.*), procedure of adoption or legalisation of a relevant legal act, an act of individual action (*legislative novelties, appointment to the administrative position of a person authorized to take procedurally significant actions*).

However, the "procedure" is not limited to procedural rules or rules. To accomplish the tasks of criminal proceedings, it is tantamount to provide both the form of the relevant stages of the process and their essential (material) component. Procedural rules that impose duties on authorised officials to maintain impartiality, to examine evidence directly, to evaluate them in accordance with internal beliefs, etc. – by their very nature, cannot be properly implemented unless law enforcer in his or her own mind incorporates material with the process and synthesise them.

The adjective "due" in the characterisation of the procedure, in author's view, is responsible for accuracy, infallibility and uniformity in the process of enforcement – a requirement for a lasting form. The "legal" procedure is a reference to the essential content.

"Legal" procedure is a procedure that fully complies with and establishes in practice the principle of the rule of law. It is worth noting that this is not a law procedure, procedure occurred according to the law, but a legal procedure. In this respect, the linguistically Anglo-American "due process of law" principle less reflects this important substantive emphasis because it literally translates "in accordance with a process established by law" (continental law has historically had less potential for transformation, replenishing with new meaning of old constructs, which, by contrast, succeeds in the common law system, with its precedent and the role of the court, which in certain circumstances may act as a generator and translator of law). In this context, it is necessary to oppose the legal procedure to formal legality, which, if the laws of law do not comply, can lead to catastrophic consequences (for example, the laws of the Nazi regime). That is, a legal procedure is first and foremost a fair (morally and conscientiously justified) and proportionate (in accordance with the principle of proportionality) procedure.

A "due" procedure is, firstly, a procedure that must be applied to a person in a certain status. Secondly, due means "what is to be", that is, such a procedure must be permanent, uniform, and therefore embody the principle of legal certainty.

Synthesising what has been researched in the analysis, the author proposes the following definition: due process (due legal procedure in Ukrainian language) is an order

of legal action that embodies the rule of law in practice by applying to each person those rules of law that fully meet all important objectively existing circumstances and allow for unambiguous circumstances and predict in advance such application and its results.

2.3 The essence of due process

Philosophy understands essence as the main, defining in the subject, which is caused by deep connections and tendencies of development and is learned at the level of theoretical thinking [25].

The direct theoretical and legal in-depth substance of due process is to ensure the sustainability of the social contract. It is the proper legal procedure that constitutes the basic guarantee against the arbitrariness of power, unlawful coercion and pressure from the latter on the population of the state.

The stated purpose is the specific, clearly defined procedures and constitutions in the Constitution[1] and laws that constitute the content of due process [26–28]. These are the procedures of formation of power, the procedures for the implementation of direct people's will, the procedures for staffing state bodies, procedures for the introduction of special legal regimes of martial law or state of emergency, legislative procedure, etc. With regard to the fundamental personal rights and freedoms of persons, such rights may legitimately be restricted or temporarily deprived, mainly only during and after the consequences of criminal proceedings. The Constitution of Ukraine clearly defines a number of criminal procedural procedures (See: Part 2, 3, 4, 5, 6 Article 29, Part 2, 3 Article 30, Article 31, Part 2 Article 55 1, Article 59, Articles 62, 63 of the Basic Law of Ukraine)[2]. Rules such as nullum crimen sinae lege (Part 2 of Article 58) and ne bis in idem (Part 1 of Article 61) form the basis for due process in criminal proceedings [29; 30]. The procedure of application and enforcement of all the above norms is detailed in the CPC[3] and other acts of criminal procedural legislation of Ukraine.

Also, the basis of due process in the domestic legal system is not only the provisions of Art. 1, Part 1, Art. 8 of the Constitution of Ukraine[4], but first and foremost part 2 of Art. 19 of the Basic Law, "State authorities and local self-government bodies, their officials are obliged to act only on the basis, within the powers and in the manner provided by the Constitution and laws of Ukraine". At the same time, there is a special rule of Part 1 of Art. 129 of the Basic Law of Ukraine for a judge, according to which a judge must be guided by the rule of law.

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

[2] *Ibidem*, 1996.

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

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

2.4 Similar concepts of due process under previous criminal procedural law

According to Article 2 of the CPC[1], one of the tasks of criminal proceedings is to ensure prompt, complete and impartial investigation and trial so that each party to criminal proceedings is subject to due process of law. The corresponding task was formulated in the text of the new CPC of Ukraine in 2012[2]. Prior to that, national criminal procedural legislation had not known the concept of "due process" and, of course, had not identified it as a task. But by analysing previous versions of criminal procedural law, it is possible to find similar concepts.

The Criminal Procedure Code of the Ukrainian SSR in 1927[3] did not single out either the aim or tasks of the criminal process. The 1960 Code[4] already contained Article 2 of the Criminal Procedure Task, which in each of its versions (*the author has counted three: the original of 1960[5], of 1984[6], and of 1992[7]*) designated "ensuring the correct application of the law" as a task criminal proceedings (*hereinafter – the old version*). It was the change in the wording that came with the application of due process as the task of criminal proceedings. It is worth comparing their content.

First of all, the old version points to the application of the law, that is, to the right implementation of a specific source of law, which is exclusively formalised and may not always be legitimate. The current reference to the concept of due process, first, applies to any procedure (not only criminal procedural, but also administrative, constitutional, etc., as well as its derivative procedures) and is more procedural in nature, secondly, to the sources of law, which can determine the procedure is not defined in the formulation of the task.

Another difference is that, in the context of the old version, application of, first and foremost, criminal law should be considered the task of the criminal justice. This is indirectly evidenced by the mention of the correct application, which is more characteristic of the material component of the criminal industry (proper qualification, correct analysis of the crime, etc.). On the other hand, the current version, as mentioned above, has a more procedural focus, pointing to a "procedure". Secondly, due process involves one and only one clearly defined order of action, which alone can be considered legitimate. In this approach, it is unacceptable to use valuation terms "true"/"false". The latter can only be used when there is an objective inability for the average law en-

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

[2] *Ibidem*, 2012.

[3] Code of Criminal Procedure of the Ukrainian Socialist Soviet Republic. (1927, October). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP270014.html.

[4] Code of Criminal Procedure of Ukraine: from Article 1 to Article 93-1. (1960, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1001-05.

[5] Code of Criminal Procedure of the Ukrainian SSR. (1961). Retrieved from http://pravoved.in.ua/section-kodeks/79-upku.html.

[6] Code of Criminal Procedure of the Ukrainian SSR. (1984). Retrieved from http://lawlibrary.ru/izdanie2985.html.

[7] Code of Criminal Procedure of Ukraine: from Article 1 to Article 93-1, op. cit.

forcer to determine a comparative approach of several that is rarely inherent in formalised criminal procedural law.

2.5 Place of application of due process in the system of criminal proceedings

Applying due process to every participant in criminal proceedings is a task-guarantee, a kind of safeguard for unlawfulness. It seeks to limit (within the rule of law) the other, overarching task – to ensure prompt, full and impartial investigation and trial. This is clearly evidenced by the grammatical construction that is used after the general task – "in order to".

In the old version, ensuring the correct application of the law referred to the general tasks of criminal justice. This is another argument to understand "the application of the law" in the old version as above all the application of substantive criminal law. This task was subject to limitation by other tasks-principles of procedural direction using the above-mentioned grammatical formula.

As for the due process of law, as stated above, the latter is a common legal concept inherent in most modern states. Due process of law is a combination of the procedural aspects of the rule of law, fairness, proportionality and legal certainty. Due process is a requirement that applies to all enforcement activities carried out by a person with authority or authority.

In author's opinion, the legislator distinguishes the application of due process as a separate task of criminal proceedings in connection with the following:

1) as a fuse, a general limit (limit) for the general task. That is, to ensure that authorised persons, when necessary to conduct criminal proceedings quickly, impartially and fully, must respect the general principles of law without which a rule of law cannot exist – due process of law;

2) in order to assert that, if the due process is not followed, criminal proceedings lose any meaning. The purpose of its existence becomes unattainable;

3) having enshrined that every participant in criminal proceedings has the right to apply to him only due process of law, the legislator appealed to a wide range of persons, confirming anthropocentrism in the process, the importance of ensuring human rights and freedoms in its implementation.

2.6 The importance of applying due process of law

In essence, criminal procedural rules are primarily aimed at preventing the arbitrariness of the authorities, the arbitrariness of the state in relation to society or individuals. In the course of criminal proceedings, serious restrictions on its participants may be lawfully applied; the most severe procedural coercion is experienced by a suspect/defendant.

Also, the current criminal process is not balanced: the prosecution party has certain preferences for taking evidence, initiating and conducting pre-trial investigations rather than the defence side. In author's opinion, the most disadvantaged in the present

circumstances is the victim, who is limited to the maximum in the positive and effective mechanisms of protection of his violated right or freedom.

To cite one example from author's own experience: an unidentified person broke a window in the ground floor apartment at night from Friday to Saturday, using a heavy 8x10 cm stone. Of course, neighbours heard the sound of broken glass. But the greatest shock and emotional stress was experienced by an elderly woman living alone in this apartment. There is no doubt that there is a grave breach of public order. Therefore, an application for hooliganism was filed (part 1 of Article 296 of the Criminal Code of Ukraine[1]). Investigators entered into the Unified Register of Pre-trial Investigations information on their previous legal qualifications – Part 1 of Art. 194 of the Criminal Code of Ukraine[2] – the destruction or damage to someone else's property in large amounts (*for an amount exceeding UAH 200 thousand*). The foregoing can be assessed as a clearly inappropriate legal qualification. However, neither the applicant nor the victim has any procedural rights to challenge such unlawfulness in connection with the closed list of Part 1 of Art. 303 of the CPC of Ukraine[3]. The procedural supervisor, being part of the prosecution, also does not respond to the objections raised. And to challenge such a cynical inappropriate legal qualification at a preparatory court hearing is obviously impracticable, since with such a qualification the indictment cannot be drawn up in the proceedings.

Unfortunately, there are many such examples in practice. At the same time, they not only prove the lack of balance in regulatory regulation, proper competition in all actually represented stakeholders, but, first of all, in reality they are always caused by the fact that the proper legal procedure was not followed by specific legal enforcers.

In the example above, it is also convenient to explain the two sides of the procedure:

1. Due procedure is to apply the provisions of Part 1 of Art. 214 of the CPC of Ukraine[4], namely the submission of information to the ERDR about the crime committed within 24 hours from the receipt of the relevant statement. And from a formalistic point of view, the procedure was followed.

2. The legal procedure involves performing the appropriate procedural action taking into account and investigating the merits of the case, the circumstances of committing the unlawful act and determining the appropriate, most probable in a particular situation, previous legal qualification. It is in this aspect that a clear violation of the victim's right to the due process of law has manifested itself.

The attention should be paid to the most critical point – casuistry, which arises in any process of law enforcement. N. Yu. Sakara states that, despite the importance of legislative regulation of the content of due (fair) court procedures, their general prin-

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

[2] *Ibidem*, 2012.

[3] *Ibidem*, 2012.

[4] *Ibidem*, 2012.

ciples are not defined in national laws [11]. In a sense, any provision of regulatory acts defines the procedure for the actions of the enforcers. But the text of a regulatory act itself will never be perfect: gaps or competition (conflict of law) will arise.

In the case of a challenge to a previous legal qualification, there is a clear gap in the jurisdiction of such a challenge, the absence of an effective mechanism to protect the interests of the victim or the applicant.

Concerning the competition of law regulations, there are the most exemplary current matches:

– part 2 of Art. 29 of the Constitution of Ukraine[1] establishes the exclusive jurisdiction of the court to arrest or detain a person. At the same time, Art. 615 the CPC[2] legalised the delegation of the relevant powers of an investigating judge to a prosecutor [31];

– according to the case-law of the European Court of Human Rights, the seriousness of the charge is not the basis of long detention itself. At the same time, part 8 of Art. 194 of the CPC[3] establishes a binary alternative to the election of a preventive measure (bail or detention) to persons suspected or accused of committing a crime for which a basic penalty of more than three thousand non-taxable minimum incomes is imposed. As is known, a recent norm (Part 5 of Article 176 of the CPC[4]) was declared unconstitutional;

– part 3 of Art. 29 of the Constitution of Ukraine[5] stipulates that the authorities empowered by law may use the detention of a person in custody as a temporary preventive measure, the validity of which within 72 hours must be verified by a court. However, Part 3 of Art. 14 of the Law of Ukraine "On Combating Terrorism"[6] stipulates that preventive detention of persons involved in terrorist activity can be carried out for a period of more than 72 hours, but not more than 30 days;

– part 5 of Art. 387 of the CPC of Ukraine[7] provides that all issues related to the release of jurors from participation in criminal proceedings, as well as the recusal and removal of jurors, are resolved by court order [32–34]. At the same time, in practice there are cases when the judges, determined by the automated system of document circulation of judges, release a judge from the performance of their duties in accordance with Part 1 of Art. 66 of the Law of Ukraine "On the Judicial System and Status of Judges"[8].

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

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

[3] *Ibidem*, 2012.

[4] *Ibidem*, 2012.

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

[6] Law of Ukraine "On Combating Terrorism". (2003, March). Retrieved from http://zakon3.rada.gov.ua/laws/show/638-15/.

[7] Criminal Procedural Code of Ukraine, op. cit.

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

On November 28, 2018, paragraph 20 of Section 11 "Transitional Provisions", of the CPC of Ukraine[1], which laid down simplified conditions for applying a special pre-trial investigation (in absentia) to a suspect in the temporarily occupied territory of Ukraine, was terminated. At the same time, Part 3 of Art. 12 of the Law of Ukraine No. 1207-VII of April 15, 2014 "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporary Occupied Territory of Ukraine"[2] contains a provision similar to the one mentioned above, which simplifies the list of grounds provided for by the CPC[3], which are necessary for a decision to exercise a special pre-trial investigation (in absentia).

The above conflicts must necessarily be overcome in reality. The procedure that is applied in practice must be due and legal. The actual conformity of the content of law enforcement activities with the proper legal procedure is a true rule of law in the state. But for this it is necessary to have ways of official formalisation, harmonisation of the content of due process.

The issue of the application of due process is of great importance when ignored in practice by the principle of the rule of law, legal certainty and justice. This may be facilitated by either the technical and legal defects of the legislation (loopholes or conflicts of law), the failure of law enforcers to impose new compulsory sources of law, or the overly conservative corporate position of a group of certain institutions (unconscious sabotage of innovations). National law empowers a number of authorities to carry out the official (compulsory) interpretation of conflicting rules of law or of such provisions, the legitimacy of which is called into question. In exercising their respective powers, these institutions formalise the substance of due process. Such bodies are: The Verkhovna Rada of Ukraine, the Constitutional Court of Ukraine, the European Court of Human Rights, the Supreme Court. It is these authorities that create the due process of law, that is, fill the general legal concept with specific casual content.

CONCLUSIONS

The scientific novelty of the research is that the author provided his own definition of the concept of due process, performed a comparative legal analysis of the formulations of the tasks of criminal proceedings in the context of ensuring the due process of law, proposed the division of tasks of criminal proceedings enshrined in Art. 2 of the CPC into general tasks and tasks-guarantees, the importance of the application of due process and the list of institutions, which are intended to formalise the content of the due process in criminal proceedings, were indicated. The relevant provisions can be summarised as follows:

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

[2] Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine". (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1207-18.

[3] Criminal Procedural Code of Ukraine, op. cit.

– it was found that the application of due process as a task of criminal proceedings in 2012 replaced the previous wording, which had been in force since 1961 – to ensure the correct application of the law as a task of criminal justice;

– the application of due process is a safety-barrier that limits the general purpose of criminal proceedings – to ensure prompt, complete and impartial investigation and trial;

– the application of due process contributes to overcoming the gaps and conflicts of law. Compliance with the actual content of law enforcement activities with due process of law is a genuine rule of law in the state.

Determining the practical significance of this study, the author considers it necessary to point out that the science of jurisprudence is always aimed at asserting the rule of law, justice in reality; moreover, the most general concepts – categories – of the theory of law are those pillars of the universe of law, which underpin all the activity of law enforcement. Such effectiveness is most desirable in the field of criminal procedural law, since it depends on it as an effective guarantee of the inevitability of punishment for a criminal offence, compensation for harm to victims and society, as well as non-exceedance, proportionality and validity of the rights or freedoms of any person in the course of criminal proceedings. At the same time, the concept of due process is the primary basis from which criminal proceedings should begin and be continuously carried out. In the framework of this study, an attempt was made to determine the essence of the due process of law, which should assist Ukrainian law enforcers in ensuring the effectiveness of criminal proceedings.

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Suggested Citation: Novozhylov, V. S. (2019). Due process in code enforcement as criminal procedural task: to the issue on essence and practical use. *Journal of the National Academy of Legal Sciences of Ukraine,* 26(4), 89–107.

Submitted: 01/06/2019
Revised: 28/10/2019
Accepted: 29/11/2019

УДК 340.12
DOI: 10.31359/1993-0909-2019-26-4-108

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ПРАВОВА ВИЗНАЧЕНІСТЬ ТА ПРИНЦИП НЕДОПУСТИМОСТІ ПОДВІЙНОЇ ВІДПОВІДАЛЬНОСТІ: ПИТАННЯ ТЕОРІЇ І ПРАКТИКИ

Анотація. *У статті розглянуто принцип недопустимості подвійного притягнення до відповідальності особи за одне і те саме правопорушення. Визначено, що традиційно цей принцип досліджується як принцип кримінального та кримінально-процесуального права, де існує переважна згода у поглядах на необхідність його дотримання. У статті стверджується, що недопустимість повторного притягнення особи до відповідальності має зв'язок з іншими загальнотеоретичними положеннями. Порушення цієї вимоги веде до розширення дискреційних повноважень державних органів. Подвійна відповідальність формує невизначеність для учасників правовідносин, створює загрозу неоднакового застосування законодавства у схожих чи подібних правовідносинах, що негативно впливає на рівень правопорядку. У роботі були використані такі методи: системно-структурний, метод аналізу і синтезу, у поєднанні з аксіологічним та антропоцентричним підходами. Показано необхідність застосування цього принципу в органічному зв'язку з принципом законності, остаточності судового рішення і обов'язковості його виконання. Доводиться положення, що недопустимість подвійної відповідальності є не тільки конституційним положенням, а і принципом юридичної відповідальності. Наразі існують підстави говорити про можливість застосування його до всіх видів юридичної відповідальності незалежно від галузевої приналежності. Окрім того, цей принцип як складова входить до теоретичної концепції правової визначеності, перебуваючи в органічному зв'язку з іншими його складовими. Практичне значення застосування цього принципу полягає в розмежуванні відповідальності за кілька правопорушень, склади яких наявні в діях особи, від подвійної відповідальності за одне правопорушення. Досягається це шляхом включення принципу недопустимості подвійної відповідальності як структурного елементу до правової визначеності. Таким чином можна прослідкувати його зв'язок з іншими складовими цього принципу та стверджувати, що недопустимість подвійної відповідальності є правилом, що поширюється на всі без виключення види юридичної відповідальності, а не тільки на кримінальну. Теоретичне обґрунтування такого підходу запропоновано автором, а практичні переваги продемонстровані на конкретних прикладах.*

Ключові слова: юридична відповідальність, принципи права, правопорушення, передбачуваність, верховенство права.

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LEGAL CERTAINTY AND INADMISSIBILITY OF DOUBLE JEOPARDY: ISSUES OF THEORY AND PRACTICE

Abstract. *The paper considers the inadmissibility of repeated prosecution for the same offence. It has been determined that this principle has traditionally been explored as a principle of criminal and criminal procedural law, which agree on the necessity to comply with it. The article argues that the inadmissibility of double jeopardy is connected to other theoretical provisions. Failure to do so leads to the extension of discretionary powers of public authorities. Double jeopardy creates uncertainty for participants in legal relationships, creates the threat of unequal application of legislation in similar and like legal relationships, which negatively affects the level of law and order. The following methods were used in the work: systematic and structural, method of analysis and synthesis, in combination with axiological and anthropocentric approaches. The necessity of applying this principle in the organic relation to the principle of legality, the finality of the judgment and the obligation to comply with it has been shown. It has been argued that the inadmissibility of double jeopardy is not only a constitutional provision, but also a principle of legal liability. Currently, there is reason to speak of the possibility of applying it to all types of legal liability, regardless of branch. In addition, the theoretical concept of legal certainty includes this principle as a component, which is organically related to its other components. The practical significance of applying this principle is to differentiate liability for several offenses whose composition is present in the actions of a person from repeated prosecution for one offense. This is achieved by including the principle of double jeopardy as a structural element in legal certainty. It is thus possible to trace its relationship to the other components of this principle and to claim that inadmissibility of double jeopardy is a rule that extends to all, without exception, legal liabilities, not only criminal. The theoretical substantiation of this approach is suggested by the author, and practical advantages are demonstrated by specific examples.*

Keywords: legal liability, principles of law, offense, predictability, rule of law.

INTRODUCTION

The principle of inadmissibility of double jeopardy is fundamental to the institution of legal liability in both the countries of Anglo-American law and the countries of continental law. For the most part, this principle finds its industry disclosure [1; 2], because liability in each of the branches of law has its own peculiarities. In the framework of this study, the task of theoretical understanding of the principle of inadmissibility of double jeopardy as such, which is inherent in legal liability irrespective of its sectoral orientation and substantiates the necessity to include it as an integral part in the concept of legal certainty, is formulated. In practice, the principle of inadmissibility of double jeopardy manifests itself most clearly where the most severe liability is assumed, namely, in criminal law, when a person is prosecuted [3].

The question of the existence of this principle can hardly be considered polemical, because there are few opposing opinions: based on the principles of fairness, proportionality, proportionality of the crime and promptness of prosecution, inadmissibility of re-committing an offence, in a situation where an offender has already been punished logical, the existence of this rule seems to be logical and understandable. However, the legal nature of this principle remains unclear. The author aims to prove the link between the principle of legal certainty and the inadmissibility of double jeopardy.

However, the issue of double jeopardy may arise when the subsequent actions of an offender, to whom the softer punishment had been applied, do not indicate a correction, when the grave consequences of an offence, which were not known at the time, have been identified after the prosecution. In such cases, parties involved in the legal relationship, and most often an injured party, initiate a revision of the decision in order to apply more stringent measures or sanctions, which threatens to prosecute twice a person for one committed offence. Often, the situation is compounded by the fact that, given the individual circumstances and particularities of the a, such actions appear to be fair, and the imposition of double jeopardy is made with reference to legislative rules.

The full application and practical significance of this principle in the relationship of legal liability depends on the understanding of its legal nature, its correct theoretical understanding. Since this principle is at the same time both a principle of legal liability and a constitutional principle, and a constituent principle of legal certainty, it is necessary to analyse it in relation to these concepts.

1. LITERATURE REVIEW

1.1 Principle of inadmissibility of double jeopardy in branch law and legislation

Today, two approaches to understanding the principle of inadmissibility of double jeopardy have been formed – branch and general theoretical. The first examines the operation of a principle within one branch of law, focusing on sectoral features; the second – sees the principle of inadmissibility of double legal liability as a common law basis. According to the provision of the Constitution of Ukraine[1], the principle of inadmissibility of double jeopardy is not limited only by criminal law. However, the vast majority of scientific research relates to it in this field, since in criminal law this principle is most striking.

According to O. Drozdov, "in the case-law of the Court of Justice (European Court of Human Rights), the principle of non bis in idem extends only to the criminal sphere, the boundaries of which the court understands far beyond the national jurisdictions of the member states of the Council of Europe. The ECHR includes certain types of administrative offences to criminal" [4]. Regardless of branch affiliation, the ECHR applies

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

this principle to public-law liability relationships, where the entity is a power authority that creates an increased risk of expanding its discretionary powers.

However, the question of the principle of inadmissibility of double jeopardy is also relevant for private law. The question of the appropriateness of the application of the principle of non bis in idem in economic relations is raised by A. S. Fonova. In business contracts, legal entities provide for a number of sanctions for breach of conditions, in particular, and penalties for late payment. Analysing the case law, the author argues that business agreements often provide for fines and penalties that are the responsibility of one type. In the future, such provisions of the contract are interpreted differently by the courts and in one case, the debtor is ordered to pay both a fine and a penalty, otherwise only one of the foreseen types of liability applies [2]. This problem creates uncertainty for the subjects of the relationship, violates the requirement of predictability, according to which a person must predict the legal result of his legally significant behaviour.

1.2 Principle of inadmissibility of double jeopardy in general theoretical studies

According to N. Parhomenko, "the study of domestic and international experience demonstrates that the principles of legal responsibility are formed on the basis of the principles of law". The scientist pays special attention to the analysis of the principle of legality, considering it as a "special legal principle" and "general law category". "In the criminal, civil, administrative, labour law, the basic requirements of law are enshrined as the principle of legal responsibility, to which the scientist includes, – inadmissibility to prosecute twice for a single offence" [5]. Researching the relation between the general principles of law and the principles of legal responsibility in her thesis, M. Yu. Zadnipryana pointed out that the general principles of law are an independent kind of principles that deserve special attention. They serve as sources of law and help to solve important legal problems and conflicts of law. Summarising the views of modern researchers, it is possible to distinguish the following basic principles that have emerged from the jurisprudence: the right to judicial protection; the principle of equal treatment and non-discrimination; the principle of proportionality; the principle of legal certainty; the principle of protection of legitimate expectations; protection of fundamental rights; the right to protection [6].

E. Kozubra notes that "the impossibility of bringing to justice twice for the same offence directly refers to the inability to apply twice the same type of legal liability for the same offence. This principle does not exclude the possibility of imposing on the person additional types of legal liability" [7].

Some researchers of the branch application of this principle have indicated that this principle of legal liability is linked to legal certainty. In particular, as noted by N. Kovtun and A. Zorin, "the non bis in idem rule in procedural terms partly coincides with the principle of the stability of a judicial act that has entered into force, and therefore also acts as a substantive element of legal certainty" [8]. In doing so, they linked this provision to the principles of law.

Proponents of this approach refer to the case law of the European Court of Human Rights, pointing to the ne bis in idem principle being linked to the rule of law, legality and justice. This rule is an integral element of legal certainty according to the practice.

2. MATERIALS AND METHODS

The main method used was the method of analysis and synthesis. Its application was based on the fact that individual manifestations of inadmissibility of double jeopardy in civil, commercial, tax, criminal law should be analysed by defining their common features. These common conditions for the application of the principle of double jeopardy should be systematised and distinguished by their scope and the degree of interrelation with other legal principles. This method allows to separate repetitive and regular, stable and constant from casual, variable, unstable, particular. By rejecting the latter, it is possible to form regularities and find their theoretical explanation. This method was used in the article to form a general picture of the frequency and spread of the application of the principle of non bis in idem in the branch law and the laws of its application. Formed on the basis of the synthesis of individual elements of the provision, it was possible to prove the general theoretical value of this rule for legal liability. The application of an axiological approach has made it possible to conclude the value of considering inadmissibility of double jeopardy through the prism of legal certainty, since its inclusion as a component element in this theoretical concept gives grounds to establish a relationship between the principle of inadmissibility of double jeopardy, the rule of law and freedom of human rights.

The aim of this article is to analyse the content of the principle of inadmissibility of double jeopardy as part of the principle of legal certainty, as well as to prove its importance as a general principle of legal responsibility.

In addition, the systematic and structural method was also used. Thanks to it, the article focuses on the disclosure of the relationship between the principle of legal certainty and the principle of legal liability non bis in idem, the thesis of the general legal nature of this principle is presented and substantiated. It is stated that the inadmissibility of double jeopardy serves stability, predictability and predictability in law, creates confidence in the efficiency of the legal system on the part of citizens, ensures their legitimate expectations.

3. RESULTS AND DISCUSSION

3.1 Correlation between the principle of legal certainty and the principle of inadmissibility of double jeopardy of a person for a single offence

The inadmissibility of double jeopardy is closely linked to the task and purpose of legal liability, among which the punishment of an offender is only one factor in the row. It is the legal responsibility of an offender to suffer the adverse effects of his behaviour, to compensate for the harm and to refrain from such action. While at the national level, in the first place, liability serves as a means to restore the existing

state of an offence, to restore the disturbed law and order, to return legal relations that have gone "beyond" into a legal and lawful direction. And only the means to achieve this goal are the penalties and sanctions provided by the relevant industry standards. The absence of such a broad view of legal liability and the action taken against it by the principle of the inadmissibility of repeated prosecution leads to the extension of this principle across different legal branches, to its analysis solely within the scope of industry specificity.

The inadmissibility of double jeopardy takes into account the relationship with other theoretical provisions, correlating legitimate conduct and liability in the event of its violation. An offender is affected by the negative consequences of misconduct, and even when it is not physically possible to repair the disturbed state, he compensates for the losses. As a result of such actions the possibility of continuation of legal relations in the legal course is provided, different, but the best way for the individual situation is chosen. In this situation, double jeopardy creates the risk of uncertainty, because having variability of types of liability combined with the unpredictable use of the respective types, a person cannot fully realise in advance either the gravity of his offence or imagine the size and extent of the negative consequences that he will suffer. Having a large number of variations gives a person a false idea that liability can be avoided, or at least it will not be subject to more severe alternatives. Finally, the possibility of applying simultaneously two types of liability extends the discretionary powers of law enforcement agencies, which can apply such types of liability at their discretion, freely interpreting the provisions of the law, to create the presumption of unequal application of law.

Article 61 of the Constitution of Ukraine states: "No one may be prosecuted twice for the same offence. A person's legal responsibility is individual"[1]. Such a provision imposes a duty on the state to fully, comprehensively and accurately investigate a case, obliges parties to a dispute to prove their legal position carefully and in a timely manner, taking a responsible role in the investigation of a crime or other offence. According to the literal translation of the Latin sentiment, which became the embodiment of the relevant legal idea, – non bis in idem – one answer is enough. This means that the injured party or state must once be charged and demand that an offender be held accountable for his or her actions. Such a principle is found in procedural law, it is consistent with the principle of the finality of a judgment, ensuring its lawfulness and binding enforcement. These provisions serve to maintain stability and the rule of law, emphasise the predominant role of the regulatory function of law, and create safeguards for the transformation of law into a means of legal and political struggle. An analysis of the procedural principles shows that, determining the equal procedural status of the parties, regulating the sequence of court cases, the limits of judicial proceedings and the legal

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

status of court decisions, they are built with the knowledge that this is the only opportunity to bring a violator to justice. Accordingly, all necessary legal and procedural remedies should be provided to an individual.

Regardless of branch affiliation, the ECHR applies this principle to public-law liability relationships, where the entity is a power authority that creates an increased risk of expanding its discretionary powers.

At the same time, studies of the positive aspect of legal responsibility encourage researchers to analyse more closely the relation of particular sectoral manifestations of legal responsibility with general theoretical principles and provisions, such as legality, equality, rule of law, legal certainty. Scientific approaches to the study of legal liability in recent years have, in principle, turned to the study of positive liability, not negative, which reduced responsibility solely to the application of sanctions. As V. E. Golubovskyi notes "positive liability is a measure of demanding self and others, a deep understanding of the interests of the state, society, conscientious and active fulfilment of civic duty. It is determined by the real socio-legal status of the subject, that is, this approach is more promising because it fills legal liability with positive content" [9]. If to consider liability from these positions, it is impossible to avoid the connection of legal liability and general principles of law.

In author's view, a narrow understanding of the operation of this principle, which is mentioned in the context of exclusively criminal law, is unjustified, as evidenced by examples of other branches of law (relevant scientific approaches are presented in the literature review). In our opinion, such a contradiction arises because of the lack of proper elaboration of the provision on the inadmissibility of double legal liability [10]. In fact, this provision should be considered not only a legal prescription, but also a principle of legal liability (irrespective of one of the branches of law), which as part of the theoretical concept of legal certainty, a principle most closely related to the institution of legal responsibility.

The principle of legal certainty is defined as "a set of requirements for the organisation and functioning of the legal system in order to ensure above all stable legal position of the individual by improving the processes of law-making and enforcement" [11].

One of the problematic aspects of the inadmissibility of double jeopardy is the application of this provision to legal persons. On the one hand, given the equality of status of subjects in private legal relationships, both individuals and legal entities have the equal right to claim the inadmissibility to held liable for one offence. On the other hand, the provision of the Constitution of Ukraine, which contains this rule, is included in the section "Rights, freedoms and responsibilities of the individual and the citizen"[1]. And this is a direct reference to an entity to which this right applies. In civil and economic relations, there is a problem in applying property sanctions for breach of obligations, and in such cases legal entities rightly refer to the need to follow the same ap-

[1] *Ibidem*, 1996.

proaches in the same legal relations with their counterparties – individuals. Contrary to the statement about the possibility to apply repeated liability to legal entities in view of Art. 61 of the Constitution of Ukraine[1], which applies exclusively to the rights and freedoms of individuals, the provision on the inadmissibility of double jeopardy extends to legal entities. The theory of legal certainty provides an explanation for this phenomenon, pointing to the obligation to apply it to both legal entities and individuals when applying legal liability to them. The thesis about the impossibility of unambiguous solution of this problem by the norms of the branch law and about the possibility and necessity of a deeper legal theoretical discussion has already been advanced by Ukrainian scientists [12].

Today, the constant mention of the principle of the rule of law, and more rarely, of legal certainty as its constituent, in the context of solving almost every theoretical problem of legal science is a popular phenomenon [13–15]. At the same time, general legal principles, such as the rule of law, freedom, recognition and protection of fundamental human rights, equality must be specified in normative acts of general character, in industry norms, and find their application in court practice [16–18]. Therefore, the study of the origins of the principle of double jeopardy has an organic connection with other, more extensive legal principles, and without establishing such a connection meaningful understanding of the rule on double jeopardy is truncated and incomplete. Its contents are revealed by M. I. Kozubra – "the inability to bring to justice twice for the same offence directly refers to the inability to apply twice the same type of legal liability for the same offence. This principle does not exclude the possibility of imposing on the person additional types of legal liability" [7].

Ensuring stability and predictability, clarity and unambiguity in qualifying actions as unlawful is a prerequisite for ensuring that the principle of inadmissibility of double jeopardy for a single offence is valid. These provisions are a manifestation of the principle of legal certainty in the legal responsibility of different branch areas.

3.2 Case law of referring to the principle of inadmissibility to held a person liable twice for a single offence

Due to the non bis in idem principle in law enforcement, there is a problem of delimitation of the duality regarding the qualification of an act (when it is possible to simultaneously qualify different offences and necessary to choose the correct one) from the cases where the actions of a person contain two or more separate offences, each of which may be qualified separately. For example, a road accident resulting from a traffic violation entails administrative and civil liability for the harm to the lives and health of the victims' property. In the actions of an offender there is at once a composition of several offences, even before those provided by different branches

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

of law. Liability comes for each offence, even though they are all related to one life situation [19–21]. In this situation, to invoke the principle of inadmissibility of double jeopardy is incorrect, since the composition of the offence is different and a person will be prosecuted only once – more precisely he once will be responsible for each committed offence. This situation should be distinguished from cases where a person is tried to prosecute twice for the same offence.

For such a delimitation, international judicial institutions use the actual composition of the offence as a basis, as in the case of Sergei Zolotukhin v. Russia. This approach implies, in particular, that the issues of whether the charges were the same were established to a greater or lesser extent on the basis of the assessment of facts than on the basis of the formal comparison of essential elements of the charge [22]. Therefore, the question is whether the offence was properly qualified, or if there was no qualification during competition of the composition of the two offences, and instead, a person was charged with committing several offences, while his actions presented a composition of only one offence.

In the case of Igor Tarasov v. Ukraine, the court proceeded from the fact that the legal qualification of a procedure under national law alone cannot be the sole criterion for the application of the non bis in idem principle [23; 24]. During the trial of Tarasov's acts of hooliganism, it was established that they were qualified as hooliganism with aggravating circumstances and as intentional causing moderate bodily harm, and the person was accordingly twice held liable.

Answering the question whether the offences for which the applicant had been prosecuted were the same, the interpretation of the non bis in idem principle similar to the case of Sergei Zolotukhin v. Russia was applied. This principle should be understood as prohibition of prosecution or trial in a second offence, if they stem from identical or substantially the same facts. With regard to the individual case of Mr. Tarasov, the court found that both proceedings at the national level concerned the applicant's behaviour at the same place at the same time interval and, therefore, the facts that twice led to the applicant's liability were inextricably linked between themselves, in both court proceedings the same facts as those in the first trial were concerned. The Court found that the following actions violated the principle of non bis in idem.

Although in the case-law of this court, the principle of non bis in idem relates to criminal liability, it is clear that, by applying this principle, the courts have to differentiate between offences, the liability for which is provided by different branches of law: criminal, administrative, tax, labour, etc. Therefore, in interpreting this right, it is necessary to go beyond the sphere of criminal law and talk about the principles of legal liability and the principles of law as such. The non bis in idem rule in ECHR practice is closely linked to legal certainty. Because any ambiguous and fuzzy interpretation of a rule of law in the context of legal liability is detrimental to the principle of legal certainty and the protection of a person's legitimate expectations.

4. CONCLUSIONS

The general principles of law, proclaimed as broad concepts, are specified in legal rules and are manifested, in particular, in legal responsibility. This is justified because in the context of legal responsibility such universally accepted values as human rights, equality, freedom, justice can be endangered. The non bis in idem rule applied in case law, including the ECHR, has a sound theoretical background and the need for its application is generally not called into question. However, the prevailing approach to understanding it as a branch principle is narrowed and limits its meaning. The inadmissibility of double jeopardy is regarded as a component of legal certainty – a general principle of law, which in turn has a close connection with the rule of law. In order to ensure the inadmissibility of double jeopardy, it is necessary to consider other elements of this principle, namely, stability and predictability, clarity of legal orders, legality. Therefore, the principle of inadmissibility of holding a person liable for a single offence is legally certain in close relation and should be interpreted on the basis of the factual circumstances of the case in compliance with other general principles of law. This approach gives the inadmissibility of dual responsibility as a component of the legal certainty of the anthropological dimension. This requirement of legal certainty can be applied to all types of legal liability, to legal and natural persons equally.

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Suggested Citation: Ogneviuk, A. Z. (2019). Legal certainty and inadmissibility of double jeopardy: issues of theory and practice. *Journal of the National Academy of Legal Science of Ukraine*, 26(4), 108–118.

Submitted: 29/05/2019
Revised: 20/10/2019
Accepted: 03/12/2019

УДК 340.12
DOI: 10.31359/1993-0909-2019-26-4-119

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МУЛЬТИКУЛЬТУРАЛІЗМ ЯК ПОЛІТИКО-ПРАВОВИЙ КОНЦЕПТ

Анотація. *Глобалізація, яка за певних обставин і до певної міри може сприяти розмиванню етнокультурної ідентичності, в цілому не знищує етнічного чинника, не спричиняє повної уніфікації соціокультурної сфери. Одним із перспективних варіантів забезпечення міжкультурного діалогу, вирішення правових протиріч та досягнення взаєморозуміння в умовах подекуди вимушеного співіснування носіїв різноманітних етнокультурних ментальностей, є ідея та політико-правова концепція мультикультуралізму. Метою статті є філософсько-правовий та загальнотеоретичний аналіз природи та різновидів мультикультуралізму крізь призму світоглядної дихотомії лібералізму й комунітаризму. Важливим практичним моментом є загальна спрямованість комунітаризму на захист прав етнічних, конфесійних та інших меншин, що до певної міри зближує комунітаризм із мультикультуралізмом. Водночас еволюція позиції частини лібералів від неприйняття до схвалення правової політики мультикультуралізму є результатом впливу комунітарної парадигми та доказом синтезу й конвергенції обох філософських напрямів і появи нового концептуально модифікованого політико-правового «гібриду» – ліберального комунітаризму. За аналогією із «сімейством лібералізмів» можна вести мову про «сімейство мультикультуралізмів», маючи на увазі неможливість створення єдиної для всього глобального соціуму концепції мультикультуралізму. Як діахронно, так і географічно соціальні відмінності є дуже суттєвими. Мультикультуралізм як політико-правова концепція і як правова політика може бути ефективним лише щодо конкретної держави в конкретно-історичних умовах. У цьому зв'язку важливим є питання щодо вибору тієї чи іншої моделі, або ж навіть унікального локального варіанту мультикультуралізму.*

Ключові слова: полікультурне суспільство, права меншин, лібералізм, комунітаризм, ліберальний комунітаризм.

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MULTICULTURALISM AS A POLITICAL AND LEGAL CONCEPT

Abstract. *Globalisation, which to some extent can contribute to the erosion of ethno-cultural identity, generally does not destroy the ethnic factor, does not lead to a complete unification of the socio-cultural sphere. One of the possible promising options for ensuring intercultural dialogue, resolving legal contradictions and achieving mutual understanding in conditions of forced*

coexistence of different ethnic and cultural mentality is the idea and political and legal concept of multiculturalism. The purpose of the article is the philosophical-legal and general theoretical analysis of the nature and varieties of multiculturalism through the prism of the ideological dichotomy of liberalism and communitarianism. The important practical point is the general orientation of communitarianism to the protection of the rights of ethnic, confessional and other minorities, which is to a certain extent brought together by communitarianism with multiculturalism. At the same time, the evolution of the position of some liberals from the rejection of the approval of the legal policy of multiculturalism is the result of the influence of the communitarian paradigm and a vivid proof of the synthesis and convergence of both philosophical trends and the emergence of a new conceptually modified political and legal "hybrid" – the so-called liberal communitarianism. It is stressed that, by analogy with the "family of liberalism", it is possible to talk about the "family of multiculturalisms", implying the impossibility (and, probably, and inexpediency) of creating a single concept for multiculturalism for the whole global society. Both diachronic and geographically-social differences can be very significant. Multiculturalism as a political and legal concept and as a legal policy can only be effective in relation to a particular state in concrete historical conditions. In this regard, the question of choosing a particular model, or even a unique local variant of multiculturalism, is extremely important.

Keywords: multicultural society, minority rights, liberalism, communitarianism, liberal communitarianism.

INTRODUCTION

Every day, the metaphorical "Great Wall of China" between different countries and different cultures continues to collapse more and more rapidly. In the long run, globalisation processes, hopefully, will still lead to the creation of an unbounded frontier and other artificial obstacles, the one and only "mega-society" whose name is humanity. However, as of today, it can be said that globalisation, which in certain circumstances and to some extent may contribute to some erosion of ethnocultural identity, does not generally destroy the ethnic factor, does not cause complete unification of the sociocultural sphere. Moreover, since the widely recognised fundamental collective rights nowadays include *the right of different communities to protect their identities*, one of the pressing topics of general jurisprudence is the problem of identity as one of the systemic elements of human collective rights. This aspect is particularly interesting for the study of political and legal and philosophical problems on the material of multicultural societies of the Western world, where due to the processes of immigration during the encounter of different cultures, the collision of two systems of values: the Western originating from the concept of man as an individual and the eastern, that regards a person primarily as part of a large family.

As the scientific literature rightly points out, "migrants continue to live in a system of conserved values of their own cultures, which are dominant for them and only formally agree with the values of a new European culture, that is a necessary condition for their legal status. The duality of migrants' existence is manifested in the fact that they become fully-fledged subjects of the law of the host country, but they live, for the

most part, in the closed conditions of national "reservations" as a kind of "parallel" communities, such "mini-states" [1].

Among the contradictory phenomena that occur in such "parallel" communities, one of the leaders of contemporary British multiculturalism, B. Parekh, calls female circumcision (clitoridectomy); polygamy; "Muslim and Jewish ways of cattle slaughter"; "contract marriages"; scarring practices in the initiation process in some African communities; wearing a Muslim headscarf in schools and offices; the practice of Muslims not to allow their daughters to exercise that require the exposure of different parts of the body; the refusal of the Sikhs to wear motorcycle helmets, as well as to remove the turban when sworn in court; refusal of Roma or Amish to send their children to public schools after reaching the certain age; the requirement of the Hindus to allow them to cremate their dead and scatter their ashes in the rivers; the subordinate status of women in many minorities [2].

The "friend or foe" archetype, which was considered to be one of the defining features of traditional regulation, continues to function in our time, in the postmodern era. According to a report by the United Nations Development Program (UNDP), about one billion people, that is, one in seven inhabitants of the Earth, belong to a group that in one form or another is a victim of "exclusion" by ethnic, racial, religious or, more broadly, "cultural" grounds. [3].

All this leads to a legitimate increase in interest in concepts that could form the basis of practical decisions to allow "full freedom for all persons, all societies in the way of life, self-expression, which provides freedom to their personal traits in the context of respect for others"[1]. One of the possible perspectives for ensuring intercultural dialogue, "tolerance" intercultural relations, resolving contradictions and achieving such desirable mutual understanding in conditions of forced coexistence, coexistence of representatives and carriers of different ethnocultural mentalities, is the concept of multiculturalism [4].

The works of such domestic and foreign researchers as P. Ahluwalia [5], J. Berry [6], N. Vysotskaya [7], N. Glazer [8], R. Ashcroft [9], K. Joppke [10], W. Kymlicka [11], A. Kolodiy [12]. E. Colombo [13], Ch. Kukathas [14], S. Maksymov [15], A. Mason [16], N. Meer [17], B. Parekh [2], A. Saeys [18], Ch. Taylor [19], G. Therborn [20], V. Uberoi [21], D. Faas [22], L. Qiang [23], and I. Chestnov [24], are devoted to content and models of multiculturalism. However, given the complexity and versatility of these issues, it is necessary to state the urgent need for further scientific exploration of these issues.

Therefore, the *purpose* of the article is the philosophical-legal and general theoretical analysis of nature and varieties of multiculturalism through the prism of the worldview dichotomy of liberalism and communitarianism.

[1] The Declaration "Multicultural Society and European Cultural Identity". Council of Europe. Conference of Ministers responsible for Cultural Affairs (1990, 1990). Retrieved from http://www.coe.kiev.ua/docs/km/conf6.htm

1. MATERIALS AND METHODS

In order to achieve the aforementioned purpose of this scientific intelligence, the author considers it necessary to declare (as the *fundamental hypothesis* of the study) that, in his opinion, one of the most important, defining, central dichotomies for modern Western (European and American) political and legal philosophy is "communitarianism". It seems that the analysis of these two concepts precisely as political and legal categories has a great heuristic potential, not yet disclosed to date in the national scientific literature. This applies, for example, to the possible limits of their application in the analysis of human rights interpretative approaches used in the consideration of specific legal cases for the protection of constitutional human rights by national and international judicial institutions. It should be noted that while the core, the basis for a true understanding of the dichotomy of "liberalism – communitarianism" is the question of the relationship between the individual and the collective, the analysis of the identified dichotomy requires an appeal to a number of others related to the considered opposites. In particular, it is about the interplay of the philosophy of cultural universalism and particularism, the political morality of traditionalism and modernity, the ethics of values and the ethics of duty, which defines the prospects for further research, including the issues of multiculturalism under consideration, which are quite new and interesting. The author thinks that the results of the study of the nature and varieties of multiculturalism through the lens of the worldview dichotomy of liberalism and communitarianism can claim to have at least the *elements of scientific novelty*.

It should be noted that in the process of scientific activity, in order to obtain knowledge that objectively reflects reality, it is essential to adhere to the basic tenets of methodology – the doctrine (theory) about the use of approaches and methods, ways and means of scientific research. At the same time, as Professor V. Selivanov rightly pointed out, "the complexity of natural and social, among them legal, phenomena determines and involves the interaction of different methodological approaches, in particular to their cognition. This complexity and pluralism of approaches to its research, study, awareness do not deny the existence of truth, although they do imply movement to it from different directions, formulation of its multidimensional image. The historical world experience of knowing the real reality has proved that nothing is so far removed from the comprehension of truth as an attempt to do so on the basis of the principle of monism and yet ideologically sanctified" [25]. Therefore, the methodological basis of the proposed scientific intelligence is a number of different philosophical, general scientific and specially legal methods of knowledge of political and legal phenomena.

In particular, the use of the dialectical method (and, above all, one of the laws of dialectics, to which Hegel paid considerable attention – the law of the mutual transition of quantitative changes into qualitative ones) made it possible to clarify the nature and

essence of multiculturalism as a phenomenon of reality in dynamics of formation and constant development of this phenomenon and its, sometimes contradictory, interconnection, interaction, coexistence with other political and legal phenomena.

Principle of historicism, synchronous and diachronic analysis, combined with a multidisciplinary approach to the problem under analysis are leading in the study. Accordingly, the author considers it necessary to point out that it is the interdisciplinary approach, complex studies at the "junction" of jurisprudence, philosophy, ethnology, psychology, sociology and other branches of social science that appear to be the most promising, including the political and legal phenomenon of multiculturalism.

In the process of article preparation, comparative legal and systemic-structural methods also played the important role – in analysing the approaches of scientists to constructing definitions of the concept of multiculturalism; formal and legal – in the process of examining international legal instruments (the Universal Declaration of Human Rights, the Declaration of Council of Europe "Multicultural Society and European Cultural Identity", etc.) and national regulations. The prognostic method helped to outline the prospects for the development of multiculturalism in the near future.

In addition, the formal-logical method and, in particular, its logical techniques, such as analysis, synthesis, classification, deduction, induction, were used as the method of study.

2. RESULTS AND DISCUSSION

2.1 The phenomenon of multiculturalism: some contemporary interpretations

The term "multiculturalism", without which it is difficult to imagine today the lexicon of social sciences, became popular in the Western world in the 80's of the 20th century. Obviously, it existed already then, as it is nowadays, multidimensional, multifaceted and even, frankly, quite vague, "hazy". Using computer slang, the concept of "multiculturalism" can be compared with a file, and the term itself with a "shortcut", a file pointer. It is clear that the content, the filling of the "file" depends on the position (in particular, ideological and methodological) of a researcher.

Among all the interpretations of multiculturalism in the scientific literature, there are two generic meanings of the term, in relation to which others can be considered derivatives and species. First, they are increasingly denoting the fact of cultural heterogeneity of society, group, collective, social centre, cultural phenomenon. In this case, "multiculturalism" is simply synonymous with well-known categories of cultural diversity, cultural heterogeneity, coexistence or interaction of cultures, cultural polyphony and the like. In the second (and, indeed, primordial, independent, and therefore the main) sense, multiculturalism is a philosophical and political ideological system that posits cultural heterogeneity as a core principle of the organisation of society. It is a purely modern concept both in the historical context of its origin and in the ideological and value load it carries. For in its logic, this concept is deeply postmodern, even if it

paradoxically stimulates the penetration of elements of early modern, pre-modern and archaic into Western "postmodern" societies [26].

With this position, the national researcher S. Drozhzhina actually solidifies, distinguishing the *descriptive* ("the coexistence of several notable cultural groups in a single political society, who wish and, in principle, are able to reproduce their specific identity") and the *normative* features of multiculturalism. At the same time, the normative approach, she said, affirms "the justification and the necessity for modern societies to make efforts to support and promote the material and spiritual prosperity of different cultural groups, as well as respect for their identity" [3]. It is noteworthy that in her other work the author formulates the definition of the term "multiculturalism" ("it is a state, processes, views, politics of a culturally heterogeneous society, focused on the freedom of expression of cultural experience, recognition of cultural diversity; cultural, political, ideological, religious, religious the rights of minorities at both the public and the state level" [27]), based essentially on a normative approach.

In general, the conceptual considerations discussed in the previous two paragraphs can be agreed. The only thing the author can emphasise – in author's opinion, the very existence of a multicultural society (without clear "normative" signs) can hardly be defined as "multiculturalism" in its strict sense.

Consideration should also be given to the analytical generalisation of the Swedish sociologist G. Therborn, who stated, "The concepts of "multiculturality" and "multiculturalism" are usually used in three contexts. One is a political, which argues for or against multiculturalism policies and appropriate governance, with both supporters and opponents using the term [6]. In this context in Canada in the 1960s this concept originated. Another context is empirical, descriptive, or analytical. It takes place in scholarly writings and in public debates that affect the various manifestations of cultural heterogeneity in society, and is most closely linked to the emergence of "multicultural societies". The third context relates to social and political philosophy, to issues of social and political order and human rights in the context of the heterogeneity of the culture of a society" [20]. In author's view, all three of these contexts are closely interrelated. The empirical context serves as a necessary basis for the other two. At the same time, the philosophical basis is, in author's opinion, one of the defining factors both in public debate and in the process of political governance in multicultural societies.

According to N. Vysotskaya, numerous definitions of multiculturalism can be grouped into clusters round several leading interpretations of this phenomenon: *demographic-descriptive*, which states the presence of ethnically or racially diverse segments in a society or state; *programmatic-political*, which refers to specific types of programs and political initiatives designed to respond to ethnic diversity (in this sense, the term "multiculturalism" was first used in the Canadian Royal Commission on Bilingualism and Biculturalism in 1965). This approach seeks to take into account the interests of different national groups and to provide them with a degree of recognition and autonomy while maintaining a corresponding vision of national unity; *ideological-norma-*

tive – as a slogan or model of political activism based on sociological and ethical-philosophical ideas about the place of people with culturally distinct identities in society; *social-transformative*, aimed at eradicating racism, nationalism, sexism, homophobia and achieving equality for all groups of society, etc.; *historical and cultural*, which emphasises, in particular in the United States, the importance of studying and understanding as many cultures as possible and interacting with them for the better understanding of the nature of American culture" [7]. It should be noted that the author's assessment of the demographic and descriptive cluster has already been stated our above when it was about synonymous categories – the empirical context (in G. Therborn's terminology) and descriptive features (in S. Drozhzhina's terminology). At the same time, program-political, ideological-normative and socio-transformative interpretations, although they alone have some heuristic potential for in-depth study of the phenomenon of multiculturalism, do not, without significant methodological and cognitive losses, be combined into one, relatively speaking, "normative cluster." Since normativity seems to be the "common denominator", the necessary element, without which neither social transformation nor the measures envisaged by political programs can be carried out.

The correctness of author's position is indirectly confirmed by the reasoning of Professor of Political Theory of the London School of Economics Ch. Kukathas 14]. In other words, the empirical fact of a multicultural society may not only result in a policy of multiculturalism itself, but also lead to at least three other possible developments.

Well-known American sociologist N. Glaser defines multiculturalism in the US as a position "on racial and ethnic diversity, which rejects assimilation and the notion of melting pot as being imposed by dominant culture and favours such metaphors as "salad bowl" or "bright mosaic" in which the ethnic and racial element of the population retains its distinct difference" [8].

It is noteworthy that the term "mosaic" in this context, as far as is known, was first used by J. Gibbon in 1938 in the monograph "The Canadian Mosaic" [28; 29]. The geographical affinity of this "pioneering" intelligence seems quite natural, because Canada is the first in all respects (both chronologically and in terms of regulatory development) "multicultural" state in its own sense of the word. Recall that as early as 1971, "multiculturalism" became the official term that signified the new governmental course of this state (with the slogan "unity in diversity"). In June of 1988, the Canadian Act of Multiculturalism was approved by Parliament. According to paragraph 3 (1 (b)) of this regulation, the policy of the Government of Canada "must recognise and promote the understanding that multiculturalism is a fundamental feature of Canada's heritage and identity and that it provides an invaluable resource in shaping Canada's future" [1].

[1] Canadian Multiculturalism Act. An Act for the preservation and enhancement of multiculturalism in Canada. R. S. C. 1985, c. 24 (4th Supp.). Published by the Minister of Justice. Retrieved from http://laws-lois.justice.gc.ca

Distinguishing the descriptive/normative dimensions of multiculturalism is an expression of the dichotomy of existent/due, as the basic categorical pairs in the philosophy of law and ethics. The conceptual concept can thus be defined 1) as a normative-value idea (due) and 2) as an embodiment of this idea in social practice (multicultural social reality is existent). The author thinks that a descriptive approach to understanding multiculturalism can only be viewed in the context of implementing a normative approach. In particular, confirmation of the validity of such conclusions is the existence of an apartheid regime (1948–1991) in the South African Republic, whose official policies aimed at racial discrimination, segregation, oppression, is the complete antithesis of multiculturalism.

2.2 The philosophical basis of minority rights: some contemporary approaches

The important issue in the context of our intelligence is the question of the philosophical basis of multiculturalism and, consequently, of the philosophical foundation of minority rights. The author thinks that the perspective of multiculturalism through the lens of the dichotomy "liberalism – communitarianism" is considered promising in this regard, which, in the author's opinion, is the central dichotomy for contemporary European and American political and legal philosophy [30].

First of all, it is worth noting that from the standpoint of proponents of multiculturalism, this doctrine responds to such challenges of the postmodern era as:

- the necessity to reconcile the goal of national unity and the existing and increasingly appreciated ethnic and racial and cultural diversity of the world's population in the age of globalisation;
- the inappropriateness of assimilatory methods of social integration due to changes in the public consciousness (ethnic minority consciousness) – because this path of integration is associated with considerable suppression;
- shift in the social discourse towards "other", "partial", "specific", shifting interest from whole to part, from the norm to deviation;
- the emergence of new moral and psychological attitudes, stemming from the increased sensitivity of all population groups, including immigrants and national minorities, to human dignity; disagreement with repression, oppression or even domination; the requirement to recognise their culture and their rights and to respect the principle of equal treatment [12]. As is seen, many of these positions correspond to the ideas of the apologists of the *communitarianism* paradigm.

Instead, *liberal critiques* of multiculturalism include such arguments. First, this legal policy provides state support not so much to cultures, but to communities and groups that unreasonably undertake the mission of representing the interests of all ethnicities or religions. Second, public sponsorship of communities encourages the development of a group of communitarian (community) identity, depressing the individual. Such a policy establishes community power over an individual who is deprived

of choice. Third, multiculturalism artificially preserves traditional-community relations, preventing the individual integration of representatives of different cultures into civil society. In many countries in Europe and the US, there are numerous cases where people who have lost their ethnic or religious identity are forced to return to it simply because the government does not sponsor culture, but communities (their schools, clubs, theatres, sports organisations, etc.). Fourth, the major drawback of multiculturalism's legal policy is that it provokes segregation of groups, creating artificial boundaries between communities and forming a kind of ghetto on a voluntary basis [31].

In the framework of "European multiculturalism", the one-sided tolerance of the host community has become, according to N. Sarkozy, a concern for the identity of the immigrant in the absence of interest in the identity of the host country. At the same time, the "multicultural fiasco" for "isolation" of immigrant groups was also criticised by British Prime Minister D. Cameron. The latter emphasised that promoting diversity in Britain led not to multicultural dialogue but to segregation, "Within the doctrine of state multiculturalism, we have encouraged representatives of different cultures to live separate lives, far from each other and from the mainstream. We have not been able to convey the vision of the society to which we would like to belong. We have even been tolerant of these segregated communities behaving in a way that is completely contrary to our values" [32].

The danger of ethnocultural fragmentation of society, the existence of "parallel" societies in one state, caused by the collision of values between the host European country and immigrants, in particular those with a Muslim identity, certainly deserves scrupulous attention. However, the author believes that the widely known series of top-level official statements about the "collapse of multiculturalism" made in 2010-2011 rather testified to the obvious miscalculations and shortcomings of only a few the model of multiculturalism, not its complete debacle as a doctrine as a whole. It seems that it is too early to "write off" multiculturalism – as a political and legal idea, as well as a socio-philosophical concept – in the archive of world history. In turn, the "viability" of this phenomenon seems to be due to the fact that it is "fuelled" by the ideas of two powerful philosophical and worldview currents of the present, which have already been mentioned – communitarianism and liberalism.

At the same time, at first glance, communitarianism looks the more obvious, explicitly appropriate, adequate philosophical basis of the legal policy of multiculturalism. This thesis already follows from the fact that the defining, initial, basic term-concept of communitarian worldview is "community", whose rights cannot be reduced to the totality of the rights of its members.

To confirm this, the author turns to the works of the authoritative Canadian scholar V. Kymlicka [33], who unambiguously defined the first stage of the development of multiculturalism (until 1989) as "communitarianism", "If you are a liberal and advocate for individual autonomy, you will be opposed to multiculturalism as an unnecessary

and dangerous departure from the proper emphasis on individuality. On the contrary, for the communitarist, multiculturalism is a legitimate way of protecting communities from the destructive effects of individual autonomy and promoting the value of the community. (…) Thus, the defenders of multiculturalism initially reached out to communitarianism as a possible philosophical foundation for minority rights. And on the contrary,… the natural evolution of communitarianism was heading towards some form of multiculturalism" [33]. However, according to this researcher, at the second stage of the problem of multiculturalism, most of the issues are discussed within the framework, "coordinates" of liberalism: "…there are vital interests related to culture and identity *that can be fully integrated with the liberal principles of freedom and equality* (italics by the author), which justify the granting of minorities with special rights. It can be called the position of "liberal culturalism" [33]. An important caveat, however, is that "liberal culturalism rejects the idea that groups may legitimately restrict the civil or political rights of their members in order to preserve the purity or authenticity of the group's culture and traditions" [33].

The latter thesis is broadly explained in another work by V. Kymlicka [11], where he focuses on an analysis of nature of the collective rights of national minorities. First, the Canadian philosopher acknowledges that, even after the Second World War, "many liberals hoped that an emphasis on "human rights" would also address minority rights issues. Instead of protecting the most vulnerable groups directly, by granting special rights to their members, it was envisaged that the rights of ethnic minorities would be protected indirectly by guaranteeing fundamental civil and political rights to all people, regardless of their affiliation with a particular group" [11]. Actually, in light of this philosophy, the Universal Declaration of Human Rights of 1948 did not include references to the rights of ethnic and national minorities.

It is obvious that the Declaration was a reflection of the political and legal ideology of liberalism itself. It is therefore not surprising (given the liberal postulate of the individual's priority over the collective) that the document proclaimed the rights of the individual, virtually ignoring the rights of the communities. However, in author's opinion, some of the terms contained in the Declaration, including "members of the human family", "conscience of mankind" (Preamble), "in the spirit of brotherhood" (Article 1), "family" as "the natural and fundamental focus of society" (Article 16), "the will of the people" (Part 3, Article 22), "each person as a member of society" (Article 22), "friendship between all peoples, racial or religious groups" (Article 26), "cultural life of society" (Article 27), "social and international order" (Article 28), "responsibilities to society" (Article 29), can be considered at least "sprouts", who were preparing the ground for development of conception and creation of real international legal and internal mechanisms to ensure and protect not only the individual, but a collective human rights, including – minority rights [34].

V. Kymlicka argues that, at the present stage, "differentiated national minority rights… do not, in fact, contravene the liberal principles of equality. They are really

necessary in the view espoused by Rawls and Dworkin that justice requires the rectification of a grave situation in which national minorities find themselves undeserved or for "morally unjustifiable" reasons, or for compensation for wrongdoing, especially if they are "deep, widespread and existent from birth" (Rawls)" [11]. In doing so, the philosopher distinguishes two groups of minority rights: 1) related to "*internal restrictions*", namely, to the demands of cultural minorities to restrict the basic civil or political freedoms of their own representatives; 2) related to the requirements of "external protection" that reduce the vulnerability of minorities to the decisions of the majority society. It is clear that only the second category of rights can correspond to liberal principles. To sum up, a Canadian researcher points out, "Liberal views require *freedom within a minority group* and *equality between* minority and majority groups. The minority rights system that respects these two limitations is, I am convinced, perfect in terms of liberalism. It does not contradict, but also in fact it upholds basic liberal value" [11]. Thus, the analysis of V. Kymlicka's reasoning suggests that he is a consistent and clear supporter of a *rigid* multiculturalist approach, according to which "diversity should not be simply tolerated – it should be strengthened, encouraged and supported by financial means (if necessary) or by giving cultural minorities special rights" [14].

Instead, the *soft (classic)* liberal multicultural regime can be defined, in the words of its contemporary apologist Ch. Kukathas, "as the mode of greatest tolerance. It is tolerant enough to stand up to the presence of even those who are against it in its environment. At the same time, it does not provide particular benefits and protection to any particular group or community. It will not prevent anyone from pursuing their own goals or upholding certain traditions, but it will not encourage, subsidise, or give particular preference to any goals and traditions. It is multiculturalism without fear and favouritism" [14].

Obviously, in turn, the "soft" and "hard" variants of multiculturalism correlate with the postulates of, respectively, classical and modern liberalism (neoliberalism). The ideologists of the consider that recognition of individual freedom is followed by the requirement of non-interference of the state in the private life of citizens, reproduced in the well-known formula "state – night watchman". Such a state should and can only guarantee civil and political rights (first-generation human rights). Instead, the specificity of the latter is usually seen in a pronounced social component, in changing the position on the role of the state in securing and protecting the rights of citizens and, above all, in expanding, supplementing the catalos of such rights with social, economic and cultural ("second generation" rights).

In general, the liberal and communitarianism concepts seem to be the philosophical foundations of the policy of multiculturalism in the various models of its practical implementation. Moreover, the evolution of the attitude of liberalism to multiculturalism described above, in author's opinion, is a further confirmation of the convergence of liberal and communitarianism trends in the direction of liberal communism.

CONCLUSIONS

Therefore, it can be argued that in view of the projected perspective, so to speak, the "inevitability" of further acceleration of the process of globalisation, in the world philosophical and legal discourse on human rights, one of the leading places will be the problem of finding the optimal balance between such dichotomous characteristics of this phenomenon, both universal and particular (cultural-special). Obviously, the study of this problem will require, in turn, a further meticulous analysis of the arguments of the apologists of liberalism and communitarianism, the two defining currents of contemporary European and American political and legal thought.

The important practical point is the general orientation of communitarianism to protect the rights of ethnic, denominational and other minorities, often marginalised. This brings communism closer to multiculturalism. At the same time, it seems that the evolution of the position of some liberals from non-acceptance to the approval of the legal policy of multiculturalism is the result of the influence of the communitarian paradigm and yet another visual proof of the complementarity, enrichment and ultimately convergence of both philosophical directions and the emergence of a new conceptually modified "hybrid" – so-called liberal communitarianism.

In author's opinion, just as they say about the "family of liberalisms", it is possible to talk about "the family of multiculturalisms", implying the impossibility (and probably inappropriateness) of creating a single, universal society of the concept of multiculturalism. Diachronically and geographically, differences can be very significant. Multiculturalism as a political and legal concept and as a legal policy can only be effective against a particular state in specific historical contexts. An important question is the choice of a particular model or even a unique local variant of multiculturalism.

In itself, the presence of a multicultural society (without a clear embodiment of the value-normative features of multiculturalism) can hardly be defined at all in the strict sense of the term "multiculturalism". In turn, the need to pay attention to the normative aspects of multiculturalism, to "legal multiculturalism" (I. Chestnov), requires special studies within the philosophy of law and related legal disciplines, which is an important aspect of further scientific exploration of this topic.

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Suggested Citation: Pankevych, O. Z. (2019). Multiculturalism as a political and legal concept. *Journal of the National Academy of Legal Sciences of Ukraine,* 26 (4), 119–132.

Submitted: 17/07/2019
Revised: 23/11/2019
Accepted: 05/12/2019

УДК 341.231.14
DOI: 10.31359/1993-0909-2019-26-4-133

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ПЕРЕГЛЯД КОНСТИТУЦІЇ І РЕВОЛЮЦІЙНА УСТАНОВЧА ВЛАДА: ПОЛІТИКО-ПРАВОВІ СТРАТЕГІЇ ЛЕГІТИМАЦІЇ ЗМІН ДО ОСНОВНОГО ЗАКОНУ ДЕРЖАВИ

Анотація. *Актуальність дослідження зумовлена триваючими конституційними трансформаціями, які відбуваються в Україні, та їх революційним характером. При цьому методологічні засоби опису таких трансформацій та зв'язок змін у правовій системі із здійсненням установчої влади зазвичай залишаються поза увагою українського правознавства. Метою статті є виявлення впливу типу праворозуміння на вирішення питання про конституційність і чинність акта, яким оформлюється здійснення функцій первинної установчої влади. Використане у статті поєднання діалектичного підходу з методом порівняльного аналізу дало змогу встановити особливості розуміння ознаки дійсності установчого акта з позицій основних типів розуміння права. При цьому діалектичний підхід виявляє свої евристичні можливості у формі принципів єдності історичного і логічного, змісту і форми, сутності та явища, а також закони єдності протилежностей і заперечення в розвитку політико-правових феноменів. Автором доведено, що звернення до соціально-діяльнісного і соціально-психологічного обґрунтувань легітимності революційної зміни конституції дозволяє стверджувати, що основні правові характеристики акта здійснення установчої влади (правомірність і чинність) соціально зумовлені та конкретно-історичні. З огляду на це, такі характеристики є реляційними та релятивними. Реляційність установчого акта полягає у його зв'язку з конкретною системою права та конкретною правовою свідомістю та у співвіднесеності з відмінними типами праворозуміння. Релятивність акта стосується історичної змінюваності правової оцінки акта. Соціологічний позитивізм і юснатуралізм слугують стратегіями легітимації, які можуть використовуватись як у революційних, так і консервативних цілях. Юридичний нормативізм виступає засобом легітимації актів ординарної нормотворчості і делегітимації неконституційних актів установчого значення.*

Ключові слова: конституція, установча влада, юридична революція, дійсність чинність конституції, дієвість конституції, нормативізм, соціологія права.

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CONSTITUTION REVISION AND REVOLUTIONARY CONSTITUENT POWER: POLITICAL AND LEGAL STRATEGIES FOR LEGITIMIZING CHANGES TO THE FUNDAMENTAL LAW OF THE STATE

Abstract. *The study is relevant due to the ongoing constitutional transformations taking place in Ukraine, and their revolutionary nature. With that, methodological tools for describing such transformations and the connection of changes in the legal system with the exercise of constituent power usually remain without attention of Ukrainian jurisprudence. The purpose of the paper is to identify the influence of the type of legal understanding to solve the issues of constitutionality and the force of the act, formalizing the exercise of the functions of the primary constituent power. The combination of the dialectical approach with the method of comparative analysis used in the article enabled the establishment of the features of understanding the sign of the validity of the constituent act from the standpoint of the main types of understanding of law. Moreover, the dialectical approach manifests its heuristic capabilities in the form of principles of historical and logical unity, content and form, essence and phenomenon, including the laws of unity of opposites and denial in the development of political and legal phenomena. The author has proved that the appeal to the socio-activity and socio-psychological justifications of the legitimacy of the revolutionary constitutional amendments allows us to argue that the main legal attributes of the act of exercise of constituent power (legitimacy and force) are socially determined and specifically historical. Factoring this in, such attributes are relational and relative. The relationality of a constituent act lies in its relationship with a specific system of law and a specific legal consciousness and in correlation to different types of legal understanding. Relativity of an act refers to the historical turnover of a legal assessment of an act. Sociological positivism and natural law serve as strategies of legitimation that can be used for both revolutionary and conservative purposes. Legal normativism acts as a means of legitimizing acts of ordinary rule-making and delegitimizing unconstitutional acts of constituent significance.*

Keywords: constitution, constituent power, legal revolution, validity of constitution, efficiency of constitution, normativism, sociology of law.

INTRODUCTION

The desire to maintain continuity in the constitutional development of the state and at the same time to make fundamental changes in the rule of law inevitably creates the contradiction between legality and legitimacy, which is most clearly manifested during the political and legal revolutions [1]. Over the last 15 years, the constitutional process in Ukraine has been largely extraordinary [2–3]. The extraordinary nature of this process is manifested, first of all, in those key historical moments during which changes were made to the Fundamental Law with regard to the form of state government and a redistribution of powers between the president, parliament

and government. The peculiar points of socio-political bifurcation, which marked the movement of the "pendulum" of political and legal changes in the state, were the Orange Revolution, the rise to power of V. Yanukovych, the which is quite reasonably evaluated as usurpation, and also the events of the Revolution of Dignity [4–5]. The relevance of the proposed study is predetermined by the problem of evaluating the legal significance of the acts that were supposed to shape changes in the form of government in Ukraine in 2004, 2010 and 2014[1], but the problem has remained unresolved in modern Ukrainian jurisprudence and demands its theoretical understanding.

The purpose of this article is to explore the specificity of the influence of the type of legal consciousness on the decision on the constitutionality and validity of acts, which regulate changes in the constitutional order and the exercise of the functions of the primary constituent power.

In turn, the achievement of the outlined purpose implies the necessity of solving the following interrelated problems: clarification of the political and legal significance of the constituent power design in constitutionalism and establishment of the nature of the conditionality of the basic legal characteristics of the act of the constituent power – legitimacy and validity – by that type legal understanding, from the standpoint of which the legitimation of such an act emerges. Considering the purpose and objectives of the study, it is also appropriate to appeal to the content analysis of texts of legal doctrine, in particular, the doctrine of ideas, views and concepts of Ukrainian and foreign constitutionalists. This analysis is based on a comparison of the semantic meanings of the concepts of reality and legitimacy in the works of representatives of the main classical types of legal consciousness. Thus, the common logic techniques of comparison and differentiation, generalization and typification allow us to investigate the specific features of theoretical models developed by individual schools of jursiprudence to explain the phenomenon of the emergence and change of constitutional law and order. Establishing the practical relevance of these explanatory models for legitimizing constitutional transformations requires a recourse to the method of ascending from abstract to specific. Its use in research makes it possible to demonstrate the socio-instrumental importance of constitutional consciousness.

1. LITERATURE REVIEW

A number of legal and political aspects of the mentioned constitutional changes in Ukraine have repeatedly become the subject of attention of Ukrainian and foreign

[1] Constitution of Ukraine. (1996). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80; Law of Ukraine "On Amendments to the Constitution of Ukraine" (2004, December). Retrieved from https://zakon.rada.gov.ua/laws/show/2222-15; Decision of the Constitutional Court of Ukraine "In the case of the constitutional submission of 252 People's Deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine" On Amendments to the Constitution of Ukraine "of December 8, 2004 N 2222-IV)" (2010, September). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KS10094.html.

constitutionalists, philosophers and theorists of law. At the monographic level, these issues were considered, in particular, by R. Maksakova [6], O. Vodiannikov [7], O. Myronenko [8], V. Rechitskyi [9–10], and M. Savchyn [11]. The domestic scientists analysed separate stages of the constitutional process in Ukraine, considered their substantive, constitutional, procedural and socio-political aspects, assessed the constitutionality, validity and legitimacy of acts, which outlined the amendments to the Fundamental Law, for which various arguments were presented – legal, political, and sociological. At the same time, the theoretical and methodological bases of such evaluation are, for the most part, insufficiently clarified, which cannot be overlooked. Against this background, the arguments presented by various authors, even within a single publication, can sometimes be based on different types of legal reasoning, and are therefore often incompatible with their opponents' positions.

In some cases, there is a substitution for constitutional law evaluations of purely political or, conversely, abstractions from political reality in favour of the "purity" of constitutional dogma. The process of changing the constitution is often described by terms that have different meanings, whether formal, legal, sociological, or axiological, which may lack proper disambiguation. In recent years, the general constitutional and theoretical problems of the exercise of constituent power have been covered in the publications of Z. Oklopcic [12], M. Loughlin [13], G. Brunkhorst [14], and M. Pereira [15]. Of interest is the debate that unfolded in 2015 on the pages of the International Journal of Constitutional Law between M. Tushnet and J. Komárek regarding the issue of constitutional revolutions in connection with the concept of constituent power [16–18].

Instead, discussing the question of changing the legal foundations of the state system demands relying on sound theoretical and legal developments. Among the latter, an outstanding place belongs to the classic work of Hans Kelzen "Pure theory of Law" (1934) [19], which has not lost its scientific importance to this day [20–22]. In Western legal science, where, unlike the former Soviet territories, jurisprudence tradition was not interrupted, back in the 70's – 80's of the last century, the Kelzen problematics of changing the Fundamental Law was developed by such researchers as J. W. Harris [23] and R. J. Lipkin [24] – in terms of isolating the causes and conditions of such change, J. Hughes [25] – in the context of the matter of validity of the mentioned norm, T. Hopton [26] and L. Wolf-Phillips [27] – in the context of the general issue of constitutional and legal legitimation of the policy. These issues have not lost their significance at the beginning of the 21st century, as evidenced, in particular, by the publications of M. Rosenfeld [28], R. Barnett [29], Z. Zevit [30] and R. H. Fallon [31].

Methodological significance for the consideration of the problems discussed below, in particular the issues of constitutional legitimation, are works on constitutional sociology, certain aspects of which are actively explored by K. Thornhill [32–33], T. Spaak [34], and Y. Roznay [35]. The work of the latter of the aforementioned researchers is based on a considerably empirical study of the nature and the limits of the political

power to amend the fundamental law [36] and the concept of "unconstitutional constitutional amendments". These issues continue to be of interest to contemporary constitutionalists in the European post-socialist space (E. Tanchev and M. Petrović) [37–38].

2. MATERIALS AND METHODS

The purpose of the study outlined above necessitates the use of a number of interrelated philosophical and general scientific research approaches, general methods and techniques that enable to achieve it in the most adequate and effective way.

The basic philosophical approach used in the proposed intelligence is the dialectical approach. This approach, used in the moderate on the antithesis of materialism and idealism of interpretation, serves as an implicit pivotal idea that structures the way of considering the validity of acts of constituent power, applied further primarily in the form of principles of unity of historical and logical, content and form, phenomenon and essence, including the unity of opposites and the negation of negation and the transition of quantity into quality in the development of social phenomena. For example, the principle of unity of the historical and the logical, in which the logical, namely the constitutional and legal, is conceived as a removed form of social and state development, is a conceptual means of understanding changes in the form of state government in Ukraine. The methodological principle of unity of form and content of phenomena facilitates the consideration of political and legal transformations, in particular those that occur in modern states of transitional, transitive type, as phenomena where the legal becomes a form of political. It is the dialectics of phenomenon and essence that reveal the unity of the socio-political and legal aspects of the constitutional process, its legal essence as the essence of the "first order" and the socio-psychological essence of legal (constitutional and legal) phenomena as some kind of essence of the "second order". Dialectical methodology, based on the use of the law of unity of opposites, creates the necessary conditions for combining procedural and formal discretion in the constitutional process with its substantive continuity. Dialectics also reveal the processes of socio-political and state transformations that are described by the emergence of new-quality constitutional phenomena. The quantitative changes to the basic law become qualitative changes and can confirm the ongoing constitutional revolution. Under these conditions, the desire to preserve the visibility of substantive continuity in the constitutional order inevitably conflicts with formal violations of such continuity. In the Ukrainian constitutional process of 2004-2014, the paradox of turning a constitutional "wrong" into a constitutional right manifests itself through a dialectical "denial of objection": revolutionary changes in the form of state government are a denial of previous constitutional regulation and at the same time a return to the regulation that preceded the "constitutional reverse" of 2010. In turn, comprehending these political and legal transformations requires finding methods that would reveal the specifics of the argumentative means of explaining the transition of constitutional "wrong" to constitutional law as a qualitative, revolutionary legal transformation.

In view of this, the dialectical approach in the study is complemented by the use of other philosophical approaches, general scientific methods and techniques. Thus, in particular, the principle of social determinism and sociological approach to the process of constitutional transformation gain substantial importance, allowing to immerse the process of evaluation of legal forms in the social context of legitimation and see the constitutional and legal categories of real social interests. The task of identifying the semantic connotations of the signs of reality and constitutional legitimacy of those acts of public authorities, through which changes in the rule of law take place, necessitates the use of a hermeneutic approach that focuses on the very problem of understanding constitutional and legal phenomena, which, due to this, is revealed as a problem of constitutional legal consciousness. The root of the problem lies in the tension between static Aristotelian logic, which fundamentally prevents the transformation of "A" to "non-A" as its formal opposite, and a dialectical logic that allows to describe any phenomenon in the process of its development, in particular, allows to reveal dynamics of revolutionary political and legal changes and explain the inadequacy of attempts to interpret them in the context of constitutional succession.

An important methodologically significant aspect of the problem of constitutional consciousness is the differences in "preunderstanding" (G. Gadamer), namely, the differences between the criteria of legal nature of social and, in particular, political phenomena. Legal precondition sets the semantic boundaries of legal and non-legal, and therefore serves as an implicit factor that determines the strategy of exploring constitutional transformations and evaluating the individual acts by which such transformations are outlined. The main differences here are the differences of legalistic positivism, sociological and natural law approaches to understanding constitutional law. If the statistician understanding of constitutional law is based on the description of normative, deontic legal reality and implicitly appeals to procedural aspects of the formation of state will as a source of justice, then the sociology of constitutional law provides a description of the actual state of affairs and empirical social processes, while understanding them as processes of law. Both cognitive strategies are descriptive and therefore positivist, but in substantially different ways. The dichotomy of the existing and the proper attests to the essential discrepancy between the results of the description of both realities, with the formal similarity of the means employed in the process (description). On the other hand, both positivist strategies of legal knowledge are opposed by a naturalist understanding of constitutional law. Such a difference manifests itself not in the deontic mode of the existence of law, from which derives a considerable part of the representatives of the school of natural law (since in this sense logistical normativism paradoxically turns out to be similar to natural law), but, instead, in its metaphysical ontological bases and in the ideal character of values, to which constitutional naturalism appeals. Accordingly, the criteria of legality are significantly different in the latter case: the naturalism, considered as an alternative to the two previous cases, appeals to the ideal and meaningful criteria of the legal as such. At the same time, the juxtapo-

sition of naturalism and sociology manifests itself when appealing to the real political processes of objectification of natural ideas and values.

3. RESULTS AND DISCUSSION

3.1 The concept of constituent power in constitutional law

Establishment of the practical significance of explanatory theoretical models for the legitimation of constitutional transformations enables the demonstration of instrumental significance of constitutional understanding and facilitates the demythologization of established conceptual constructions, and, above all, the concept of constituent power (*pouvoir constituante*). Usually, the fact that this concept is endowed with two substantially distinct, albeit interrelated meanings remains left out by the constitutionalists. The first one is value-normative, while the second one is functional and descriptive. The first sense embodies the understanding of constituent power as the "power of the people," and the second – its understanding as a function of the drafting and adoption of the constitution (the so-called primary constituent power) and the subsequent change of the basic law (derivative, secondary, or institutional constituent power). The first sense is, according to G. Hart, an "ascriptive" (non-descriptive) meaning attributed to certain actions. Note that both meanings are implicitly present in Antonio Negri's assertion that "the constituent power is a subject. This subject, this collective subjectivity, is distracted from any conditions and contradictions, which from time to time are limited by their constituent force in the specific circumstances of political and constitutional history" [7].

The primary constituent power is unlimited by definition – at least in formal and procedural aspect. In the substantive aspect, it is often considered to be bound by the requirements of superpositive, "natural" law. The complexity of disconnecting the two above mentioned connotations of the concept of primary constituent power causes it to be understood as "emerging and existing in the relationship between the constitutional imagination (constitutional myth of founding) and the activity of the bodies of established power. Constituent power, therefore, cannot be equated with that of a certain community, even a large one – this approach reduces the constituent power to the question of fact. The notion of constituent power connects the symbolic and the real in constitutional discourse" [7]. The elusive nature of such a relationship and connection may lead to the conclusion that "today, like many centuries ago, [the notion of constituent power] is still covered by the veil of les mystères de l'Etat [mysteries of the state – in French], unrecognized and incomprehensible as the mysteries of theology. Namely, the study of such power... leads to the depths of social psychology and anthropology. Neither the political science nor the legal have any power to explain this phenomenon using their scientific toolkit..." [7]. In our view, the last thesis allows one clarification: the powerlessness of legal dogma manifests itself in the light of the jurisprudence of the sociologist-positivist orientation and other descriptive disciplines.

The purification of the constitutional vocabulary from the mystical veneer enables the statement that a value judgment on a particular political decision as on an "act of primary constituent power" is possible only as an ex post facto evaluation. Such an evaluation is possible, so to speak, not so much thanks to a victory of the rule of law (which is always indisputable), but thanks to a rule of law of the victors – a rule that established itself as a socio-political fact. Such qualification of a procedurally or competently unconstitutional act as a "constituent" allows to bring the act beyond the limits of law and order and thus eliminate the possibility of its legal evaluation. As for the control over the conformity of the exercise of the primary constituent power with a particular value-normative, "material" factors, to be efficient, such control can be exercised only by the new constituent power or the bodies constituted by it. For obvious reasons, this will always cast doubt on the objectivity of such control and, at the very least, on its independence. Given the impossibility of ensuring independent institutional control over the exercise of constituent power, its connection with the requirements of natural law remains purely transcendental and metaphysical. In a descriptive way, the basic approaches to the interpretation of the founding power can be distinguished according to three types of understanding of law: legalistic, sociological and value-metaphysical.

In one of the thorough domestic studies of constituent power, the latter is defined from a sociological standpoint as "the relation of domination-subjugation, by means of which through a politically dominant public entity as a sovereign establishes (constitutes) in the territory of the state or part thereof certain public-power institutions and their basic forms of functioning (establishes the actual constitution) and also provides for their legitimation by legalizing the public order in which it is interested, by adopting or amending legal acts (legal constitution), acting as organizational and constitutional legal prerequisites for the functioning of public power" [6]. If from the standpoint of its content the constituent power is the power that establishes the actual constitution, then from the standpoint of form this power is about "legalizing", "endowing a binding force" of a certain system of organization and exercise of political power, serving for this purpose, we should point out, not merely legal and extra-legal means (especially at the initial stage of its formation).

Without denying the importance of the normative (both legal, dogmatic, and natural-legal) dimension of constitutional and legal phenomena and recognizing their unconditional legitimate value, we shall point at one advantage that empirical and descriptive interpretation of the constituent power gives: as opposed to normative criteria of recognition of certain actual social power as "people's power" or "constituent power", sociological approach creates prerequisites for scientific reflection of the most complex and ambiguous aspects of the development of the political and legal phenomenon, which, subsequently, as a result of radical social and political changes is retroactively referred to as "constituent power". Since the de facto legal form is not always a prerequisite for the exercise of constituent power, it is the empirical and sociological approach

that allows us to trace the process of transformation of the actual constitution into a legal constitution, the transformation of political decisions which, from legal and dogmatic positions, are considered to be "non-legal" acts into acts that subsequently, from the standpoint of other types of legal thinking, become treated as "legal".

Therefore, in the analytical sense it is necessary to distinguish between functional and value-normative aspects of the constituent acts. Within the same rule of law, unity of both aspects is presumed regarding any constituent acts, including those adopted with formal and/or material violations of the constitution. However, changing the law allows you to separate the two aspects, and sometimes even raise the issue of responsibility of officials for participating in the adoption of the constituent act.

The "derivative" nature of the constituent power exercised by the subject of authority of the constituent power appears to be a delusion in the event of going beyond the established constitutional powers upon adopting the act. In such case, the public authority de facto exercises its own primary, not derivative, constituent power.

If, when the constitution is amended, the constituent function is performed by an act adopted in violation of the constitution, this inevitably causes the relativity of the legal meaning of such a quasi-constituent act. From the standpoints of the constitution in force at the time of the adoption of the act, the competence restrictions (the "letter of the constitution"), participation in the adoption of the act can be considered as a special type of constitutional or other sectoral offense. Appealing to the "spirit" of the current Constitution may justify qualifying actions such as abuse of power or authority. In contrast, in view of the "spirit" of the constitution, validity of which is considered to be "renewed" as a result of a decision by a body of constitutional jurisdiction, the adoption of such an act may be interpreted as restoring the state of the "rule of law" or as an act of the said principle. In the latter case, unlike the previous one, the role of moral and political factors in the legal evaluation of the decisions and actions of the subject of power is much greater.

Within the same constitutional law and order, the unity of the functional and value-normative aspects of the constituent acts is assumed in relation to any of them, including those adopted with formal and/or material violations of the constitution. The change of law enables a separation of the two aspects and evaluation of the act of functionally constituent power from the standpoint of the dogma of the previous or subsequent law and order in the context of quasi-constituent. On the other hand, in the absence of special legal regulation of this issue, empirically-oriented sociological-positivist legal consciousness, which deduces the legally proper from the existing, allows to keep in force all acts of public authorities, approved "to execute" a quasi-constituent act at the time of its defective approval. Constituent and quasi-constitutive acts of public authorities as acts of constitutional change occupy a special place in the system of acts of public authorities, serving as a legal form of political transformation in society and the state.

3.2 The validity of the Constitution from the standpoint of Hans Kelsen's normativism

From a methodological standpoint, of interest is the consideration of the transformation of non-law into law in Kelzen's "pure theory of law" – a normativist concept, which uses sociological principles in important points [22]. One of the achievements of Hans Kelzen's doctrinal legacy was the legal concept of revolution used in the first edition of The Pure Theory of Law (1934) and reproduced in its second edition in 1960. According to Kelzen, "a revolution in the broad sense of the word, including the coup d'etat, is any illegitimate, that is, such that does not conform to the provisions of the constitution, change of the same constitution or its replacement with another fundamental law. From a legal standpoint, it does not matter whether this change in the legal situation has occurred through the use of force against the lawful government, or by members of the same government; the movement of the masses or a group of individuals. It is crucial that the current constitution be modified or replaced in some way in a manner not stipulated in the previous constitution" [19].

The principle that "law cannot define its own limits" expresses the issue of the marginal ground of law as a logical and legal problem of regressus in infinitum – an endless regression to legal sanctions. To overcome this, the Austrian jurist posits the concept of "die Grundnorm", which is outside the constitution and is "logically necessary for the objective validity (force) of positive legal rules" [19]. At the same time, Kelzen acknowledges that a separate rule and law and order of law in general, to recognize their reality, require not only a logical basis, but also the necessary social condition – minimal efficiency and effectiveness. "Rules of the legal order are valid because the Fundamental Rule, which constitutes the basic rule of their creation, is presumed to be valid and not because they are efficient; however, they are only valid as long as this legal order is efficient" [19]. Thus, according to Kelzen, when the constitution ceases to be efficient, it automatically loses its validity.

The absence of a statutory established mechanism for refuting the presumption of the constitutionality of acts of the hierarchically supreme bodies of state power logically leads to the inconsistency of this presumption. It should be noted that the above refers to the legal qualification of decisions (actions) of public authorities made by them within the limits of the constitutional order of the law. Both the scope of the presumption of constitutionality and the possibility of its refutation are limited by the *established* law and order. Being an integral element of the existing law and order, the presumption of constitutionality extends to acts of public authorities issued within its normative, constitutional and semantic boundaries. Accordingly, it is unlikely that this presumption may be valid in relation to acts which change the constitution with one or other violations of the rules of amendment of the previous constitution. At the same time, the functions of constituent power are exercised by state bodies, the constitution is not

specifically authorized to do so, or the situations when these functions are exercised in a manner not provided for by the constitution. According to "pure theory of law", in such cases, one basic rule is replaced by another.

The founder of normativism emphasized that "the subjective meaning [of a legal act] must be distinguished from the objective one. The "duty" is a subjective meaning of any human act of will intentionally directed at the behaviour of another human. But not each of such acts has this objective meaning. And only when it has the objective meaning of duty, is this duty called the "norm". The fact that "duty" is also an objective meaning of the act is manifested in that the behaviour to which the act is intentionally directed is perceived as being necessary not only from the standpoint of the one who performs the act, but also from the standpoint of the third, disinterested party. Moreover, even if the will, the subjective meaning of which is a duty, actually ceases to exist, and the meaning (that is, a duty) does not disappear with it; if the obligation remains effective ("gilt") and after the disappearance of the will, if it is valid even when the individual, who – according to the subjective meaning of the act of will – must behave in a certain way, knows nothing about the act and its meaning, and, nevertheless, it is considered obliged or governed to act in accordance with a duty, it is then when the duty as an "objective" duty is "valid", such that obliges the addressee with a "norm" [20].

Thus, within the hierarchically constructed legal system, the objective normative sense of a legal act expresses some conventional legal-normative meaning of the text that sets out the content. Such significance, on the one hand, derives from the act of higher legal force, which imparts to other, hierarchically lower acts, logically preceding them (legal logical and dogmatic legitimation). At the same time, according to Kelzen, "a legal norm is considered objectively valid only if the behaviour it regulates, at least to some extent, actually corresponds to it". Therefore, in the context of pure theory of law, the objective, social meaning of the norm is "objective". Such meaning is expressed in the acts of competent law enforcement authorities and in the behaviour of persons who follow the norm. This brings to the active, behavioral, and therefore – sociological legitimation of acts of constituent power.

However, when it comes to decisions of authorities of power, the subjective meaning of which is aimed at repealing certain provisions of the current constitution, however, the possibility of such termination of constitutional provisions is not explicitly stipulated and at the same time is not prohibited by them. Such decisions can be imparted by an objective normative meaning only and exclusively in retrospect, in the subsequent behaviour of bodies and officials as human rights defenders.

"Legally revolutionary" constituent acts cannot be regarded as acts pertaining to the existing law and order (that is, the law which they claim to be subjective in their subjective meaning), and therefore, in the legal-dogmatic understanding are outside the field of current law.

3.3 Socio-psychological foundations of the normativity of the Constitution: Georg Jellinek and Alf Ross

Sociological jurisprudence, as opposed to legal dogma, explicitly or implicitly relies on the principle of "normative force of fact" put forward by Georg Jellinek. Rejecting the idea of the completeness of the system of law, a prominent jurist pointed to the reality of the historical priority of national-political facts ("power") regarding the positive law. From a sociological-positivist standpoint, he emphasized the fictitious nature of legal continuity in the process of state development: "...the history of law is at the same time a history of upheavals in law and gaps that are not filled in by the legal content within separate legal orders and next to them, and only through fiction, which in its groundlessness is not inferior to the most daring natural-legal speculations, can it still maintain the semblance of continuous continuity rights" [39]. Jellinek provides a psychological justification for the transformation of empirical state order into *law* and order. According to the thinker, the elements that lead to such a transformation are: a) a mental perception of what is actually happening as being both normative (a conservative element from which there is a presumption that an existing social fact is at the same time a legitimate fact); b) a mental conception of law that is above positive law (rationalistic, evolutionary, progressive element in law). "Before custom causes the transformation of the factual into normative, the belief in the rationality of the new order will create in such cases an idea of its legitimacy" [39].

In denying the absolutization of the juxtaposition of law and power, the German scientist emphasized that "only the force that does not cause us to feel its conformity to the norm is perceived by us as non-legal" [39]. In pointing to the huge number of social factors on which depend the features of the "process of transforming state relations based on strength" ("political facts") into legal relations, Jellinek summarizes his considerations about the key role of factual (especially socio-political and social-psychological) factors for resolving the issue of lawfulness/unlawfulness of political acts: "There are epochs in the life of peoples, which in the minds of both contemporaries and subsequent generations are periods of lawlessness and pure arbitrariness. This consciousness can acquire legal significance in the event that it is possible to destroy the order, which is recognized as illegal, which subsequently, in relation to the restored one, that has not yet lost its nature and order in the people's consciousness, will appear as a usurpation rather than law" [39]. Methodologically significant here is the accentuation of socio-evaluative (in epistemological terms) and de facto specific historical and relativistic (in ontological sense) nature of the attribute of "legitimacy" of an act of public authority. Such an argument by Jellinek attests to the decisive role of legal consciousness in the legal qualification of acts aimed at changing the existing constitutional order.

The above is also confirmed by the discussion on the validity of legal acts that took place in the 20th century between the law schools of normativism and legal realism.

According to one of Kelzen's opponents, a representative of Scandinavian legal realism Alpha Ross, the basis of the validity of law and order is beyond the rule of law, and therefore by definition can only be meta-legal (socio-political, moral, divine, etc.): the duty to obey the law "is a moral obligation to the legal system, not a legal duty under that system". The "obligation to the system" cannot follow from the system itself, but it must follow the rules or principles contained outside the system [40]. In practical terms, Ross's reasoning can be used, in particular, to justify not the legal but moral (moral and political) nature of sanctions, which ensures compliance with legal standards by judges of higher courts and members of other bodies authorized to make final and non-appealable decisions. However, such a proof, quite correct from the standpoint of formal logic, does not prevent the empowerment of various government bodies to assess judges' observance of their moral obligations, including upon making final decisions. Moreover, given the direct indication of the Constitution, such a moral assessment in practice can take on a legal form – despite some formal inconsistency of such a normative decision and even the appearance of the effect of the so-called "reverse control" [10]. In the end, in view of concrete historical facts, a radical change in socio-political circumstances and the implementation under such conditions of a legal assessment of even a formally final act cannot be completely ruled out. For obvious reasons, such an assessment can no longer be based on the principles of legalistic positivism.

Thus, from the arguments of Ross, as well as from the views of Jellinek, the conclusion follows about the socio-historically determined complementarity of both the sociological and natural-legal approaches to legal dogma. From the standpoint of both jurists follows the inevitability of going beyond the latter when substantiating the legitimacy of a revolutionary change in the legal system. Among other things, the above statements of a Scandinavian jurist can also be considered as a sociological interpretation of the special nature of acts of constituent power outside the law and order established by them, although, despite this, they are also considered to belong to the latter.

To explain the transformation of the factual into normative (so surprising for Kantian thinking), the well-known theoretician of law Ya. M. Magaziner, in the work "The General Theory of Law on the Basis of Soviet Legislation", resorts to a geometric analogy: "When the side of a square adjoins the circumference of a circle, then the same point of contact of these two figures is both a point on the side of the square and on the circumference of a circle. Same as in public life: the same point – an unlawful act – becomes the intersection of two sharply distinct legal figures, two consecutive but different legal systems (for example, autocratic and constitutional) and what was an offense for one of them, will be the source for the following one" [41]. In the aforementioned work, the author gives many examples of the transformation of constitutional non-law into law so as to prove that in history "the new law often stemmed from a violation and even destruction of law: the destructive act was also a creative act. Destruction is not only a factual force that terminates the existing rule

of law, and, like the elements of water or volcanic lava, hides this [legal] communication, but is also the legal date from which stems a new order, that is, the source of that order" [41].

From the standpoint of modern constitutionalism, such a combination of the sociology of constitutional law with its dogma in the description of the exercise of constituent power is described as follows: "Formally, constituent power is reduced to legitimization... both by means of mechanisms – the transformation of the actual constitution into a legal one, and by means of extra-legal mechanisms at the initial stage of implementation, followed by the provision of a legal form for these transformations". It is substantial that the new rule of law turns out to be completely invalid from the standpoint of the internal logic of the previous law and order in cases where amendments to the constitution are made in a different way than that provided for by the constitution itself. At this point, however, Kelzen's logic is combined with the logic of the sociology of law: the question of evaluating a constituent act arises when the legal system actually goes beyond the law, namely, when the most fundamental rule directly related to a specific constitution is changed. Consequently, a change in the constitution as a direct or indirect result of the adoption of the relevant act by the public authority indicates the actual implementation of the functions of constituent power. Such power may be derivative (exercised in accordance with the provisions of the constitution) or primary, that is, exercised independently of or in violation of such requirements.

From the perspectives of various types of legal understanding, such an act, committed by a body of constitutional legal proceedings, may receive an excellent legal assessment. Thus, from a regulatory standpoint, it should be admitted that the adoption of the said act is aimed at changing the fundamental rule, according to which "the current constitution must be respected". The problem here is that, within the framework of the existing law and order, there are no bodies authorized to state the fact of such a change. A revolutionary change in the rule of law creates the necessary political conditions for the establishment of certain "legal" consequences of the adoption of an act committed with the departure from the previous law and order. This applies to any acts, in particular, even formally final. However, the weak point of this approach is the danger of the retroactive effect and stability of the situation of private individuals and their associations that arose as a result of decisions of public authorities.

However, according to sociological legal understanding, the presence of legal properties in an act is not so much the result of specialized and formal (official) recognition as actual social recognition, social legitimacy, including recognition of "external" with respect to the system of bodies within which the act was issued. This is of particular importance in assessing acts that de facto change the constitution — acts of the implementation of "constituent power". Thus, the next radical change in the alignment of political forces, a revolutionary change in the rule of law creates both real opportunities and, in a certain sense, even socio-legal grounds for the revaluation of acts of the previous state power by the newly formed public authorities. Since, according to

Ya. M. Magaziner, "a crime can only become a source of law when it is committed by a person or a group of persons having or having seized power over the rule of law, that is, when the same act is a crime in terms of old law and source of law – from the standpoint of the new law "for the re-qualification of acts that served as the source of law in the previous law and order, it is necessary to change the "power over the law and order itself" [41]. It is clear that such a change is necessary for any radical socio-political transformation, in particular for the transition from an undemocratic political regime to a democratic one.

CONCLUSIONS

1. Differences in the value-normative and functional-descriptive aspects of the conceptual apparatus of constitutionalism enable the identification of mythological components in the doctrine of constitutional law. Such components include, in particular, the concept of constituent power, considered from the standpoint of its legitimizing and political-ideological functions.

2. An appeal to the socio-active (G. Kelzen) and socio-psychological (G. Jellinek, A. Ross) types of justification for the "revolutionary" constitutional changes suggests that the basic legal characteristics of the act of exercising constituent power (lawfulness and validity) are socially determined and specifically historical. Factoring this in, such characteristics are relational (formally) and relative (meaningful).

3. Attributing the value-normative meaning of "acts of the primary constituent authority" to certain actions and decisions allows not only to remove the problem of their inconsistency with the predefined procedural rules, but also to create the conceptual basis of the new rule of law. In the context of political and legal transit, the positivistic sociology of law acts as a retroactive strategy, performed "retroactively" by the legitimation of political decisions and actions. Sociological positivism serves as a strategy of "ascertaining" socio-empirical legitimation, which can be used for both revolutionary and conservative purposes. Natural law argumentation is also politically ambivalent, which allows providing meaningful legitimation to new constituent (in the functional meaning) acts and delegating the constituent significance of previous acts. The metaphysical nature of the evaluation criteria allows the use of natural law both prospectively and retrospectively. But legal dogma, in particular, in the legal and normativist version, appears to be a promising and at the same time conservative strategy for formal legitimization of acts of ordinary rule-making and delegation of unconstitutional acts of constituent significance.

4. Consideration of the requirements of legal certainty requires a limitation of retroactivity in the subsequent assessment of the consequences of the "legal-revolutionary" change (that is, a change made in violation of the formal constitutional requirements) of the rule of law. This shows the law-making role of time, which, thus, is able to turn political facts into legal acts, the action of which can no longer be rejected.

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Suggested Citation: Rabinovych, S. P. (2019). Constitution revision and revolutionary constituent power: political and legal strategies for legitimizing changes to the fundamental law of the state. *Journal of the National Academy of Legal Sciences of Ukraine,* 26(4), 133–151.

Submitted: 25/05/2019
Revised: 05/11/2019
Accepted: 04/12/2019

УДК 340.12
DOI: 10.31359/1993-0909-2019-26-4-151

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ПОСТМЕТАФІЗИЧНЕ МИСЛЕННЯ У ПРАВІ: ПРИКЛАД ГЕРМЕНЕВТИЧНОЇ ФІЛОСОФІЇ

Анотація. *Статтю присвячено проблемі постметафізичного мислення у праві, про актуальність якої свідчить криза фундаментальної юриспруденції як наслідок властивої сучасній думці в цілому відмови від осмислення граничних підстав. З метою виявлення умов можливості постметафізичного мислення у праві, використовується метод історико-філософської реконструкції, що він водночас виявляється герменевтичним проясненням. Проблема розкривається у три кроки. Спершу в широкому історико-філософському контексті розглянуто поняття метафізики та чинники, які зумовили критику метафізичного мислення. Далі виявлено основні мотиви постметафізичного мислення та розкрито сенс філософської герменевтики як постметафізичного проєкта. Нарешті, визначено особливості постметафізичного мислення у праві та роль герменевтичної філософії права в епоху постметафізики. Метафізичність (що її характеризують передусім ідеалізм і пріоритет теорії) мислиться як одвічна складова філософії, що виявляється у парадоксі теоретичного досвіду, який головно й інспірує критику метафізичного мислення. Відповідно, перевершення метафізики виявляється перманентним самоперевершенням філософії, яке, разом з тим, стає домінуючою спонукою сучасного (постметафізичного) мислення. Герменевтична філософія, або феноменологічна герменевтика, розглядається як приклад реалізації позитивної стратегії критики метафізики, основним мотивом якої є переосмислення класичного пріоритету теорії над практикою та відновлення цілісності людського досвіду. У свою чергу, досвід права розглядається як парадигматичний приклад досвіду у власному розумінні слова, що він завжди є фронетичним досвідом, тобто таким, що поєднує теорію, практику та мистецтво. При цьому герменевтична філософія права постає як онтологічна теорія природного права, що локалізує граничні підстави права у самій структурі фундаментального досвіду як досвіду розуміння. У такий спосіб етика поєднується з онтологією й водночас уможливлюються як постметафізична філософія, так і постметафізичне право.*

Ключові слова: постметафізичне мислення, феноменологія, герменевтична філософія, досвід, фронесис.

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POSTMETAPHYSICAL THINKING IN LAW: AN EXAMPLE OF A HERMENEUTICAL PHILOSOPHY

Abstract. *The scientific paper covers the matter of post-metaphysical thinking in law, the relevance of which is evidenced by the crisis of fundamental jurisprudence as a consequence of the refusal to comprehend ultimate grounds inherent in modern thought. To identify the conditions for the possibility of post-metaphysical thinking in law, the method of historical and philosophical reconstruction is used, which itself constitutes a hermeneutical clarification at the same time. The issue is elucidated in three steps. First, in the broad historical and philosophical context, the concepts of metaphysics and the factors that caused criticism of metaphysical thinking are considered. Further, the main motives of post-metaphysical thinking are listed and the meaning of philosophical hermeneutics as a post-metaphysical project is revealed. Finally, the features of post-metaphysical thinking in law and the role of hermeneutic philosophy of law in the post-metaphysics era are identified. Metaphysicality (characterized primarily by idealism and the priority of theory) is imagined as an integral component of philosophy, manifested in the paradox of theoretical experience, which mainly inspires criticism of metaphysical thinking. Accordingly, the transcendence of metaphysics is a permanent self-transcendence of philosophy, which, at the same time, becomes the dominant motive of modern (post-metaphysical) thinking. Hermeneutic philosophy, or phenomenological hermeneutics, is considered as an example of the implementation of a positive strategy of critique of metaphysics, the main motive of which is to reinterpret the conventional priority of theory over practice and restore the integrity of human experience. In its turn, the experience of law is considered as a paradigmatic example of experience proper, that it is always a phronetic experience, meaning that it combines theory, practice, and art. With that, the hermeneutic philosophy of law appears as an ontological theory of natural law, which localizes the ultimate grounds of law in the very structure of fundamental experience as an experience of understanding. In this way ethics is combined with ontology and makes possible both post-metaphysical philosophy and post-metaphysical law.*

Keywords: post-metaphysical thinking, phenomenology, hermeneutic philosophy, experience, phronesis.

INTRODUCTION

Farewell to the past seems to be one of the leitmotifs of modern thinking at large, which imbues almost everything with the "post-prefix". And despite the semantic ambiguity of the corresponding terms, one way or another, it is clear that this is a self-transcendence of a particular tradition. The main philosophical movements of the 20th century, such as postanalysts, post-structuralists, post-Marxists, followed this path. "The fact that phenomenologists have not yet come to their "postism" makes them almost suspicious", writes Jürgen Habermas in the late 1980s in this

matter [1]. We shall note, however, that these suspicions have now been removed [2]. A similar tendency is inherent in modern philosophy of law. Particular emphasis is placed on fundamental jurisprudence (philosophy and theory of law) in the post-Soviet space, which describes itself as unconventional or post-classical [3–10]. At the same time, post-metaphysics is often imagined as a defining feature that allows to distinguish between the conventional and the modern [11–14].

With that, among the countless "post-" prefixes used in self-identification of modern jurisprudence, post-metaphysics, with its desire to overcome the "illusion of the universal", appears to be, perhaps, the most problematic. As noted by Arthur Kaufmann, overcoming the metaphysical in law means nothing short of reducing the latter to a matter, to pure positivity [15]. In such a broad sense, metaphysical thinking only makes law possible, and, by extension, philosophy. It appears that this is what Sergei Rabinovich is referring to when he emphasizes the necessity and inevitability of metaphysics as "a feature of such a comprehension of law that seeks to know its essence" [16]. On the other hand, the empirical method of the natural sciences and the formalism of the moral and legal theories of modern times, together with the development of historical sciences and the assertion of historical consciousness in the 19th century, problematize metaphysical thinking to such an extent that we are compelled to stand behind Habermas and admit that today we have no alternative to post-metaphysical thinking [1]. However, the rejection of the metaphysical conception of absolute meanings has raised a new issue: how can the experience of meaning as something fixed (theoretical experience) be possible in the turbulent flow of human existence? It seems that the key issue of post-metaphysical thinking – the need to incorporate the experience of meaning into the dynamic existence of the finite human being – is at the same time the nuclear problem of contemporary jurisprudence, which seeks to strike a balance between the dogmatism of conventional concepts of natural law, on the one hand, and the relativistic arbitrary conduct of post-modernism. In a more radical form, this issue is formulated by the American philosopher Francis J. Muts III as a provocative question: "Is law able to outlive an interpretive turn?" [17]. In other words, is a post-metaphysical claim to justice possible?

One cannot but mention the striking image of philosophy in agony portrayed by Peter Sloterdijk: "In the face of death, she wanted to be honest and divulge her last secret. She confesses: all the big topics were total twists and turns. The excitement of thought is in vain: God, the Universe, Theory, Practice, Subject, Object, Body, Spirit, Meaning, Nothing – all this does not exist" [18]. Do the ghosts of freedom, justice, human dignity, and ultimately, law, as such, not complement this list?" [19].

Among contemporary philosophical trends that feed on the contradictions of post-metaphysical thinking, philosophical hermeneutics, including hermeneutic philosophy of law, occupies a special place. Initially focused not on the assertion of its own position, but on mutual understanding, not on denial, but on recognition, it seeks not to solve the paradox of theoretical experience (which, like any paradox, cannot be resolved), but to

develop a strategy of behaviour with it that would make both post-metaphysical philosophy and post-metaphysical law possible.

What do we mean by metaphysics, and why is it necessary to overcome it? (2.1) What is post-metaphysical thinking, and in what sense is philosophical hermeneutics a post-metaphysical project? (2.2) How is post-metaphysical thinking possible in law, and what is the role of hermeneutic philosophy of law in the age of post-metaphysics? (2.3) This essay is devoted to the understanding of the outlined issues so as to clarify the conditions for the possibility of post-metaphysical thinking in law.

1. MATERIALS AND METHODS

This paper constitutes a philosophical and legal exploration, and therefore, to some extent, it expresses not the scientific experience but the experience of reflection. With that, post-metaphysical thinking in general and hermeneutic philosophy in particular are both the object of comprehension and the perspective from which this comprehension comes. Therefore, this refers to self-reflexivity of philosophical hermeneutics as a post-metaphysical project, that is, to understanding one's own conditions of possibility. As the core of this project is the juxtaposition of monologic methodological experience with the dialogical experience of meaning, it would be appropriate not to speak of methods but rather of some motives that prompt thinking. Such motives are, among other things, the desire to imagine the world as something that is happening to us, and to find universals in the very structure of experience (the motive of post-metaphysical thinking in general), including the openness with regard to the object of comprehension (the motive of hermeneutic philosophy).

At the level of logic of thought, this refers to the primacy of interrogation (as against asserting its own methodological position), and above all the interrogation on its own grounds: "How is post-metaphysical thinking possible?", "How is hermeneutic philosophy possible?", "How is comprehension of law possible in the era of post-metaphysics?" In turn, prioritizing interrogation allows to clarify the meaning – a specific hermeneutic process that substantially differs from both factual descriptions inherent in conventional empiricism and the constructivism of German idealism, and thus may be regarded as a proper hermeneutic "method" (with some reservations, as mentioned above).

With that, as from the standpoint of hermeneutical philosophy, thought is imagined as a component of historical experience, the self-reflection of philosophy in general and hermeneutical tradition in particular can be nothing short of historical and philosophical research with its inherent reconstruction of the history of ideas and concepts which materialise these ideas. However, philosophical research is not about reconstructing the timeline of events, but identifying meaningful connections between ideas that can unfold in a non-linear space of thought. Or, as Vakhtang Kebuladze writes, "in a philosophical study, the plot line presides over the fable", and therefore any interpretation contains elements of ahistorical reconstruction.

2. RESULTS AND DISCUSSION

2.1 Main motives of criticism of metaphysics

Born from the elements of myth, philosophy has continued its relentless struggle for centuries. The juxtaposition of logos and eidos, thinking and contemplation, intuition and discourse, "truth" and "method" in a certain form became the leitmotif of the entire European philosophy. As Karen Svasyan notes, "the struggle against myth is not its sporadic episode in the history of philosophy, but its idee fixe" [20]. Unlike the myth, where the first principles are clearly illustrated as the beginning of a chain of generations, in ancient philosophy, these foundations are freed from the spatio-temporal attributes and abstract to something infinite (ideal) that resists the world of the finite (material) or underlies it. Accordingly, the highest form of experience is a theory that requires the renunciation of the natural order of the world, and thus opens up privileged access to truth for the supernatural. According to Habermas, idealism and the priority of theory are the main aspects of metaphysical thinking, which seeks to explain the underlying phenomena "not in the plane of the phenomena themselves, but in something underlying the phenomena – in the entities, ideas, forms, or substances" [1]. In other words, it is a "backstage world illusion" [21] and a corresponding gesture of "penetrating the surface from the feigningly real to the depths of the genuinely real" [22].

In modern times, the concept of theory is elitist, but it keeps distance from everyday experience. This is reflected in the methodology, which reduces any mastery of the world to scientific knowledge and demands objectivity and impartiality from the scientist. As a consequence, abstract theorized scientific knowledge has virtually lost any connection with human life and its meaning. In Nietzsche's words, everything that philosophers have used for millennia have been mummies of concepts; nothing really came alive from their hands [23]. The same problem is accentuated by Edmund Husserl, who sees the substitutionary cause of the crisis of sciences and the radical crisis of European existence as a whole in the replacement of the world of everyday life by the world of ideal entities [24]. This is what Peter Sloterdijk means when he refers to the need to "protect reality from the madness of theorists, which is to believe that they have understood it" [18]. The advantage of theory as the primacy of the method over the subject matter, and the knower – over the knowable (belligerent polemic strategy of thinking) leads, in the opinion of the philosopher, to a lack of realism and specificity. The object here can only be something that is captured by methods and models. In turn, the subject's weakness, or reconciliation strategy of cognition, in contrast, gives things a chance to show their worth in their multiformity. And in this sense, "the weaker our methods", the better for "things" [18].

Thus, the critique of metaphysical thinking aims primarily at restoring the integrity of human experience, on the assumption that experience is never exhausted by

theory, and, accordingly, the comprehension of truth exceeds the scope controlled by scientific methods.

2.2 Philosophical hermeneutics as a post-metaphysical project

Habermas – the author of the idea of "post-metaphysical thinking" – considers the last defining feature of modern philosophy and distinguishes its components as follows: 1) reduction of meaningful rationality, which was imagined as a material power that regulates the world and reads itself in it, to formal rationality that is, to right-mindedness of procedures that are capable of delivering valuable results; 2) specification of the mind, which acquires the trait of historicity and individuality; 3) the linguistic turn as a transition from the philosophy of consciousness to the philosophy of language; and 4) rethinking the classical priority of theory over practice, in particular the discovery of the foundations of theory in everyday practice of understanding [1].

It appears that the last of the tendencies outlined by Habermas not only reflects the basic motive of post-metaphysical thinking (restoration of the primary unity of experience), but also captures the tension between the two forms of knowledge that gives the history of European philosophy its internal dynamics. On the one hand, the antinomy between thinking and contemplation is the result of the separation of philosophy from mythology, and then philosophy as such is metaphysics. With that, as Svasyan notes, "the uncertain memory of the primordial natural identity [of thinking and contemplation]" haunted philosophers at all times. This is both the "substance" of Spinoza, and the "the roots common but unknown to us" of Kant [20], and – we shall add – the "phronesis" of Aristotle. And in this sense, overcoming metaphysics is a self-overcome philosophy, thus reflecting the paradox of philosophy as a theoretical experience: the self-identification of post-metaphysical philosophy as a practical philosophy, in the sense of practical (performative) knowledge, is at the same time carried out within the framework of theory. Simply put, "philosophy cannot insert single things into a text" [25].

By and large, to understand metaphysics as broadly as any theory, overcoming it is impossible, same as it is impossible to return to the primary unity of experience. This rather refers to bridging the radical gap between theory and practice, the de-transcendentalization of the former and the de-trivialization of the latter. Using the very successful, in our opinion, formulation of Illya Inishev, it might be said that with regard to post-metaphysical philosophy "one should refer, rather, as to a possibility and a task than as to an accomplished fact" [26]. Being understood in this way, post-metaphysical thinking expresses itself merely in the desire to imagine the world, first and foremost, not as an object of our knowledge or technical domination, but as something that happens to us, that is, as an experience.

One of the most striking episodes of the transformation of philosophy, inspired by this motif, was the phenomenological movement founded by Edmund Husserl. In con-

trast to metaphysical dualism, phenomenology refuses to seek "true" reality beyond the reality that was given to us in experience [22]. However, the path to the discovery of a unified reality of experience lies through phenomenological reduction – the transition from natural attitude (wherein the empirical subject is convinced of the existence of the world and considers itself as part of it) to the phenomenological (wherein the world is "bracketed" to enable consciousness to refer to itself). This refers to eliminating all the prejudices that interfere with seeing the meanings (phenomena) that are evidently opened to reduced consciousness [27]. At the same time, the primary attitude from which the phenomenologist proceeds is the pre-theoretical experience of consciousness, as it presupposes the rejection of all prejudices, including theoretical constructs. But the immediacy of this experience is the result of the methodical actions of consciousness itself. Thus, all phenomenological experience is a construction, and any construction lies outside the domain of phenomenology [28]. Martin Heidegger, in particular, points to this when he states that "phenomenological consideration should come from a natural attitude, that is, from the matter, as it is given from the very beginning. Through this, a preliminary view of the existential definition of matter, wherein consciousness and reason are concrete, included in the existential certainty of a particular being, called man, should be obtained" [29]. The answer to the question "what is this creature whose being is to understand" [30] has become the main motif of the phenomenological hermeneutics developed by Hans-Georg Gadamer following Heidegger.

Philosophical hermeneutics imagines any experience as an experience of understanding, or an experience of meaning. With that, understanding is not one of man's abilities, but the primary way of being in the world, "potentiality for being" (Heidegger) [31], "the primary being characteristic of human life itself" (Gadamer) [32], "the specific human way of being alive" (Arendt) [33]. In this sense, understanding is an endless process by which we accept reality, that is, "trying to be at home in the world" [33]. From birth to death, a person is learning the ropes of this world, understanding it and themself in it and thus creating meaning. With that, there is no meaning as such, neither in the world nor in man; meaning is always a meeting of the two.

The fundamental ontological structure of experience as the experience of meaning is a circle: being-in-the-world is the whole, on which the understanding of its parts, the world and man, depends. In turn, the understanding of being-in-the-world is determined by the understanding of the world and the self-understanding of man [31]. The ontological hermeneutic circle assumes that understanding, on the one hand, is always engaged (which Heidegger defines as "oblivion") and, on the other hand, always incomplete, that is, not something that is available but an opportunity ("project"). Thus, "human existence in its own structure is a forgotten project" [32].

In trying to overcome the aporia of Husserlian phenomenology, hermeneutics demonstrates the universal conditionality of any experience, which, however, does not impede understanding, but only enables it. In other words, while trying to cast off our preconceptions, the ultimate "unleashing" of the world is fundamentally impossible,

just as it is impossible to give up our own "I". The paradoxical nature of this impossibility is subtly emphasized by Anna Arendt: "A person who wants to be deprived of their identity actually opens up the possibilities of human existence, which are as infinite as the universe itself. But the rebirth of a new personality is as problematic and as hopeless as the new creation of the world" [34]. In the words of Maurice Merleau-Ponty: "We can't get away from life. We are not given the ability to see the face of either an idea or freedom" [35]. But this very idea compels us to continue to seek them out, acting in the world, and to wait for proof of our ability in the approval of others. Thus, Cézanne sees working on the canvas as an endless task, and sometimes spends an hour before applying a smear. However, in spite of the fact that it takes one hundred painting sessions to paint a still life, and one hundred and fifty posing sessions to paint a portrait, he only sees unsuccessful attempts in his works [35]. The eternal doubts of Cezanne, described by Merleau-Ponty, are the embodiment of the circular structure of our experience of the world. With that, he refers neither to the dictates of the world, nor to the absolutely free creativity of man, but rather to the dialogue between them, which changes both of its participants.

In Gadamer's opinion, dialogue is a universal model of any experience. The hermeneutic situation in which we find ourselves in relation to the world is similar to a conversation, the participants of which try not to defend their position and not to accept the position of the interlocutor, but to understand the essence of what is being discussed. Accordingly, the logical structure of any experience is the question. Understanding that the matter is not what we believed it was, come to us through the question of what exactly is the matter, one or the other. The openness inherent in the essence of experience is precisely this openness to "one or the other". Thus, the condition of the possibility of understanding is the acknowledgement of the interlocutor (another person, tradition or the world at large) in their claim to be heard, not in the meaning of a simple acknowledgement of their otherness, "but in the meaning that they really have something to say to me". This refers to principled openness to different answers to the question posed and a readiness to experience as a readiness to reconsider our prejudices, because "any experience worthy of this name is at odds with our expectations". In this case, the main result of understanding is not belief or skill; experience teaches us mainly to stay open-minded to new experiences [32].

In this meaning, primary experience is not merely a theoretical experience as an appreciation of an invariable truth, but also not an experience of art as an unlimited freedom of creativity, but an experience of meaning as a meeting. To clarify this idea, Gadamer, following Heidegger, turns to Aristotle's Nicomachean Ethics, in particular, the concept of prudence (phronesis), which is understood as practical wisdom, the ability to act in unforeseen situations, the willingness to meet the unexpected, the unexpected based on axioms and principles. Thus, Aristotle identifies three types of knowledge that correspond to three forms of human experience: 1) scientific knowledge –

Episteme (ἐπιστήμη) – is expressed in theory and relates to things unchanged, such as the laws of nature; 2) knowledge in the field of creativity – Techne (τέχνη) – is applied in art and represents mastery, technology, ability to create something new; 3) practical knowledge – Phronesis (φρόνησις) – represents moral and practical wisdom about the right actions in a particular situation [36].

It is in the phronesis that Heidegger sees not only the model of his own idea of philosophy, but also the most authentic way of dealing with the world at large, that is, the initial basis of experience, which is subsequently differentiated and forgotten, which in turn prioritizes the cognitive model of theory [37]. As Bent Fleivberg fairly points out, what is indicative of the scope of "theorizing" of modern thinking is that even today there are no derivatives of European words in European languages, whereas ἐπιστήμη is found in modern words "epistemology" and "epistemological", and τέχνη – in "technology" and "technical" [38]. Aimed at the rehabilitation of the idea of phronesis, hermeneutic philosophy departs from purely prehistoric knowledge: we are not confronted with facts that we merely establish, but are directly involved in what we know and what our actions are aimed at. This is the meaning of the title of Gadamer's main work "Truth and Method": the philosopher sets the scientific, theoretical experience of the world (monologic "method") to the moral and practical wisdom (dialogical phronesis) as an experience of hermeneutical comprehension of "truth".

Thus, philosophical hermeneutics embodies the motive of rethinking the conventional notion of the superiority of theory over practice, which is key to post-metaphysical philosophy. However, this does not refer to abandonment of the theory in favour of practice, but rather to bridging the radical divide between them. Having become a natural extension of Husserl's phenomenology, hermeneutic philosophy, at the same time, is more consistent, demonstrating the futility of any attempt to go beyond its own historicity into the realm of eternal and immutable truths, and consider any theoretical construction as a moment in the circular motion and questions and answers as an indestructible absolute. According to Andrei Bogachov, Gadamer's hermeneutical experience is that he recognizes the paradox of philosophy as a theoretical matter, but does not reject it [28]. In this sense, philosophical hermeneutics is a positive strategy of post-metaphysical thinking that seeks to transform metaphysical philosophy, overcoming its radical dualism, while preserving the possibility of philosophy as such [26].

2.3 Hermeneutic philosophy of law as a positive strategy for the criticism of metaphysics

With regard to law, this refers to bridging the gap between law theory and jurisprudence, the dogmatism of conventional natural law theories, on the one hand, and relativistic arbitrariness of postmodern concepts, on the other hand. If the former consider the pre-existing "already-law" as the object of knowledge in law [39], from which an impartial subject derives a just decision, and the latter, on the contrary, absolutize the creative component of legal experience, considering law as the object

of our indivisible domination, then hermeneutic philosophy imagines law as something that happens to us, that is, an experience proper, or a phronetic experience of understanding.

With that, hermeneutical reading of law is of interest not only for jurists, but also for representatives of hermeneutical philosophy, because the experience of law is not an average example of hermeneutical experience, but a very special case. On the one hand, legal experience is rather an exception because of the limitations imposed by the general law. Thus, according to Albrecht Velmer, the dogmatic nature of legal texts eliminates the possibility of direct hermeneutical dialogue, claiming a truth that cannot be problematized, as some pre-emptive general applies only to something special, thus only preserving the dogmatism of the text [26]. In Gadamer's view, on the contrary, the application of law is a paradigmatic example of hermeneutical experience, capable of illuminating the general issues of hermeneutics and restoring the unity of hermeneutical problem: "A lawyer who, in the performance of his duties as a court, recognizes his own right to extend the law in comparison with the original meaning of the legislative text, does exactly what happens by itself in every understanding" [32]. Such crucial to the phenomenon of understanding element is application. The latter, according to Gadamer, is not the application of something general to the particular case, which was provided from the outset and understood in itself, to be further applied to the special. On the contrary, to understand the meaning of the text, the interpreter must not associate itself with the situation and the situation in which it is present, but relate the text to that situation. Thus, the judge comprehends the meaning of the law in terms of a particular case and for the sake of this case, which, by Gadamer, is a universal model of the relationship between past and present [32].

Special place in hermeneutical philosophy is also given to the law by Paul Ricker, considering the expression of law in the particular circumstances of the trial as a paradigmatic example of phronetic experience, which, like philosophizing, is impossible without free thinking, same as medicine is impossible without the doctor's ability to go beyond standardized guidelines and make decisions in an uncertain situation [40; 41]. Aristotle also points to the importance of the context for the legal judgment and the inevitable situationality of the latter, when he states that "any law is made for the general case, but some things cannot be said correctly in the general form". Consequently, "the fault lies not in the law and not in the legislature, but in the nature of the object, because that is precisely the substance of the acts" [36]. It is here that Gadamer sees the real problem of legal hermeneutics: patterns of behaviour are not eternal and unchanging, but at the same time they are not simple conventions, because they reflect the nature of things, and the point is that the latter defines itself every time only in application [32]. In a similar meaning, Kaufmann says that law cannot be obtained from a rule as something already contained in it; on the contrary, law first arises in justice from the rule [15].

Thus, the experience of law cannot be reduced either to science or to art, since it does not presuppose the extraction of existing legal meanings from authoritative sources with a purpose of their further application in a particular situation, and not the arbitrary construction of these meanings, but rather a new invention in every occurring dialogue. It is a matter of abandoning the claim for an impartial inference of justice from abstract principles and focusing on the circumstances of the case itself, factoring in the existing opinions. In doing so, boundaries are set not only by the context, but also by the very structure of the experience of understanding, which implies a fundamental openness and willingness to acknowledge the other party in its claim to truth, thus recognizing its equal freedom and equal dignity. This probably is the very "nature of things" that Gadamer refers to. In other words, the idea of justice is both descriptive and normative in that it both coincides with the concept of experience, or, to quote Lloyd L. Weinreb, "*the kosmos* lies within ourselves" [42].

Being interpreted in such a way, the hermeneutic philosophy of law is an alternative to both absolutism and relativism in jurisprudence, again unfolding an ontological project wherein, however, the place of metaphysical representations of the existence of independent moral truths focuses on human experience. In this sense, hermeneutics is compatible with the ontological concepts of natural law, which see the objective grounds of morality in our historical experience, affirming "the reality of our moral experience, not just as subjective feelings or beliefs, but as something objectively real, part of what actually exists" [43]. However, it is impossible to deduce specific rights and obligations from this experience: this more likely refers not to the proclamation of moral truths, but merely to the recognition of the truth of moral experience [17]. In other words, the price of knowledge is the rejection of absolute knowledge. The hermeneutical concept of law reminds us that justice can only be human, never claiming a definitive judgment, which Riker brilliantly expressed as a symbol of the distinction "between Dike, the justice of the people and Themis, the marginal and twilight haven of equality between Revenge and Justice" [44; 45].

CONCLUSIONS

It appears that legal thought not only reflects the general spiritual situation of the present, marked by a critique of metaphysics, but also vividly illustrates the paradox of post-metaphysical thinking that in law turns into a crisis of the idea of normativity or the idea of the proper. Therefore, post-metaphysical thought in law, provided that it remains a) thought and b) thought on law, is merely an attempt to imagine law as an experience. The hermeneutic philosophy of law here appears to be a very special example, since, unlike purely procedural theories of justice, it remains on solid ontological ground, thus preserving the possibility of both philosophy and law.

Thus, the hermeneutic philosophy of law is a post-metaphysical project insofar as it proceeds from the unity of human experience as the experience of its own historicity,

abandoning the claim of the theoretical mind to clarify the last grounds of justice. Contrary to popular belief, hermeneutic philosophy does not offer any method of finding a "true" right, representing not so much the formulation and assertion of a particular position on law as the experience of law as such. However, this experience awakens in us the openness and readiness to hear others, the patience and respect for another point of view, the desire for mutual understanding and responsibility for the meaning of law. The conciliatory as against polemical thinking strategy inherent in hermeneutics also contributes to actualizing the peace-making character of the law itself, it only makes it possible to distinguish it from politics, and the intellectual modesty accompanying such a strategy demonstrates the greatest illusion of lawyers – the illusion of the omnipotence of law, the belief that a reasonably organized system of institutions is capable of forcing the devils to angelic public behaviour. The hermeneutical opinion, on the contrary, highlights the fact that the possibilities of legal institutions are very limited, and the peaceful coexistence of people, including the existence of law itself, requires our constant effort and responsible judgment.

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Suggested Citation: Satokhina, N. I. (2019). Postmetaphysical thinking in law: an example of a hermeneutical philosophy. *Journal of the National Academy of Legal Sciences of Ukraine,* 26(4), 151–164.

Submitted: 02/08/2019
Revised: 20/10/2019
Accepted: 04/12/2019

УДК 349.42
DOI: 10.31359/1993-0909-2019-26-4-165

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ЗАСТОСУВАННЯ ДЕЯКИХ ЗАХИСНИХ ЕКОЛОГІЧНИХ ЗАХОДІВ У СІЛЬСЬКОГОСПОДАРСЬКОМУ ВИРОБНИЦТВІ ЗА ЗАКОНОДАВСТВОМ ЄС

Анотація. *Досягнення консонансу між збереженням довкілля та забезпеченням продовольчої безпеки, з одного боку, й інтенсифікацією залучення природних ресурсів у сільськогосподарське виробництво в контексті перманентного збільшення населення визнається стратегічним напрямом при вирішенні глобальних проблем, що обумовлює актуальність дослідження. Одним із механізмів, спрямованих на досягнення вказаного завдання є забезпечення екологічно сталої практики ведення сільського господарства. Тому основною метою роботи є правовий аналіз застосування екологічних захисних заходів у сільськогосподарському виробництві за законодавством ЄС. Для реалізації поставленої мети у роботі були використані такі методи наукового дослідження: діалектичний, історичний, формально-юридичний, герменевтичний, порівняльно-правовий, структурно-функціональний методи та метод абстрагування. Встановлено, що використання екологічних заходів у сільському господарстві стимулюється для фермерів економічним механізмом реалізації агроекологічних програм. Досліджено еволюцію реформування Спільної аграрної політики в контексті екологізації аграрного виробництва ЄС. Проаналізовано особливості таких екологічних заходів як: диверсифікація сільськогосподарських культур, підтримка постійних пасовищ та встановлення екологічних пріоритетних територій. Досягнення цілей сталого розвитку можливе через кореляцію оновленої практики ведення сільського господарства, інтенсифікації виробництва сільськогосподарської продукції за рахунок застосування інноваційних технологій в аграрному секторі економіки та необхідністю захисту довкілля, збереження цінних властивостей природних ресурсів та екосистем.*

Ключові слова: екологізація сільськогосподарської діяльності, екологічні заходи, Спільна аграрна політика, охорона довкілля, збереження біорізноманіття.

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THE APPLICATION OF SOME PROTECTIVE ECOLOGICAL MEASURES IN AGRICULTURAL PRODUCTION UNDER EU LEGISLATION

Abstract. *The consensus between environmental protection and food security, on the one hand, and the intensification of the involvement of natural resources in agricultural production in the*

context of permanent population growth, is recognised as a strategic direction in solving global problems, which makes the research relevant. One of the mechanisms aimed at achieving this goal is to ensure environmentally sustainable farming practices. Therefore, the main purpose of the paper is a legal analysis of the application of environmental protection measures in agricultural production under EU law. In order to achieve this goal, the following research methods were used in the work: dialectical, historical, formal-legal, hermeneutical, comparative-legal, structural-functional and abstraction methods. It has been established that the use of environmental measures in agriculture is stimulated for farmers by an economic mechanism for the implementation of agroecological programs. The evolution of the reform of the Common Agricultural Policy in the context of the greening of EU agricultural production has been explored. The features of such environmental measures as the diversification of crops, the maintenance of permanent pastures and the establishment of ecological priority areas have been analysed. Achieving sustainable development goals is possible through the correlation of renewed agricultural practices, the intensification of agricultural production through the use of innovative technologies in the agricultural sector and the need to protect the environment, to preserve the valuable properties of natural resources and ecosystems.

Keywords: greening of agriculture, ecological measures, Common Agriculture Policy, nature conservation, preservation of biodiversity.

INTRODUCTION

In the context of globalisation processes in the European space, the question arose of reforming the EU Common Agricultural Policy (hereinafter – the CAP) and replacing the focus on the predatory uncontrolled use of natural resources, especially agricultural land aimed at increasing the volume of agricultural production with environmentally balanced use aimed at preserving the unique properties of land, water and forest resources, which are the most important components of life ecosystems. At the European level, the conceptual foundations of a new vision of the economy through the prism of stability, competitiveness, socio-financial growth are laid down in the Europe 2020 Strategy, which establishes additional incentives for farmers to apply green farming practices, which go beyond the basic requirements of the norms necessary to receive EU assistance and complement existing agroecological programs [1]. Seven key areas of cooperation are in place for the implementation of the priorities set out in the Strategy, including the Resource Efficient Europe Initiative, which seeks to support change towards a resource efficient, low carbon and green economy, as well as to balance links between growth and use of natural resources and energy [1].

The key provisions for the strategic development of EU economic and environmental relations are set out in the EU Eight Framework Programme for Research and Innovation "Horizon 2020", in which food security, sustainable agriculture and bioeconomy, safe, clean and efficient energy, climate change, efficient the use of resources and raw materials are recognized as major priorities among social challenges [2]. The mechanism of implementation of the principle of greening of agricultural production in European policy is provided by the Resolution of the European Parliament of

23.06.11 "Common Agricultural Policy 2020: Food, Natural Resources and Territorial Challenges"[1]. The European Community has recognised that the inclusion of renewed and ambitious goals in the CAP, including those related to consumer protection, environmental protection, animal welfare and regional cooperation, are the highest standards to be protected at the international level [3; 4]. Long-term productivity and food security depend on the proper care of natural resources, especially soil, water use and biodiversity. The agrarian sector of the economy is critical to combat climate change, especially by reducing greenhouse gas emissions, carbon sequestration and biomass production. Thus, the integration of environmental issues into the CAP is aimed at reducing the risks of environmental degradation and improving agro-ecosystems.

Agriculture makes a significant contribution to the support of unique rural areas. Agricultural land management has been a positive force for the development of a wide variety of landscapes and animal habitats, including wetlands, afforestation, and extensive open country areas [5]. In addition, agricultural development contributes to combating climate change, creating new jobs by stimulating economic growth with environmentally efficient use of natural resources and the use of renewable energy. On the other hand, the pristine nature and the landscape value of landscapes have made rural areas more attractive for business, housing, tourism and recreational businesses[2]. Many animal habitats in Europe are supported by extensive agriculture, and the survival of a wide range of wildlife is dependent on farming practices. However, improper farming and land use can have an adverse effect on natural resources: soil, water and air pollution, fragmentation of wildlife habitats, and loss of biodiversity. All of the above dictated the need for accelerated "green" development through the introduction of innovations, the implementation of new technologies, the development of new products, changes in the production process and support the nature of demand, especially in the context of the emergence of the bioeconomy[3].

The CAP identified three priority areas of the updated agricultural policy: 1) conservation of biodiversity, development of farming and forest systems, as well as traditional agricultural landscapes; 2) use of water resources; 3) climate change related area. These rules are in line with environmental requirements and the CAP measures will promote the development of agricultural practices while preserving the environment and protecting the countryside[4]. The support of agrotechnical methods aimed at protect-

[1] The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future. European Parliament resolution. (2011, June). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011IP0297&rid=1

[2] *Ibidem*, 2011.

[3] The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future. European Parliament resolution. (2011, June). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011IP0297&rid=1

[4] Council decision 2006/144/EC on Community strategic guidelines for rural development (programming period 2007 to 2013). (2006, February). Retrieved from https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32006D0144

ing the environment, preserving the countryside and improving the livelihood of animals are essential elements in achieving the goals of agricultural and environmental policies. Such support should provide: a) ways of utilising agricultural land in accordance with the objectives of the environment, landscapes, natural resources, soil and genetic diversity; b) ecological extensification of agricultural production and management of low-productive pastures; c) the use of environmental planning in agricultural activities; d) improvement of the conditions of keeping animals[1].

1. MATERIALS AND METHODS

In order to achieve the goals and objectives of the work, a comprehensive approach was used to identify the features of legal regulation and implementation of environmental measures, as well as to find out their effectiveness for environmental conservation during agricultural activities in the EU, which involves the use of a conglomerate of both general scientific and special methods of scientific cognition: dialectical, historical, formal-legal, hermeneutical, comparative-legal, structural-functional and method of abstraction. These methods were used in their interconnectedness and interdependence, which allowed a comprehensive and objective solution to the task of work and to formulate scientifically sound conclusions. The dialectical method of cognition has allowed: on the one hand, to identify the interdependence of the existence of (common link) environmental and agricultural policies in the context of environmental security requirements, biodiversity conservation and enhancement of the agricultural sector of the economy through the production of competitive agricultural products in the EU; on the other hand, this method contributed to the identification of the genesis of the application of environmental protection measures in agricultural production in EU legislation. In addition, the dialectical method has contributed to the comprehensive justification of the laws governing the formulation of EU legislation in the field of research, as well as its constant updating and dynamics.

Using the historical method, the genesis of the substantive essence of such a phenomenon as greening in agricultural production has been elucidated. In particular, at the initial stage of birth, greening was dispositive, that is, applied to agricultural operators only if environmental requirements were met in particularly vulnerable areas. Subsequently, such measures were envisaged by agroecological programs and were of an imperative nature. The use of the formal-legal method has allowed to obtain reliable information on the state of legal regulation of crop diversification, maintenance of permanent pastures and establishment of ecological priority areas, as well as to determine the internal construction of EU legislation in the field of greening agricultural

[1] Council Regulation 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations. (1999, June). Retrieved from https://op.europa.eu/en/publication-detail/-/publication/c70dfc8c-6243-4b1a-817e-4673042024c4/language-en

production. The explanation and interpretation of EU norms on the legal regulation of the application of environmental protection measures in agriculture were carried out using the hermeneutical method. The use of a comparative legal method of scientific cognition has made it possible to carry out a comparative analysis of the effectiveness and feasibility of using environmental protection measures in some EU countries. In particular, this method contributed to the conclusion that the effectiveness and success of the implementation of these measures directly depends on the level of development of the state, its political and legal orientations and economic ambitions and economic stability of the country. The most widespread use of agroecological programs, their positive impact on the achievement of the Sustainable Development Goals, is observed in the most economically advanced countries with high standards of living, while some countries are pursuing agrarian policies to increase the economic attractiveness of the country rather than the introduction of greening into agriculture.

The structural and functional method was crucially important in achieving the goals of this scientific article; it has helped to identify the characteristics of environmental protection measures used in agricultural activities as structural elements of a single interdependent system of measures for the implementation of greening principles. In addition, this method helped to identify the place of these measures in the EU agricultural policy system, as well as their uniqueness and features among the system of all environmental measures. The method of abstraction has made it possible, among all the variety of means of ensuring the implementation of the principle of greening agricultural activities on the European continent, to identify specific features of such environmental measures as diversification of crops, the maintenance of permanent pastures and the establishment of ecological priority areas. Using the method of analysis, it has been possible to conclude on the axiological role of each type of environmental action in agriculture and its impact on overcoming the ecological crisis, preserving natural ecosystems, improving the status of water, land, forest resources, combating climate change and maintaining biodiversity. It is established that the implementation of the investigated means can not only contribute to the achievement of environmental goals, but also to ensure the economic prosperity of the country.

2. RESULTS AND DISCUSSION

2.1 Greening of agricultural production

The CAP reform process should include a comprehensive approach to addressing the development of the agricultural production sector and, at the same time, the environmentally balanced use of natural resources during agricultural activities. Greening is considered as a modern line of activity of agricultural producers, which is based on the use of ecological and economic management methods in order to ensure comprehensive restoration of natural resources by forming a sustainable ecological and economic system, increasing the production of competitive and environmen-

tally safe products, creating an agricultural system through the use of environmental methods [6]. The first series of agroecological measures in the CAP was integrated in the 1980s and was aimed at making payments to farmers involved in the process of protecting green areas[1]. The concept of "agroecology" was first applied in the UK, but later this agroecological tool was extended to other member states and towards the end of the 1980s [7]. The 20th century has acquired a contractual form of cooperation between public authorities and farmers who have applied green land management practices for agricultural land.

In the 90s of the 20s century agroecological programs have been extended to compensate for lower control prices and mandatory acreage reduction. Measures aimed at reducing production residues that began with the introduction of dairy quotas in 1984 were introduced to the CAP in 1992 in order to pay compensation for arable (field) crops. In this context, the second wave of agroecological programs was aimed at providing compensation for the lower guaranteed price and the implementation of mandatory acreage reduction [8]. Today, all EU Member States have their own agroecological programs, prioritising rural development plans and achieving environmental goals. In general, the richer EU countries (Finland, Ireland, the United Kingdom, Austria, Sweden and Denmark) place far more priority on agroecological programs than the poorer countries (Bulgaria, Romania and Malta) that focus on socio-economic and social cohesion. Thus, the advantage given to agroecological programs in a country or region is not only a reflection of the ecological status of agricultural landscapes, but also their formation is influenced by the socio-economic situation [8]. According to the European Parliament Resolution of 23.06.11 "Common Agricultural Policy 2020: Food, Natural Resources and Territorial Challenges", the list of measures that can be applied in the agricultural sector also includes: 1) support for low carbon emissions and measures to reduce greenhouse gas emissions; 2) support for low energy consumption and promoting energy efficiency; 3) creation of anti-erosion strips (buffer zone around industrial zones), hedges, etc.; 4) the existence of permanent pastures and the like (paragraph 34)[2].

In modern foreign literature, greening in agriculture is considered through three innovative models: 1) new scientific bases and generalised technologies with environmentally friendly potential (biotechnology, information and communication technologies, bioproduction and biofortification; 2) the implementation of economic management integrated methods of pest control without the use of poisonous chemicals, organic farming, integrated nature management system, urban agro ltura and suburban agriculture); 3) national integrated greening regime (biofuel production, agritourism, use of

[1] Council Regulation 797/85 on improving the efficiency of agricultural structures (1985, March). Retrieved from https://op.europa.eu/en/publication-detail/-/publication/8d0c3365-8447-455b-9ecb-7d08622db2c6/language-en

[2] The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future. (2011, June). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011IP0297&rid=1

renewable energy sources in agricultural production, etc.) [9]. The reform process of the EU Common Agricultural Policy should cover all available instruments, taking into account the best of them, as provided for by the regulatory documents of the European institutions. Today, European public institutions oblige agribusiness representatives to apply environmental measures within the direct payment system, which are considered to be a mechanism for integrating greening into agricultural activities, including: 1) crop diversification; 2) maintaining permanent pastures; 3) establishment of ecological priority areas.

2.2 Certain types of environmental measures in agricultural production according to EU law

2.2.1 Diversification of crops

The purpose of this environmental event is, first and foremost, to protect and defend the soil and to improve its quality, since sowing monocultures in one area for a considerable time can lead to soil disturbance, poor quality, as well as drying and re-compacting. The implementation of this measure by farmers is also aimed at providing environmental public benefits and mitigating the effects of climate change. According to p. 1 of Art. 44 of Regulation (EC) No 1307/2013 of 17.12.2013 "On establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy", farmers holding arable land with an area of 10 to 30 ha must grow at least two cereals, and farms with more than 30 ha – 3 cereals. Main grain crops should not cover more than 75% of the land[1].

Although the said rule is imperative in the activities of agricultural producers, several flexible provisions are permitted in the field of application of crop diversification rules [10]. Thus, the norm of p. 1 of Art. 44 of that Regulation does not apply, for example, to holding companies where more than 75% of the eligible arable land is permanent pasture and used for the production of grasses, other plant fodder or crops under water for a considerable part of the year or agricultural cycle provided that arable land covered by these uses do not exceed 30 ha[2]. In 2016, 75% of arable land in the EU was subject to such an environmental measure as crop diversification, with up to 63% the rule of planting three crops was applying and 12% of arable land being diversified by two crops. The percentage of arable land that is diversified in every European country also differs: for example, in the Czech Republic and Hungary 90% of the land is subject to this environmental measure, while in Greece or Malta – less than 50% [11].

Member States should ensure a list of nitrogen-fixing crops established in accordance with established principles, the cultivation of which will contribute to the achieve-

[1] Regulation 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009. (2013, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R1307

[2] *Ibidem*, 2013.

ment of biodiversity goals. The number of landings of such crops is allowed within 4-19 units. The most popular are broad beans, peas, alfalfa, lupines and clovers, which are to be presented during the growing season [12]. EU Member States should also lay down rules where nitrogen-fixing crops can be grown in order to avoid the increased risk of leaching in the fall. These rules should take into account the requirements of Directive 91/676/EC on the protection of waters against pollution caused by nitrates from agricultural sources (Directive on Nitrates)[1] and the Water Framework Directive 2000/60/EC establishing a framework for Community action in the field of water policy [13].

In some countries, alternative crop diversification practices are being applied to the practice of greening agricultural production. For example, France has a certification system for maize producers. Farmers who are members of this system are allowed to place winter ground cover with the help of plant cover from the sown crops on all their arable land, which is a very similar measure of crop diversification. The essence of this measure is that maize producers have to grind and mulch their residues, which can have a positive impact on the environment, achieving the goal of greening, since such residues provide coverage, guarantee the presence of nitrogen fixers and organic matter in the soil and allow control of pests and pests.

2.2.2 Support of permanent pastures

Permanent pastures should be understood as land used for the cultivation of grass plants or forage naturally or through cultivation and which have not been included in crop rotation for 5 years or more [14]. The definition of permanent pasture is first provided in EU Regulation 2017/2393 of the European Parliament and of the Council of 13.12.2017[2], as amended by Regulation 1305/2013. The legal regime of permanent pasture is laid down in EU Regulation 1307/2013 of 17.12.2013 "On establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy". Thus, according to Part 2 of Art. 45 of this Regulation, Member States shall provide at least 5% of permanent pasture in relation to the total area of agricultural land[3]. In the same case, if the share of

[1] Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources. (1991, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31991L0676

[2] Regulation (EU) 2017/2393 of the European Parliament and of the Council amending Regulations (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy, (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy, (EU) No 1308/2013 establishing a common organization of the markets in agricultural products and (EU) No 652/2014 laying down provisions for the management of expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and plant reproductive material. (2017, December). *Retrieved from* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32017R2393

[3] Regulation 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and

permanent pasture at regional or national level is less than 5%, the Member State concerned shall be obliged to return the land previously transferred to them for other uses and to grant the status of permanent pasture to those lands. This rule does not apply where the reduced percentage of permanent pasture is the result of arable planting in accordance with environmental requirements and does not include short rotation plantations, Christmas trees or fast growing trees for energy production[1]. Establishing a proper conservation regime for such pastures is of conceptual importance for ensuring the integrity of the ecosystem functions of natural resources and preserving biodiversity. For example, permanent pastures perform important functions for the protection of water resources.

For example, a study of the effectiveness of permanent pastures and their impact on water resources, conducted on the example of Poland, in which such pastures cover 21% of agricultural land and 13% of the total area of the state, indicates their ability to prevent soil erosion. This is due to the fact that the pollutants remaining on the surface of the pasture or alkali decompose rapidly due to the intensive biological activity of soil microorganisms associated with the pasture ecosystems and the saprophytic activity of the mesofauna, thereby making the pasture the role of biofauna [15]. As the problems of biodiversity conservation in the current context of globalisation processes, on the one hand, and the requirements for greening the agrarian sector of the economy, need correlation, some EU Member States are embarking on an integrated approach to addressing these problems based on relevant European legislation and common protection instruments, including through the system of specially protected natural areas, the legal regime of which is determined by Council Directive 92/409 / EEC of 2.04.1979 on birds and Council Directive 92/4 3 EEC of 21.05.1991 on the protection of the natural habitats of wild fauna and flora (Directive on Habitats).

Thus, according to Part 1 of Art. 45 of EU Regulation No 1307/2013 of 17.12.2013, Member States should designate permanent pastures which are specially protected areas within the meaning of Directive 92/43/EEC, including peat and wetlands located in these territories and in need thereof enhanced protection to achieve the objectives of the Directives[2]. This means that EU Member States are obliged to establish permanent pastures, which are specially protected areas in the territories defined by the Directives, including peat and wetlands located in those territories, which need strict protection to achieve the objectives of these Directives[3]. Such specially protected areas are defined

repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009. (2013, December) *Retrieved from* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R1307

[1] *Ibidem*, 2013.

[2] Regulation 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009. (2013, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R1307

[3] Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources. (1991, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31991L0676

within the Natura 2000 network and are prohibited from ploughing the soil. As of 2015, 48% of permanent pastures included in the Natura 2000 network were designated as Protected Areas (6.99 million hectares), and in 2016 – 51% (7.71 million hectares) [11].

At the same time, a study of the effectiveness of the use of such an environmental measure by the EU's CAP as establishing permanent pastures in Germany by the Federal Environment Agency has made it possible to observe that Germany has limited use of the possibility of creating permanent pastures in specially protected areas under conversion restrictions. Only pastures that are habitats (under the Habitats Directive) are designated as protected areas. The area of pastures established under this Directive amounts to about 666 thousand hectares, which is about 14% of the total area of pasture in Germany [16].

EU Regulation No 1307/2013 of 17.12.2013 establishes sufficiently flexible rules for the maintenance of permanent pastures, allowing Member States to introduce the equivalent of greening practices: regulating the use of grasslands or pastures [17; 18]. In doing so, farmers are required to maintain permanent pasture and take any of the following measures: mowing mode, maintaining landscape features of permanent pasture and shrub control, applying a sowing regime to restore depending on the type of pasture without reducing its natural value, purification of hay and feed, fertiliser and pesticide use restrictions; 2) the use of an extensive grasing system: sheep or cattle breeding and the use of local or traditional breeds for grazing on pastures[1].

2.2.3 Establishment of ecological priority areas

The implementation of this environmental measure is aimed primarily at protecting and improving the state of biodiversity on land used by farms, as well as obtaining other environmental and climate benefits [11]. Farmers with more than 15 ha of cultivable land must provide at least 5% of their land as an ecological priority area in order to protect biodiversity[2]. Within the framework of this measure, agricultural producers may grant the status of ecological priority territories to one or more types of land (steamed land; terraces; landscape elements adjacent to arable land; nitrogen-fixing cultures, etc.). At the same time, at the level of each EU Member State, farms take into account the economic factor (that is, choose the least costly but most effective type and political and administrative factors) when deciding on the selection of a particular type of environmental priority area [19-21]. Ecological

[1] Regulation 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009. (2013, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R1307

[2] Regulation 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009. (2013, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R1307.

and economic studies of the possible potential impact of this environmental measure have shown a positive impact on biodiversity. At the same time, the elements of the landscape and the land under steam are the most valuable for the environment. The former have an effective impact on invertebrates, birds and terrestrial plants, while fallow land contributes to the conservation of reptiles and amphibians. The reduction of the effects of climate change is ensured by the increased use of legumes and the displacement of nitrogen fertilisers [22].

However, the environmental benefits of greening agricultural production, including through explored environmental measures, are significantly limited, as a large proportion of land and farms are exempted from environmental measures [23-25]. In addition, an analysis of the implementation of greening at the national level indicates that the domestic policy of each EU country is oriented towards avoiding negative economic impacts on farmers rather than achieving positive environmental impacts [22]. Achieving the modernised goals of the common agricultural policy requires coordinated cooperation at both the regional and local levels and involving all actors that can affect the outcome. Of course, such cooperation should be based on a wide range of legal mechanisms. Against this background, the environmental measures under study should not conflict with other key legal instruments in the field of greening agricultural production. In particular, it is about adherence to the system of norms required for EU assistance, as well as agro-climatic measures, afforestation and agroforestry, organic farming, protection of areas with natural limitations [11].

CONCLUSIONS

A comparative legal study of the mechanism of application of environmental measures in agricultural production has shown that the effectiveness and success of the implementation of these measures depends directly on the level of development of the state, its political and legal orientations and economic ambitions and economic stability of the country. The most widespread use of agroecological programs, their positive impact on achieving the Sustainable Development Goals, is observed in the most economically advanced high-living countries (Finland, Ireland, United Kingdom, Austria, Sweden and Denmark), while countries such as Bulgaria, Romania and Malta aim agrarian policy at more enhancing the economic attractiveness of the state, rather than introducing greening into agricultural production.

Diversification of crops, as one of the measures to introduce the principle of greening into agricultural production, is possible and flexible. Thus, the practical significance of the results is to outline the prospects for reforming Ukraine's agricultural policy in the context of the Europeanisation of political and legal reality and compliance with our country's international legal obligations to introduce the principles of "green economy" (greening production), improving the environmental situation not only both nationally and globally. At the same time, the mechanism of application of environ-

mental measures in agricultural production is complex and requires careful independent study of the implementation features of each environmental measure. In this regard, these issues require further research and scientific-theoretical substantiation.

To summarise, it is worth to mention the words of the prominent American philosopher and founder of theory of transcendentalism Ralph Waldo Emerson, "Nature cannot be caught up with the untidy and half-dressed, it is always beautiful. Nature does not tolerate inaccuracies or errors."

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Cited suggestion: Stativka, A. M. (2019). The application of some protective ecological measures in agricultural production under EU legislation. *Journal of the National Academy of Legal Sciences of Ukraine,* 26(4), 165–178.

Submitted: 24/07/2019
Revised: 21/10/2019
Accepted: 06/12/2019

УДК 349.42
DOI: 10.31359/1993-0909-2019-26-4-179

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СПІВВІДНОШЕННЯ ПОНЯТЬ «ПРИРОДНЕ ПРАВО» ТА «БІОЕТИКА»

Анотація. *Проводиться співвідношення поняття «природне право» (jus naturale-лат.) із відносно новим для юриспруденції поняттям «біоетика». Обґрунтовується введення в науковий оборот поняття «neo jus naturale», яке розуміється як новий етап еволюції jus naturale та підстава для формування оновленого типу праворозуміння – біоетичного. Neo jus naturale розглядається як фундамент сучасного правотворення. Засилля позитивізму в постмодерністському праві та домінуюча концепція антропоцентризму в життєдіяльності сучасної цивілізації поставили людство на грань самознищення. Однак відтермінувати самознищення людини ще можливо. Для цього необхідно змінити домінуючий наразі антропоцентричний світогляд на прогресивний екоцентризм та повернути jus naturale у процес законотворення. Метою дослідження є з'ясування сутності природнього права, формалізація його ознак для практичного застосування та співвідношення його з біоетикою. В процесі дослідження jus naturale визначається як біоетика. Провідними методами дослідження є метод «трагічної діалектики» та ідеалістичної діалектики. Взагалі ж застосовано трирівневу систему методології (фундаментальні, загальнонаукові та конкретно-наукові методи). Застосування біоетичних засад на рівні законотворення дозволить створити якісний, правовий, справедливий закон. Такий закон, який буде відображати існуючі потреби суспільства, задовольняти їх сучасними засобами і таким чином відповідати втіленню вищої справедливості. Neo jus naturale – біоетичне право майбутнього. Дотримання якого у законотворенні дозволить зростити нову генерацію людей, покращити якість їх життя та відповідно якість навколишнього середовища, а відтак пролонгувати існування людської цивілізації.*

Ключові слова: природне право, jus naturale, біоетика, право, нормотворення.

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RELATIONSHIP BETWEEN NATURAL LAW AND BIOEHTICS

Abstract. *Analyzes the relation between the concept of "natural law" (jus naturale) and the relatively new concept of "bioethics" for law csience. The introduction of the concept of "neo jus naturale", which is understood as a new stage in the evolution of jus naturale and the basis*

for the formation of an updated type of legal thinking – bioethical, is grounded in the scientific revolution. Neo Jus naturale is considered as the foundation of modern lawmaking. The dominance of positivism in postmodern law and the dominant concept of anthropocentrism in the life of modern civilization put humanity on the brink of self-destruction. However, it is still possible to delay the self-destruction of man. To do this, it is necessary to change the dominant anthropocentric worldview to progressive eccentricity and return jus naturale to the legislative process. The purpose of the study is to find out the essence of natural law, to formalize its features for practical application and to relate it to bioethics. In the process of research jus naturale is defined as bioethics. The leading methods of research are the method of "tragic dialectics" and idealistic dialectics. In general, the three-tier system of methodology (fundamental, general scientific and specific scientific methods) is applied. The application of bioethical principles at the legislative level will allow to create a high quality, legal, fair law. Such a law, that will reflect the existing needs of society, satisfy them with modern means and thus be in line with the incarnation of higher justice. Neo jus naturale the bioethical right of the future. Compliance with this law will facilitate growth of a new generation of people, improve their quality of life and, accordingly, the quality of the environment, and thus prolong the existence of human civilization.

Keywords: natural law, jus naturale, bioethics, law, lawmaking.

INTRODUCTION

The dominance of positivism in postmodern law and the dominant concept of anthropocentrism in the life of modern civilization put humanity on the brink of self-destruction [1]. A striking indicator of this is the uncontrolled discovery of so-called dangerous knowledge and the effort to exploit its results. Dangerous knowledge is recognized as knowledge whose potential is unknown to mankind and lacks the ability to control it or, otherwise, it is knowledge that is ahead in the development of the field of human knowledge, tested by practice, and thus causes a temporary social and legal imbalance. Among the dangerous knowledge of the time was the discovery of nuclear energy, the development of viruses and more. Over time, humanity has learned to manage the results of these types of dangerous knowledge less successfully, but there is no complete control over it today, as evidenced in particular by the Chornobyl and Fukuyama tragedies.

There are two important steps to be taken. First, to change the dominant anthropocentric worldview (the goal and center of all is man – the highest value on earth) to progressive ecocentrism (according to which man is an equal share among other elements of the ecosystem, and therefore his relation to the surrounding world should be appropriate: devoid of excess ambitious) [2; 3]. The second step to the salvation of humanity must be the return of jus naturale (natural law) to the process of lawmaking [4–6]. Although two steps were formally identified previously, they are closely intertwined. Doing one step without the next will be empty body movements meaningless. We believe that at the heart of measures to save humanity from self-destruction is the observance of the natural law – jus naturale, the importance of which in the course of modern law-making is emphasized in this work. Despite the age of jus naturale and its

seemingly compulsory presence in the lawmaking process, it is too difficult for a modern lawmaker to understand the criteria for the naturalness of a rule that needs to be formally expressed in law. Such difficulties are due to the lack of specific principles of natural law. Almost all Ukrainian lawyers understand the essence of jus naturale, but in the law-making process, as the positivists are rooted, they want to find a formal jus naturale rule with which to verify the candidate norm and decide whether it is jus naturale principles and worthy of a place of honor in the system of legislation or not. Using modern terminology, jus naturale can be defined as bioethics [7; 8].

Bioethics is knowledge about the rules of human coexistence with other elements of the ecosystem. The basic principles of bioethics are the principles of jus naturale. The same principles of natural law can be found in various sources: from the works of the classics of the philosophy of law to modern international legal and national normative acts (Universal Declaration on Bioethics and Human Rights[1] and State Concept of Ukraine in the field of bioethics[2]). To bioethical principles (principles) include: 1) the principle of ecocentrism; 2) the principle of altruism; 3) the principle of transparency; 4) the principle of rationalism; 5) the principle of equilibrium; 6) the principle of restrictions; 7) the principle of safety of life; 8) the principle of realism. These principles form a system that exists under certain rules. These rules are manifested in the coordination of these principles with each other, and contain in the middle of their system another – a system of restraints, balances and interactions, in particular, with the principles of criminal law policy of Ukraine. All of the above principles of bioethics are important, their location in the system in a digital order – is very conditional.

In fact, bioethics (in essence) and jus naturale are "peers". The above system of bioethical principles – principles of natural law is not fully copyright know haw. Bioethical principles are tested over time for the existence of mankind (many generations) [9; 10]. The experience of human civilization, reflected in religious and epic chronicles, concentrated in them. Our task was only to analyze and interpret them in modern language; proving to modern society the need to adhere to them. The system of bioethical principles is a modern algorithm of lawmaking in any field of human knowledge. By passing every potential knowledge through the prism of these principles, one can understand whether such knowledge is safe for the ecosystem, or poses the risk of its destruction. The given algorithm of law-making in the form of the system of bioethical principles allowed to declare a new round of development of jus naturale – its updating, which consists in clearly formulated principles of natural law. We call this new level neo jus naturale. On the basis of this renewed naturalism, modern and future lawmaking must take place. Despite the growing flow of bioethical literature, we did

[1] United Nations educational, scientific and cultural organization ethics of science and technology social and human sciences sector: Universal Declaration on Bioethics and Human Rights. (2005, October). Retrieved from www.unesco.org/shs/ethics SHS/EST/BIO/06/1

[2] Ukraine in the field of bioethics: State Concept. (2002). Retrieved from http://biomed.nas.gov.ua/files/concept_ru.pdf

not find publications in which the subject matter would coincide with the statements in our work.

Therefore, the purpose of the article was to determine the correlation between the concepts of "jus natural" and "bioethics", as well as to find out their significance for lawmaking activity.

1. MATERIALS AND METHODS

To achieve this goal, an appropriate research algorithm was selected, characteristic of the set of collected materials, conditions and form of work (fundamentally applied). The study applied a three-tier system of methodology, consisting of fundamental, general, scientific and specific scientific levels. The basic among the fundamental (philosophical) methods of cognition used is dialectical (idealistic dialectic). Alternative dialectics of cognition were also used: "tragic dialectics", existentialism, phenomenology, gestalt approach, synergetic method sometimes dogmatism. Thus, the method of "tragic dialectic" was a prerequisite for the need for scientific research and development in its process of "fuses", the discovery and use of dangerous knowledge, as well as their correct use. Using the phenomenological method, Gestalt approach, induction, abstraction, hypothetical method and philosophy of existentialism, as well as the provisions of German classical philosophy, philosophy of life, etc., the author's concept of bioethics was developed and presented and developed. The dogmatic method is used in the operation of some classical concepts, such as the concept of "biological death", "crime", "rule of law" and the like. In the approach to the meaning of life, the position of ancient philosophers who professed epicureanism was chosen. The study deliberately turns away the sophistication method – we believe that the basic techniques of this method (the substitution of concepts, manipulation of facts, etc.) do not allow to objectively reflect reality, and thus can not help to obtain the ultimate objective scientific result. Theocentrism and anthropocentrism also turn away as a philosophy of being. Confessing ecocentrism, we are convinced that at the center of the universe should be not God (in interpreting the philosophy of theocentrism and the corresponding purpose of human existence), not man (as in anthropocentrism), but nature (the environment). It is our promotion of the philosophy of ecocentrism and development in each person of the ecocentric type of consciousness that has also become one of the prerequisites for this scientific study. Humanity must embark on the path of co-evolution. The whole text of the work is presented using the moral method, that is, in such a sequence that the reader himself comes to the basic idea that was laid down in the work – the need for cultivation of bioethical consciousness among society and the creation of bioethical rules of law.

Along with the fundamental methods of knowledge of reality, we have used common scientific methods. The systematic approach was used to formulate a general concept of scientific research. The specified system consists of a set of smaller elements arranged in a specific sequence. Through system analysis, certain elements of the sys-

tem were identified, investigated, and their relationship identified for successful combination, and the appropriate placement in the body of work.

The axiomatic deductive method permeates almost all the work, since the formation of any new concept requires repulsion from the existing concepts taken by the axiom. This method has developed the author's concept of "bioethics". Using the comparative-historical method, such concepts as "bioethics", "law", "life" were studied in the historical plane, in terms of their axiology. This approach revealed their evolution and the main objective changes in the attitude of mankind to them, and therefore to determine their present value. The method of comparison is used almost in the whole text of the paper: to identify the features of bioethics and other social phenomena, in determining approaches to regulatory regulation of bioethical problems, taking into account foreign experience, etc. Incomplete induction has been used to study the relevant jurisprudence and legislation of foreign countries. Using the full induction method, we were able to find out the essence of bioethics by first identifying and analyzing specific areas of its application, and then summarizing it all in a single concept. Developing their own concept of "bioethics", they are forced to break away from existing concepts – this is the method of abstraction. Some conclusions in the work on the results of the study helped formulate the so-called method of hypothesis acceptance. The author's concept of "bioethics", "bioethical principles" are hypotheses.

Using the synergistic method, the proposals to the Criminal Code of Ukraine were formulated and substantiated regarding the response by the state through criminal-legal measures to commit offenses in the sphere of "dangerous knowledge".

Along with the methods of scientific research, we have used such cognitive techniques as: idealization, abstraction, generalization of a thought experiment, which is a broader method of scientific cognition than the method. By generalizing, analyzing the etymological origin of bioethics, the evolution of this concept, its essence, bioethical principles have been developed, as well as the existing concept of bioethics has been refined.

2. RESULTS AND DISCUSSION

It is known that the ideas of jus naturale were laid by the Greek philosophers-stoics. The latter were convinced that jus naturale arises from the human nature as a rational, social and natural creature; it is these rules that regulate human behavior in general. Being the simplest and most rigorous, the jus naturale rules have been universally applied. Thus, according to the teachings of the Roman lawyer Ulpian, the natural law is a law that applies to all animals and is not limited to exclusively human being [11]. The law to Ulpian is a art of good and just. However, in addition to such human qualities as rationalism, sociality and naturalness, the formation of jus naturale was influenced by ethics which contained the human religiousnes and morality.

The well-known philosopher of the Renaissance, Hugo Grotius (1583–1645), defined the law through the category of justice. In his opinion, everything is legitimate is

fair, and the basis of law are ethical concepts, expressed in legal terms. In the famous treatise "Three Books on the Right to War and Peace" ("De jure belli ac libri tres") G. Grotius noted that natural law retains a moral basis, but it is not a set of laws, but a certain established by God's rule of law, organizing the existence of the world with sustainable ties. At the same time, the criteria for the search for these links according to G. Grotius is the order of common sense, in which one or another act, depending on its conformity or contradiction with the reasonable nature, is recognized as necessary; and therefore such an act is forbidden, or is prescribed by God himself, the creator of nature [12].

According to R. Tuck, one of the most well-known scholars of creativity G. Grotius, the natural right in the work of the latter is based on the general human desire (the original instinct – Ya. T.) self-preservation and consists of a fairly small set of rights and obov ' stems [13]. In continuation of R. Tack's opinion it can be noted that the essence of natural law is to preserve. However, not only self-preservation of a person. Today, the growing importance of taking care of the ecosystem, the share of which is human. By making efforts to preserve the ecosystem, a person automatically protects himself from destroying himself. Modern philosophers and theorists of law define jus naturale as a set of universal norms and principles that are at the basis of all legal systems of world civilization [14]. Probably such an interpretation of this concept stems from the doctrine of G. Grotius, his definition of the essence of jus naturale.

Russian philosopher V. Bachinin gives his criteria for determining jus naturale. Here are some of them: 1) it is derived from the natural order, that is, from the universe and the human nature, which is an integral part of the universe; 2) arose with the first steps of human civilization in the form of customary law; 3) according to jus naturale, such human rights as the right to life, freedom, property, personal dignity are unconditional, that is, they can not be restricted by the will of the state; 4) jus naturale is not identical to the current legislation and provides for the religious-metaphysical and moral-ethical principles that connect it with the majority of human culture values, extend and deepen its legal content; 5) the normative-value limit of his goals is the highest justice, which is understood as a universal ideal that corresponds to the original foundation of the universe; 6) jus naturale inseparable from world culture; 7) natural and legal worldview, thinking – is the property of the philosophical mind and metaphysical intuition [15]. Continuing the opinion laid down in the last of the following criteria for determining the natural law of V. Bachinin, we turn to the characteristics of the natural-legal consciousness or thinking of a person, a subject of law, which will demonstrate additional signs of jus naturale.

So A. Polyakov comparing the natural-legal and positivist approaches to understanding the law points out that they (approaches) point to different aspects of legal reality, while considering that their approach is the only true one. With regard to jus naturale – this is an indication of the connection of the right to the value world of the subject, the

need for his "included" participation in the life of the law because of its high significance for all and. In this case, the right is in the field of "significance", fundamentally native with the whole value of the universe and therefore blurred and indeterminate, vague, not proven formal-logical means [16].

That is why, when familiarizing with international normative and legal act, it is sometimes difficult to understand their position. Their text is designed for different approaches to legal thinking, to various legal systems including. However, it is important, when interpreted and applied, to feel their essence (the spirit of the law), which is right – jus naturale. This spirit of law must be reflected in national laws in the traditional forms of them, rather than literally, as is often the case in Ukraine, which leads to misunderstanding of the relevant international legal provisions by domestic law-enforcement officers. Characteristic examples of the latter are literally transposed from international conventions to the Criminal Code of Ukraine[1] norms in the field of counteraction to trafficking in human beings, the legalization of criminal property, corruption, etc. [17].

Similar opinions are expressed by representatives of other branches of Ukrainian jurisprudence. So, N. Onischenko, reflecting on the essence of jus naturale, notes that it is rational and fair, unlimited boundaries of certain states, extends to all times and peoples. It is eternal and immutable, as the eternal and immutable nature and mind man [18]. Supports this view and V. Bachinin, who characterizes jus naturale as the stronghold of stability and unchangeability, which is not subject to revaluation and devaluation [19].

It turns out that a person, as a potential subject of law, must learn to feel the spirit of jus naturale. Only by developing such a capacity we can talk about the man's production of legal laws. Summarizing the above definitions of jus naturale, we turn to L. Fuller, who pointed out that the general natural-legal paradigm proceeds from the existence of an ideal system of law established by God, human nature and nature in general. This ideal system is the same for all societies and all stages of history. Its norms can be detected with the help of reason and reflection. Legislative laws that contradict this ideal are null and void, and therefore, there is no moral basis to claim that they comply with [20]. Every subject (or ordinary citizen or professional lawyer) should reflect on what is supreme justice in the context of the existence of a human society and individual individuals among themselves. Try to identify the general patterns of social, orderly existence of different societies in different historical epochs. These patterns can be traced in various religious texts, customs, and other legal monuments of legal texts, etc. The sign of regularities is their repetition (in various interpretations) in different sources, while maintaining their uniqueness. A similar refrain can be a form of manifesting jus naturale. A striking example of the "inclusion" of the subject of law in the

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

law life is the Anglo-Saxon law system. Unlike the continental court, in which the court is bound by a decision only in the article of the law, even if this article is higher than a person, the court in the Anglo-Saxon law system directly affects the law-making process (through precedents).

Of course, to follow the Anglo-Saxon example administration of justice, it is necessary to change one's mind and approach to legal thinking, start to educate a new lawyers generation on the other principles basis. These principles are the principles of natural law. The natural-legal type of justice involves a lawyer thinking, not limited in his mind by the letter of law, but one that adheres to the law-enforcement activity of higher justice, established by nature, the directions of common sense and the conformity of a particular act (both their own and other persons) with intelligent nature, and therefore appreciates the necessity of committing a certain act, while not forgetting about the existence of a long instinct of self-preservation of man through the ecosystem preservation. The logical question is how to understand the principles and instructions of natural law and how to apply them in lawmaking activities.

In our opinion, the answer to this question can be given by bioethics. The latter began to emerge almost with the onset of writing in human civilization through customary law. Of course, this term was not used at that time. Separate bioethical principles can be found in various religious texts in the form of spiritual guidance (in Christianity – these are the commandments of God, in Ayurveda – veda, etc.) – all of them are aimed at harmonious, orderly, corresponding to the rational nature of human existence within the ecosystem of the Earth. For the philosophical thought of the early nineteenth century, during the Russian Empire (which included various modern independent legal systems) and in the twentieth century was an actual direction of the so-called ethics of life or ethics, which actually reflects the essence of bioethics in its modern sense under international instruments. After analyzing the corresponding these philosophers work, we came to the conclusion that the ethical concepts developed in the religious philosophy of that time did not fully reflect the understanding of bioethics in comparison with its current definition. However, some of the provisions of the latter have already been followed – the need for ethical control of new knowledge, calls for the environment protection, the biosphere and biodiversity, the next generations protection, the person spiritual enrichment, etc.

Briefly, let's summarize the main thoughts of some of these philosophers. The most famous representative of the ethics of life was M. Roerich (1874-1947) – the creator of the so-called "Living Ethics" [21]. The very names of the M. Roerich`s ethical articles are "The common cause", "Living wisdom", "The world for all living things", "Freedom of knowledge", "Fighting ignorance", "Justice", "Feelings", "Help", "Confronting evil" – demonstrate that it was the ethics of mutual solidarity, charity and justice, based on the religious and philosophical values of Buddhism. In formulating their rules of living of living beings in "Living Ethics", M. Roerich, emphasizes

the spiritual component of these living beings. Such an interpretation by the author person's life rules (existence) in essence intersects with the concepts jus naturale, which were given above.

The leading principle of K. Tsiolkovsky's ethics is the requirement that "all living be prosperous", since "life is continuous, no death" [22]. This is a Buddhist idea, in its essence, in the early work of "Ethics, or the Natural Principles of Morality", and in the later "Scientific Ethics", written in 1930. In fact, K. Tsiolkovsky considers ethics as an opportunity to gain some kind of admonition, which is uncertain at the present time, by which a person can know immortality (subject to changing his forms) – and in this he sees the path of mankind to happiness.

The most famous representative of this trend at the beginning of the XX century. was M. Umov (1846–1915) – an outstanding Russian physicist, whose philosophical works, including ethics, unfortunately, were little known. In his articles "Misunderstanding in the nature understanding", "The task of technology in connection with the depletion of energy Earth reserves", "Cultural role of physical sciences", M. Umov develops a set of ideas that substantiate the life ethics. He proceeds from the fact that life is specific in its organization, and for its comprehension is not enough understanding and methods in physics. The specificity of life lies in its antientropy, in that it is always connected with the struggle with what M. Umov calls "unstable state". This term is essentially identical because in modern physics it is called chaos, disorganization, disorder. According to M. Umov, "the unstable is likely to be the state to which unorganized nature aspires. On the contrary, the stability of movements is the basis of organized matter. The picture of the transformation of instability into stability demonstrates the history of human society... Congenital stability for us contains elements of ethics. Moral principles could not control the behavior of creatures whose nature would have been formed from unstable" [23]. While preserving the orientation towards science, on natural science (highly appreciating, in particular, the significance of Darwin's theory of evolution), M. Umov insists that the main goal of ethics – the desire to eliminate the disaster of human life through effective intervention in the life of nature, in the transformation of chaotic forces nature in the organized, "stable". He puts forward his "testament" of a new ethics: "to work on the basis of scientific knowledge" [23].

M. Umov sets a new benchmark for ethics a landmark for combating the forces of chaos, confusion in the name of asserting life: "The great task of the genius of mankind – the protection, the existence of Earth life". These provisions M. Umov's concept (concerning the fight against the disorder, his commandment "to create on the basis of scientific knowledge") later meet in the work of American professor-oncologist V. R. Potter (1911-2001) "Bioethics: Bridge to the future". V. R. Potter notes that "it is important to draw attention to some manifestations of order and disorder in society and to realize that the mess is, in essence, raw material, from which the future emerg-

es and develops the order. Attempts to build a society based solely on an aspiration to the order will not succeed until they take into account the existence of some degree of mess. The greatest benefit that science can bring to society is to develop its methods for a clearer separation of "order" and "disorder". The destruction of orderly systems, such as living organisms, causes an unconscious sense of protest, which forces us to work towards restoring such a system to its initial or even higher level of organization. After all, knowledge is a force that continuously changes the environment of human existence and leads to a new proportion of order and disorder" [24]. As we see, M. Umov and V. R. Potter is also a streamlining of human life that is inherent in natural law.

By going to foreign discoverers and researchers in bioethics, we need to bring their understanding of this concept. In foreign scientific thought, the term "bioethics" appeared in 1927. It introduced Fritz Yagr in the articles "Bioethics: a review of the human ethical attitude to animals and plants", "Bioethical imperative", as a concept of the moral principles of the use of laboratory animals and plants [25; 26]. That is, under bioethics understood the rules of human behavior in relation to other bioorganisms in their biological meaning (without taking into account the spiritual, social component).

In 1971, was published by the American biochemist and human scientist, already mentioned, V. R. Potter the book, "Bioethics: Bridge to the future", which, according to many, named "The Bioethics Bible" [24]. The author of the book defines "bioethics" as a connection of the biological knowledge system with the knowledge of the human values system. The purpose of bioethics, according to V. R. Potter, is the isolation of the human behavior morality doctrine from the standpoint of the medical and biological industry and other socially oriented life sciences. With the name of V. R. Potter connects a view on bioethics as a science of survival. In this he advanced much in clarifying the essence of this science. According to his "science of survival" is not know haw, to him similar thoughts we had met in MK Roerich's theses.

It should be noted separately that the book V. R. Potter was dedicated to the memory of his teacher – Aldo Leopold (1887-1948), who was a well-known American public figure, writer, and belonged to the followers of the American Environmental School. At one time O. Leopold created a special ethics – the ethics of the Earth and spread its effect not only to individuals but also to all types and ecological communities [27]. He believed that the ethics of the Earth is intended to establish the right to exist in the natural environment of all that constitutes the ecosystem, as well as change the human role in the biosphere, turning it from the nature invader to a full representative of the biological community. Contrary to the traditional point of view, the new ethics proclaimed the right of every species to exist, regardless of its economic value or utility. The ideas put forward by O. Leopold, have been further developed in the writings of V. R. Potter, particular, in his book "Bioethics: Bridge to the Future".

In modern times, scientists continue to formulate the true meaning of bioethics. So the author of one of the articles of the Encyclopedia of Bioethics, which in essence is a monograph, defines bioethics not only as human research in one or another sphere, but also as a certain mix of life and ethics sciences, the influence of the person activity (discovery) on the ecosystem, as well as academic discipline [28]. However, the point in discussing the definition of bioethics was set by UNESCO in 2005, which adopted the Universal Declaration on Bioethics and Human Rights[1]. This document has become the only official document that has provided a formal definition of bioethics, which the entire international community must continue to adhere to.

Since the Declaration provides bioethics definitions in the style inherent in international documents, the following are some fragments of the specific provisions of this declaration, which follow from the essence of the concept of "bioethics"[2].

Article 1. The Declaration addresses ethical issues relating to medicine, life sciences and related technologies in relation to human beings, taking into account their social, legal and environmental aspects. Article 16. Due attention should be given to the influence of the life sciences on future generations, including their genetic characteristics. Article 17. Due attention shall be given to the relationship between human and other forms of life, the importance of proper access to and use of biological and genetic resources, respect for traditional knowledge and the role of human in the protection of the environment, biosphere and biodiversity. Article 23. In order to promote the implementation of the principles set out in this Declaration and to provide a deeper understanding of the ethical implications of scientific and technological progress, in particular for young states, efforts should be made to promote education and training in the field of bioethics, as well as to promote the implementation of programs of dissemination information and knowledge about bioethics[3].

As we see, objects of bioethics are the medical sphere, life sciences, technologies that can be applied to a person (that is, a person as an object of research) and accordingly applied by people (as subjects conducting such researches). Human in this declaration is considered not just as a living being (bio), but as a person who has certain rights guaranteed to him by the international community (that is, with the social component) and the corresponding duties for which the violation is committed – should be subject to a certain form of legal liability, established by law. Thus, the formally defined understanding of bioethics is similar to the definition of bioethics provided by both domestic philosophers and their foreign counterparts.

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[1] United Nations educational, scientific and cultural organization ethics of science and technology social and human sciences sector: Universal Declaration on Bioethics and Human Rights. (2005, October). Retrieved from www.unesco.org/shs/ethics SHS/EST/BIO/06/1

[2] *Ibidem*, 2005.

[3] *Ibidem*, 2005.

It should be noted that in 2002 in Ukraine, in accordance with the decisions and recommendations of the Council of Europe Convention on the Protection of Human Rights and Dignity in Connection with the Use of Biological and Medicine Achievements (1997)[1], the Universal Declaration of Human Genome and Human Rights of UNESCO (1997)[2], and the Decree of the Presidium of the National Academy of Sciences of Ukraine dated October 03, 2002, No. 259 "On the Results of the I National Congress on Bioethics", developed the Concept of State Policy in the field of Bioethics[3].

Bioethics in it is defined as a set of ethical norms and principles, integrating into a single conceptual whole aspects of classical ethics and the latest trends that are initiated by the rapid development of scientific and technological progress and the influence of negative changes in the environment on human health. It is also stated in the Concept that bioethics as a system of views, ideas, norms and assessments that regulate the behavior of people from the standpoint of saving life on Earth, plays an increasingly important role in society. The problems of bioethics acquire a pronounced interdisciplinary character and should therefore cover all major areas of human activity, from the development of environmental conservation measures to political decisions[4].

Taking into account all the above definitions of bioethics, we arrive at the conclusion that the latter can be formulated more simply: as a branch of knowledge, which defines the rules of human coexistence with other elements of the ecosystem. Obviously, the purpose of the formulation of these rules is to follow the human instinct of self-preservation (a sign of natural law). Taking into account the realities of present a person self-preservation there is a direct proportional relation with the observance of the person concept of ecocentrism as a certain type of ideology. According to these ideology, a person is seen as an element in the chain of other elements of the ecosystem, a person is no longer the center of the universe, as in the dominant thousand years anthropocentrism ideology [29; 30].

CONCLUSIONS

Thus we can conclude that bioethics and jus naturale have a number of common features: self-preservation of man as a goal, ordering human life, moral, spiritual component of these concepts, the prevalence of prescriptions for all states, peo-

[1] Convention on the Protection of Human Rights and Dignity in Connection with the Use of Biological and Medicine Achievements. (1997, April). Retrieved from https://rm.coe.int/168007d004

[2] Universal Declaration of Human Genome and Human Rights of UNESCO. (1997, November). Retrieved from https://www.ohchr.org/EN/ProfessionalInterest/Pages/HumanGenomeAndHumanRights.aspx

[3] Ukraine in the field of bioethics: State Concept. (2002). Retrieved from http://biomed.nas.gov.ua/files/concept_ru.pdf

[4] Ukraine in the field of bioethics: State Concept. (2002). Retrieved from http://biomed.nas.gov.ua/files/concept_ru.pdf

ples, legal systems; committing a person actions in accordance with common sense (that is, not harming the ecosystem whose part is a person) and the conformity of a person's actions with a reasonable nature (essentially the same).

In fact, bioethics and jus naturale essentially coincide. The difference, in our opinion, lies in the subjects representing these areas of public opinion and are the bearers of relevant ideas. Thus, the subjects of jus naturale can be considered mainly philosophers and lawyers, and subjects of bioethics – physicians, mathematicians, physicists. That things could not concretely formulate for many centuries lawyers (definition and principles jus naturale), more specifically, was able to formulate another intellectual environment. As a result, modern bioethics has in fact become an updated natural law – neo jus naturale, adapted to present-day realities, formulated in modern language. Consequently, bioethics is a new turn in the development of natural law. In modern interpretation neo jus naturale has become more practical than jus naturale, more accessible for understanding and use in lawmaking activities. The application of bioethical principles can not only solve the problem of discovering and using dangerous knowledge and the emergence of ordinary bioethical problems on this ground, but also set up a vector of updated law making within which legal rules can be formulated that will ensure the protection of relevant values by means of crime. legal and other legal remedies. The criminal law created on the basis of these principles will become legal in nature and modern in form.

The formulation of bioethical principles and their use in the law-making in the field of criminal law, as well as the solution of existing bioethical problems on this basis will solve an important scientific and practical problem: to establish the correspondence between the task of ensuring the basic legal protection of the basic legal protection human and citizen's rights and freedoms and the actual state of such security.

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Suggested Citation: Trynova, Ya.O. (2019). Relationship between natural law and bioehtics. *Journal of the National Academy of Legal Sciences of Ukraine,* 26(4), 179–193.

Submitted: 03/06/2019
Revised: 18/10/2019
Accepted: 06/12/2019

УДК 343.1
DOI: 10.31359/1993-0909-2019-26-4-194

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ЗАГАЛЬНІ ПІДХОДИ ДО ХАРАКТЕРИСТИКИ СТРУКТУРНИХ ЕЛЕМЕНТІВ КОМПЕТЕНЦІЇ СЛІДЧОГО СУДДІ В КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ

Анотація. *В статті розглянуті питання компетенції слідчого судді як державно-владного суб›єкта, її структурні елементи. Зазначено, що досягнення цілей кримінального провадження має здійснюватися слідчим суддею суто через реалізацію його процесуальної функції – судового контролю. Запропонований розподіл цілей кримінального провадження. Проаналізовані зовнішні та внутрішні межі предмету відання слідчого судді. Загальною теорією компетенції та кримінальною процесуальною наукою доведено, що компетенція державно-владного суб›єкта включає в себе низку структурних елементів: нормативно-встановлені цілі; предмет відання як юридично визначені сфери і об›єкти впливу; владні повноваження як гарантована законом міра прийняття рішень і вчинення дій; відповідальність за невиконання рішень суб›єкта, наділеного відповідною компетенцією. Вказана структура компетенції, будучи екстрапольованою на тематику компетенції слідчого судді, не лише забезпечує спадковість як принцип розвитку наукового знання, а й надає можливість комплексно поглянути на дане питання, виявивши як особливості правової природи компетенції слідчого судді, так і теоретичні й прикладні аспекти, що потребують наукового осмислення. Актуальність дослідження визначається відсутністю комплексного наукового дослідження структурних елементів компетенції слідчого судді в кримінальному провадженні. Поява нових процедур, постійне розширення меж повноважень слідчого судді сформували запит на розробку і доповнення постулатів сучасного правозуміння його компетенції. Для досягнення поставленої мети використані загальнонаукові методи та прийоми, зокрема такі як: діалектичний; системний; системно-структурний; моделювання та абстрагування; узагальнення; статистичний; аргументування; контент-аналіз та практичний досвід. Проведене дослідження є теоретичним підґрунтям для вирішення наукових і практичних питань, пов'язаних із пошуком оптимальної нормативної моделі компетенції слідчого судді у кримінальному провадженні.*

Ключові слова: структурні елементи компетенції, слідчий суддя, нормативно-встановлені цілі діяльності, зовнішні і внутрішні межі предмету відання, судовий контроль.

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GENERAL APPROACHES TO CHARACTERIZING THE STRUCTURAL ELEMENTS OF THE JURISDICTION OF AN INVESTIGATING JUDGE IN CRIMINAL PROCEEDINGS

Abstract. *The paper investigates the jurisdiction of the investigating judge as a governmental entity, its structural elements. It was stated that the achievement of the objectives of criminal proceedings should be performed by the investigating judge purely through the exercise of procedural function – judicial control. The distribution of the purposes of criminal proceedings is proposed. The external and internal boundaries of the jurisdiction of the investigating judge are analysed. The general theory of jurisdiction and criminal procedural science proves that the competence of the governmental subject includes a number of structural elements: statutorily established goals; jurisdiction as the legally defined spheres and objects of influence; power as a measure guaranteed by law for decision-making and taking action; responsibility for failure to comply with the decisions of an entity with the relevant competence. This structure of competence, being extrapolated to the jurisdiction of the investigating judge, not only provides heredity as a principle of scientific knowledge development, but also offers a comprehensive look at this issue, revealing both the specificity of the legal nature of the investigative judge's jurisdiction, and theoretical and applied aspects that require scientific comprehension. The relevance of the study is determined by the lack of a comprehensive scientific study of the structural elements of the investigative judge's jurisdiction in criminal proceedings. The emergence of new procedures, the constant extension of the powers of the investigating judge formed a request for the development and supplementation of the tenets of modern legal understanding of their jurisdiction. To achieve this purpose, common scientific methods and techniques, such as dialectical, systemic, structured system, modelling and abstraction, generalization, statistical, argumentation, content analysis and practical experience. The conducted research constitutes a theoretical basis for solving scientific and practical questions related to finding the optimal statutory model of investigative judge's jurisdiction in criminal proceedings.*

Keywords: structural elements of jurisdiction, investigating judge, statutory goals of activity, external and internal boundaries of jurisdiction, judicial control.

ВСТУП

The issue of the procedural status of the investigating judge and the subject of judicial control in criminal proceedings was investigated by well-known Ukrainian and foreign scholars, whose works thoroughly investigate the issues of the concept, subject, boundaries of judicial control in criminal proceedings, including the theoretical foundations of the procedural status of the investigating judge, historical and comparative aspects of the legal institution of an investigating judge. Thus, I. V. Hlovyuk believes that judicial activity in pre-trial proceedings is a specific, heterogeneous in

its legal nature activity, which finds its manifestation in several directions, which are the criminal procedural functions of the court, namely: permitting functions, functions of applying measures of criminal procedure compulsion, judicial control. The scientist presents the need to isolate precisely the three procedural functions of the court (judge) in the different nature of the areas of judicial activity in pre-trial proceedings [1].

V. O. Popelyushko provides a classification of the powers of an investigating judge according to the criterion of the subject of legal regulation, which largely corresponds to the structural composition of the current Criminal Procedure Code of Ukraine, namely: powers in the field of procedural relations associated with the application of measures to ensure criminal proceedings; powers related to the consideration and decision on motions for permission to conduct investigative (search), covert investigative (search) and other procedural actions specified in the law aimed at collecting evidence; powers to consider and resolve complaints about decisions, actions or inaction of the investigator or prosecutor; powers to collect evidence in the event of refusal by the investigator, prosecutor to the defence party to satisfy the motion; powers related to the establishment of procedural terms; powers to consider and resolve disqualification issues during the pre-trial investigation of the prosecutor, investigator, defence counsel, representatives, expert, translator; powers to decide the fate of material evidence at the preliminary investigation stage; powers to decide on the use of information obtained as a result of covert investigative (search) activities, on signs of a criminal offense that is not investigated in this criminal proceeding; powers to protect human rights enshrined in Article 206 Criminal Procedure Code of Ukraine[1].

O. G. Shilo notes that the statutory model of the investigating judge's jurisdiction in criminal proceedings is undergoing constant changes in the direction of expanding the subject matter of this subject of criminal procedural activity [2]. The scientist points out the need to establish objective criteria that should determine the subject matter of the investigating judge and their procedural powers, the implementation of which ensures the execution of the proceedings. Such criteria should be factored in by the legislator when further improving the statutory model of judicial control activity, determining the criminal procedural jurisdiction of an investigating judge as an entity that ensures the implementation of the basis of adversarial procedures during pre-trial investigations, respect for the rights and freedoms of participants in criminal proceedings upon performing procedural actions that limit them, solutions of legal conflicts arising between participants in criminal proceedings during pre-trial investigation of criminal offenses [3]. The powers of the investigating judge to exercise judicial control were also investigated by V. A. Zavtur [4], N. P. Siza [5], B. A. Skibitsky [6], S. V. Nagachevsky [7], V. Rudenko [8], V. A. Seleznyov [9].

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

The relevance of the paper is determined by the lack of a comprehensive scientific study of the structural elements of the investigative judge's jurisdiction in criminal proceedings. The emergence of new procedures, the constant extension of the powers of the investigating judge formed a request for the development and supplementation of the tenets of modern legal understanding of their jurisdiction. The purpose of the paper is to establish objective criteria that should determine the subject matter and limits of the investigative judge's jurisdiction in criminal proceedings, their procedural powers. To achieve this purpose, the author has performed scientific research to determine the jurisdiction of the investigating judge, its structural elements, and their correlation relationships.

1. MATERIALS AND METHODS

The methodological basis of the study is the general scientific dialectic method, using which the general approaches to the description of the structural elements of the investigative judge's jurisdiction in criminal proceedings are analysed in the relationship and interdependence, integrity, comprehensiveness and dynamics. The nature of the subject matter also determined the use of the systemic method to examine the structure and content of the investigative judge's jurisdiction; the structured system method is the basis for extrapolating the structure of the investigative judge's jurisdiction; modelling and abstraction methods were useful in the development of scientific and theoretical applied models with aim to improve the legal regulation of the investigative judge's jurisdiction. The generalization method provided an opportunity to consistently bring single facts into a single whole and formulate reasonable conclusions aimed at improving the legislative regulation of the issues under study, overcoming its conflicts and gaps. The statistical method was used to generalize the materials of practice so as to establish the spread of various kinds of controversial situations in law enforcement. The method of argumentation was used to prove the truth of their own judgments using other judgments, arguments, and proofs. Content analysis and practical experience contributed to the study of existing judicial practice within the jurisdiction of an investigating judge in criminal proceedings.

The specified methods were used in conjunction, which contributed to the comprehensiveness, completeness and objectivity of scientific research, specificity, validity and consistency of the conclusions drawn, and the reliability of the results. The study is the theoretical basis for solving scientific and practical issues related to the search for the optimal regulatory model of the investigative judge's jurisdiction in criminal proceedings; ensuring the successful solution of a specific cognitive and practical problem of the investigative judge's jurisdiction in criminal proceedings. The legal and informational basis of the study includes: The Criminal Procedure Code of Ukraine[1],

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

subordinate legislation, interpretative acts of the highest judicial instances of Ukraine. The theoretical basis of the study is the work of domestic and foreign lawyers in criminal proceedings and other branches of legal science. The empirical basis of the research is the case law available in the Unified Register of Judgments, including the author's own 30 years' experience as a judge, including almost 8 years as an investigating judge.

2. RESULTS AND DISCUSSION

Jurisdiction, being the cornerstone in determining the place and role of public authorities in public relations, today is already a fairly deeply studied socio-legal phenomenon [10–13]. The presence of deep conceptual scientific works both on the theory of jurisdiction and on the issues of criminal procedural jurisdiction allows, in the words of Isaac Newton, "to see further by standing on the shoulders of giants" [14]. In other words, relying on the achievements recognized by the scientific community in this matter, and therefore, having a reliable scientific foundation, we can attempt to create our own "scientific superstructure" in the form of identifying the specific jurisdiction of an investigating judge as a governmental subject of criminal procedural legal relations.

Currently, the most famous scientific developments in the field of jurisdiction theory, in general terms, define jurisdiction as the scope of public affairs laid upon authorized entities by law [11]. In turn, specialists-processualists, absolutely correctly emphasizing that "the concept of criminal procedural jurisdiction is a derivative of the general concept of jurisdiction", suggest defining criminal procedural jurisdiction as "the scope of public affairs in the field of settling of criminal law conflicts arising in society, laid upon the preliminary investigation bodies, prosecutors and courts by law" [12]. We shall, however, caveat that upon considering issues of criminal procedure jurisdiction, as L. Lobojko noted, the proposed definition does not claim to be ideal and comprehensive, but merely a starting point to further deepen the understanding of criminal procedural jurisdiction as a socio-legal phenomenon. By and large, the activity of legal thought should be focused not on the formation of ideal definitions of a concept, but on the disclosure of its deep essence [12].

At the same time, being a complex phenomenon, jurisdiction, as the researchers indicate, includes a number of structural elements: 1) statutorily defined goals; 2) the jurisdiction as legally defined spheres and objects of influence; 3) power as a legally guaranteed measure of decision-making and taking actions; 4) responsibility for failure to comply with decisions of an entity endowed with relevant jurisdiction [11]. It appears that the extrapolation of the specified structure of jurisdiction to the consideration of the investigating judge's jurisdiction will not only provide a comprehensive look at this issue, but also ensure continuity as a principle for the development of scientific knowledge.

Upon considering the statutorily established goals of the investigating judge's activities in the criminal process, we will not delve into the dictionary meaning of the concept of "purpose", but will rely on the relevant conclusions made by experts in the study of jurisdiction as a criminal procedural phenomenon at large. As L. Lobojko notes, the purposes established by law for the activities of state bodies determine the way in which they are statutorily oriented towards achieving a specific procedural result. In a broad sense, this refers to public functions performed by each of the bodies that have the right to perform criminal proceedings. Departure from the performance of their functions by these bodies, or the performance of others' functions entails significant damage to the rights and legitimate interests of the subjects of the criminal process, and therefore cannot lead to the achievement of the process purposes [12].

An attempt to transfer the indicated concept of the relationship between purposes as a structural element of the jurisdiction of a governmental subject of criminal proceedings and the functions of such a subject to matters of determining the investigating judge's jurisdiction, necessitates addressing the following. The current criminal procedural legislation of Ukraine statutorily defines the objectives (purposes) of the criminal process, but does not detail them for the activities of separately defined subjects of criminal proceedings. Thus, in accordance with Article 2 of the Criminal Procedure Code of Ukraine[1], , the objectives (purposes) of criminal proceedings are to protect the individual, society and the state from criminal offenses, protect the rights, freedoms and legitimate interests of participants in criminal proceedings, as well as ensure a quick, complete and impartial investigation and judicial review so that everyone who committed the criminal offense was brought to justice to the extent of their guilt, that no innocent person be accused or convicted, that no person be subjected to unreasonable procedural compulsion and that due process be applied to each participant in criminal proceedings.

Thus, the question arises as to the possibility of equating the list of final results specified in Article 2 of the Criminal Procedure Code of Ukraine[2], the achievement of which the criminal proceedings are aimed at, to purposes as a structural element of the investigating judge's jurisdiction. In our opinion, the answer should be in the affirmative, but with the caveat that the achievement of these purposes should be performed exclusively by the investigating judge through the implementation of procedural function – judicial control. This caveat engages the statement that, due to the specificity of the legal nature of the procedural status of the investigating judge, the purposes of the criminal proceedings referred to in Article 2 of the Criminal Procedure Code of Ukraine[3] should be divided into: (a) those whose achievement is directly ensured by the activities

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

[2] *Ibidem*, 2012.

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

of the investigating judge; (b) those whose achievement is indirectly ensured by the activities of the investigating judge.

This thesis can be confirmed by examples of specific functional capabilities of an investigating judge, the implementation of which is aimed at the direct or indirect achievement of individual elements of the general purpose of criminal proceedings, as defined in Article 2 of the Criminal Procedure Code of Ukraine[1]. For example, (a) protecting the rights, freedoms and legitimate interests of participants in criminal proceedings, including (b) ensuring that no person be subjected to unreasonable procedural compulsion and that due process of law is applied to each participant in criminal proceedings, are the purpose of the investigating judge. The said purpose is achieved through the exercise of powers by the investigating judge to provide permits for investigative (search) and covert investigative (search) activities; its exclusive jurisdiction in applying criminal procedural compulsion measures to a person; the general duties of the investigating judge for the protection of human rights provided for in Article 206 Criminal Procedure Code of Ukraine[2].

At the same time, (c) protecting the individual, society and the state from criminal offenses, and (d) ensuring a quick, complete and impartial investigation and judicial review so that everyone who commits a criminal offense is held accountable to the extent of their guilt, that no innocent person be accused or convicted, are not the direct functional areas of the investigating judge.

Thus, the protection of individuals, society and the state from criminal offenses as the purpose of criminal proceedings is directly achieved primarily due to the active initiative of law enforcement agencies aimed at identifying criminal offenses and prosecuting those who committed them. In turn, the modern paradigm of the domestic criminal process assigns a more passive role to the investigating judge in this activity and involves the "inclusion" of the judicial control mechanism only if one of the parties appeals with the corresponding initiative. At the same time, it is rather difficult to deny the indirect participation of the investigating judge in achieving this purpose. Firstly, by issuing permits for various kinds of procedural actions aimed at solving criminal offenses and bringing the perpetrators to criminal responsibility, the investigating judge becomes part of the general criminal procedural mechanism, the activity of which is aimed at achieving this purpose. Secondly, by monitoring the legality of the decisions of pre-trial investigation bodies regarding various kinds of procedural actions aimed at restricting the rights and freedoms of a person and a citizen, the investigating judge indirectly (preventively) protects the individual, society and the state from those criminal offenses that include unlawful restriction human rights and freedoms by pre-trial investigation bodies. Thirdly, by selecting a preventive measure for a person, which, among other things, is aimed at preventing the suspect from continuing the criminal

[1] *Ibidem*, 2012.
[2] *Ibidem,* 2012.

activity, the investigating judge again indirectly protects the individual, society and the state from possible criminal offenses.

Ensuring a prompt, complete and impartial investigation and judicial review so that everyone who committed a criminal offense be held accountable to the extent of their guilt, that not a single innocent person be accused or convicted is also an indirect purpose of the investigative judge, since the investigating judge does not directly affect the speed, completeness, impartiality of the investigation and judicial review, and the resolution of the issue of guilt or innocence. At the same time, the mediated activity of the investigating judge in achieving this purpose is clearly evident. Thus, for example, it is the investigating judge who considers all the challenges during the pre-trial investigation, which ensures the achievement of the objective of impartiality of the pre-trial investigation. In addition, today it is the investigating judge who is obliged to verify the legality and validity of the suspicion report on a complaint by the defence, which in turn is aimed at achieving the purpose of preventing the unjustified criminal prosecution of an innocent person.

Under the jurisdiction as a separate element of competence of a governmental subject of criminal procedural relations, it is customary for the science of criminal process to understand it as the objects on which such a subject can exert a procedural influence. With that, the researchers point out that "objects of such influence are traditionally associated with the powers of state bodies regarding the possibility of proceedings in certain criminal cases" [12]. Fully agreeing with the definition of the jurisdiction as an object to which the influence of the state subject of criminal procedural relations extends, we will provide some clarifications, which, in our opinion, are appropriate to implement regarding the above statement on the powers of state bodies. Undoubtedly, the connection between the jurisdiction (as an object of influence) and the powers of the governmental subject is obvious, because, as noted above, both phenomena are structural (and therefore interconnected) elements of competence of such a subject. At the same time, this kind of connection nevertheless obliges to clearly distinguish between the jurisdiction (the range of criminal procedural relations that can be influenced by the subject of criminal proceedings) and powers (procedural possibilities to exercise such influence).

Being a structural element of the competence of a governmental subject, the jurisdiction, in turn, as scientists point out, shall also be subject to structuring. In particular, scientific works propose to distinguish between the "criminal law element (type of crime) and the criminal procedure element (personality characteristics, connection of criminal cases; alternative possibilities of proceedings in the case; territorial effect of powers of the authority)" in the structure of jurisdiction of competent bodies in the field of criminal procedure [12]. In turn, it follows that a direct extrapolation of this approach to the matter of determining the investigating judge's jurisdiction is impossible, given the specifics of the procedural status of this participant in criminal proceedings.

In particular, in our opinion, it can be argued that the criminal law element (type of crime) as a factor affecting the determination of the jurisdiction of the subject of criminal procedural relations is not relevant for solving this issue regarding the investigating judge's jurisdiction. According to the current criminal procedural legislation of Ukraine, the qualification of a criminal offense does not in any way affect the decision on the belonging of the proceedings to the investigating judge's jurisdiction. Of course, reflecting on this issue, we shall point out a certain, although not obvious, but nevertheless a connection between the severity of the crime and the delimitation of the jurisdiction of investigating judges of local and appeal courts, because it is the competence of the latter to consider issues related to the granting of permits for secret investigations (search) actions, the conduct of which is permitted only upon the investigation of grievous and extremely grievous crimes.

At the same time, in our opinion, the factor (reason) of this delimitation of jurisdiction is not the specifics of the criminal offense (in particular, its gravity), but the organizational and technical features connected with the state secret regime. In particular, it is difficult to disagree with O. I. Polukhovich is that "the main reason for legislative assignment of issues related to covert investigative (search) actions, specifically to investigative judges of the courts of appeal, is the purpose of minimizing the risk of disclosure of information on the fact of conducting covert investigative (search) actions, since the probability of disclosure of information in conditions of adopting decisions on covert investigative (search) actions in a regional level court is significantly reduced. In addition to the above, in the decision on securing the right to grant permissions for covert investigative (search) actions precisely to courts of appeal, factors of an organizational and technical nature played an important part. Considering the fact that information on the fact and methods of conducting covert investigative (search) actions is included in the list of information constituting a state secret[1], the work with all types of carriers of such information should be performed through a special information security department [15]. With that, the organization of these departments requires significant material costs connected with provision of technical, human resources, obtaining the appropriate licenses, etc.[2].

In the context of consideration of the issue of the investigating judge's jurisdiction and its boundaries, the above positions provide an opportunity not only to state the ir-

[1] Decree of the Security Service of Ukraine No. 440 "On Approval of the State Secret Information". (2005, August). Retrieved from https://zakon.rada.gov.ua/laws/show/z0902-05; Decree of the Cabinet of Ministers of Ukraine No. 939 "On approval of the procedure for organization and maintenance of the secrecy regime, in state bodies, local self-government bodies, enterprises, institutions and organizations". (2013, December) (for official use). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP130939.html.

[2] Resolution of the Cabinet of Ministers of Ukraine No. 1169 "On Approval of the Procedure for Obtaining a Court Permit to Take Measures Temporarily Restricting Human Rights and Use of the Extracted Information" (2007, September). (The decree has become invalid on the basis of the Decree of the Cabinet of Ministers of Ukraine No. 252 (252-2016-p) of 30.03.2016). Retrieved from https://zakon.rada.gov.ua/laws/show/1169-2007-%D0%BF.

relevance of such a factor as the type of criminal offense for determination of the investigating judge's jurisdiction, but also to indicate the existence of a different, by their legal nature, limits of the investigative judge's jurisdiction. In particular, in such a context, this refers to both the external limits of jurisdiction (which provide an opportunity to distinguish between the jurisdiction of an investigating judge and the jurisdiction of other subjects of criminal proceedings) and the internal limits of jurisdiction (which provide an opportunity to distinguish between the jurisdiction of investigating judges of local and appeal courts, the jurisdiction of investigative judges by territoriality, the jurisdiction of investigative judges of one court, factoring in the specifics of the person regarding whom criminal proceedings are carried out, etc.) [16].

Currently, the legislative tendency of the gradual expansion of the investigating judge's jurisdiction in criminal proceedings is evident: granting permission to conduct a special pre-trial investigation; appeal of the notice of suspicion; engaging an expert to produce expert evidence (currently – on the motion of the defence party, and in the period from March 2018 to October 2019 – on the motion of the parties to the criminal proceedings); appeal of the decision of the prosecutor to refuse to satisfy the complaint on non-conformity with reasonable time by the investigator, the prosecutor during the pre-trial proceedings, etc. At the same time, the Criminal Procedure Code of Ukraine[1] defines only a certain specific list of decisions, actions or inaction that can be appealed to certain judicial instances. Article 303 of the Criminal Procedure Code of Ukraine contains a list of decisions, actions or inaction that may be appealed to an investigating judge; Article 309 of the Criminal Procedure Code of Ukraine – a circle of decisions of an investigating judge, which may be appealed to the court of appeal; Part 2 of Article 33-1 of the Criminal Procedure Code defines the competence of an investigating judge of the High Anticorruption Court[2].

However, as evidenced by the existing judicial practice, there are procedural decisions of individual investigating judges, the resolution of which is not prescribed by law, when the investigating judge makes a decision that goes beyond their authority. The unified register of court decisions contains over 15,000 decisions of investigating judges on consideration of requests from investigators and prosecutors for permission to conduct unscheduled tax audits. The legal assessment of such decisions of investigating judges was provided by the Supreme Court on March 6, 2018 in the case of a cassation appeal by a representative of Sintop Research and Production Association LLC against a decision of the Donetsk Region Court of Appeal dated August 30, 2017 on refusal to open an appeal proceedings[3]. The panel of judges of the Supreme Court emphasized the fact that the powers of an investigating judge as a subject of criminal proceedings are determined only by the Criminal Procedure Code of Ukraine (part 3 of

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

[2] *Ibidem*, 2012.

[3] Order of the Supreme Court. EDRSU. (2018). Retrieved from http://reyestr.court.gov.ua.

Article 26), and Article 9 of the Criminal Procedure Code of Ukraine excludes the influence of other laws on issues of determining the powers of subjects of criminal proceedings, since it contains a peremptory requirement that a law that contradicts the Criminal Procedure Code of Ukraine cannot be applied[1]. The resolution states that the legislator clearly defined the role of the investigating judge in the criminal justice system: to ensure that law enforcement authorities do not violate the rights, freedoms and interests of a person upon exercising their powers. This task can justify the various powers of the investigating judge, aimed at ensuring the rights, freedoms and interests of individuals, even if they are not clearly stipulated by law. An example of such powers can be found in Article 206 of the Criminal Procedure Code of Ukraine[2], when the legislation obliges the investigating judge to "take the measures necessary" without defining a list of these measures.

However, even with the broadest understanding of the role of the investigating judge, it is impossible to harmonize it with the right of the investigating judge to expand – in comparison with the legislation – the powers of state bodies and officials. An investigating judge can only limit in a particular case, based on the circumstances of the case, the use of powers already granted to such entities by law. In the above case, the judge made a decision having the exact opposite effect: he gave the investigator powers that he was deprived of by law. This contradicts the very essence of judicial control over the actions and decisions of state bodies so as to protect the rights, freedoms and interests of individuals. It also contradicts the purpose of the court as an institution in a democratic society. Criminal procedural legislation in its essence constitutes a body of provisions that restrict the freedom of action of the state in the investigation of crimes. The meaning of criminal procedural legislation in a democratic country is to balance this legitimate interest in the investigation of crimes with other – equally important – values and interests of society: protection from excessive state interference in the private sphere, protection from arbitrariness, the value of personal freedom, and prevention of humiliation dignity, the value of family ties, freedom of entrepreneurial activity, etc. It is difficult to even list all the values and legitimate interests that the criminal procedural law protects from the desire to investigate crimes at all costs [17].

The configuration of this balance of conflicting values and interests is always the subject of fierce debate in society. This balance is too complex, too dependent on the current situation in the country, historical and legal traditions and many other factors to be the subject of discretion of a single person, in this case, an investigating judge. It is because of the complexity of determining this balance that it is determined by law. It is the Parliament, and not a single person, that constitutes the most appropriate means of finding a balance of various public interests in a democratic society. The practice of criminal investigations often raises painful questions regarding the balance between the

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

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

needs of the investigation and the protection of the rights of individuals and other values of society. But, despite the urgent needs of the investigation, the prohibition of torture is unconditional, even if torture can help investigate and – sometimes – save lives [18; 19].

Forced self-disclosure is prohibited, although it can often contribute to an investigation. Intervention in the confessional privilege is impossible, although such interference could provide decisive evidence in the investigation. A full fingerprinting would be a very effective way to control crime and a great relief in the investigation of crimes, but at the cost of freedom and privacy. In all these cases, the needs of the investigation cannot justify the state moving beyond the limits defined by legislation. It is the judicial system that has the responsibility to ensure that the law-defined balance between the needs of the investigation and other public values is respected [20]. The provisions of the law, which exclude the powers of the investigator or prosecutor to appoint inspections, cannot be interpreted as a change in the procedure for exercising powers, for example, as a ban on exercising these powers without the permission of the investigating judge or court. The legislator completely and unconditionally excluded such actions from among actions allowed to be performed by an investigator or prosecutor. In the context of the given case, the objective of the investigating judge laid precisely in that the powers of the investigator and the prosecutor, which were excluded by law, were also excluded in practice. Consequently, in this case, the investigating judge, having granted the investigator permission to conduct an inspection, went beyond his powers and ruled a decision that is not stipulated by the criminal procedural legislation. The statutorily set goals, as a fundamental element of determining the jurisdiction of governmental participants in criminal proceedings, one of which is the investigating judge, are enshrined in Article 2 of the Criminal Procedure Code of Ukraine. With that, the achievement of the objectives of criminal proceedings should be pursued solely by the investigating judge through the exercise of their procedural function – judicial review. In its turn, the stated reservation obliges to state that due to the specifics of the legal nature of the judicial control, the aims of the criminal proceedings stated in Article 2 of the CPC of Ukraine should be divided into: (a) those whose achievements are directly ensured by the activities of the investigating judge (protection of the rights, freedoms and legitimate interests of participants in criminal proceedings; ensuring that no person is subjected to unjustified procedural compulsion and that due process of law be applied to each participant of criminal proceedings, being the direct purpose of the investigating judge); (b) those whose achievements are indirectly secured by the activities of the investigating judge (protection of the individual, society and the state from criminal offenses; ensuring a prompt, complete and impartial investigation and judicial review so that everyone who committed a criminal offense be held accountable to the extent of their guilt and no innocent person be accused or convicted).

In the context of consideration of the issue of the investigating judge's jurisdiction and its limits, it should be pointed out that there are limits of a different legal nature in

the investigating judge's jurisdiction. In particular, it is appropriate to refer to both the external limits of jurisdiction (which provide an opportunity to distinguish between the jurisdiction of an investigating judge and the jurisdiction of other entities involved in criminal proceedings), and the internal limits of the jurisdiction of courts, the jurisdiction of investigating judges by territoriality, and the jurisdiction of investigating judges of one court, factoring in possible specialization, etc.

The investigating judge's jurisdiction as a subject of criminal proceedings is determined only by the Criminal Procedure Code of Ukraine (part 3 of Article 26), and Article 9 of the Criminal Procedure Code of Ukraine excludes the influence of other laws on the determination of the powers of the subjects of the criminal process, since it contains a peremptory requirement that a law that is contrary to the Criminal Procedure Code of Ukraine cannot be applied. The legislator clearly outlined the role of an investigating judge in the criminal justice system: to ensure that law enforcement authorities do not violate the rights, freedoms and interests of a person upon exercising their powers. This task can justify various powers of the investigating judge, aimed at ensuring the rights, freedoms and interests of individuals, even if they are not clearly stipulated by law. An example of such powers can be found in Article 206 of the Criminal Procedure Code of Ukraine, when legislation requires an investigating judge to "take necessary measures" without defining a list of such measures. However, even with the broadest understanding of the role of the investigating judge, it is impossible to agree with it on the right of the investigating judge to expand – in comparison with the law – the powers of state bodies and officials. The investigating judge can only limit the use of powers already granted to them by law in a particular case, proceeding from the circumstances of the case.

CONCLUSIONS

The analysis of the current statutory model of judicial and criminal activity in criminal proceedings suggests the following conclusions. To date, the general theory of jurisdiction and criminal procedural science has proved that the jurisdiction of the governmental subject includes a number of structural elements: 1) statutorily set goals; 2) subject matter as the legally defined spheres and objects of influence; 3) authoritative powers as a law guaranteed measure of decision-making and taking action; 4) responsibility for non-implementation of the decisions of the subject with the respective competence. The specified structure of competence, being extrapolated to the investigating judge's jurisdiction, not only provides heredity as a principle of scientific knowledge development, but also offers a comprehensive look at this issue, revealing both the specificity of the legal nature of the competence of the investigating judge, and theoretical and applied aspects that require scientific comprehension. The meaning of criminal procedural legislation in a democratic country is to balance this legitimate interest in the investigation of crimes with other – equally important – values and interests of society: protection from excessive state inter-

ference in the private sphere, protection against arbitrariness, the value of personal freedom, and prevention of humiliation of dignity, values of family ties, freedom of entrepreneurial activity, etc. The scientific novelty of the study is determined by the fact that the author obtained new results in the form of a set of scientific conclusions about the structure of the investigating judge's jurisdiction.

The conclusions and proposals presented herein can be used for research purposes – for further processing of the subject of structure and limits of the investigating judge's jurisdiction; in legislative activity – upon improving the current Criminal Procedure Code of Ukraine; in law enforcement – to assist practitioners in the application of the law and the formation of law enforcement practice; in the educational process – in the preparation of textbooks, teaching guides and methodological materials on the criminal process, upon teaching the course of the criminal process and other educational disciplines.

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Suggested Citation: Sharenko, S. L. (2019). General approaches to characterizing the structural elements of the jurisdiction of an investigating judge in criminal proceedings. *Journal of the National Academy of Legal Sciences of Ukraine*, 26(4), 194–208.

Submitted: 27/05/2019
Revised: 29/10/2019
Accepted: 26/11/2019

УДК 343.9.01:343.36-043.88
DOI: 10.31359/1993-0909-2019-26-4-209

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АВТОМАТИЗАЦІЯ ПРИЙНЯТТЯ РІШЕННЯ СУДДЕЮ ПІД ЧАС КВАЛІФІКАЦІЇ КРИМІНАЛЬНОГО ПРАВОПОРУШЕННЯ ТА ПРИЗНАЧЕННЯ ПОКАРАННЯ

Анотація. *Враховуючи розвиток науково-технічного прогресу, який впливає на всі сфери життєдіяльності людини, можна констатувати зміну техніко-криміналістичних засобів фіксації доказової інформації та використання інформаційних технологій як під час здійснення досудового розслідування, а також під час судового розгляду, експертного, виконавчого провадження та виконання покарання. Стаття присвячена проблемам автоматизації прийняття рішення суддею під час кваліфікації та призначення покарання. З цією метою було досліджено кримінально-правові та криміналістичні передумови автоматизації прийняття рішення суддею, а також перспективи автоматизації прийняття рішення суддею. Під час дослідження були використані філософські, загальнонаукові та спеціальні методи наукового пізнання. В статті акцентовано увагу на необхідності запровадження автоматизації не тільки документообігу на стадіях досудового розслідування, судового розгляду або виконавчого провадження, що вже досягається в Україні в умовах діджиталізації, але й автоматизації прийняття рішення суддею. Найбільш важливими рішеннями при здійсненні автоматизації є кваліфікація кримінального правопорушення та призначення покарання. Це дозволить досягти мети справедливого суду, зменшити корупційні ризики та повернути довіру суспільства до органів правосуддя. Вважаємо, що досягти такої мети можна із використанням Автоматизованого робочого місця (АРМ) судді, яке має відповідати певним вимогам: 1) методичне забезпечення судового розгляду; 2) організаційне та тактико-криміналістичним засобам; 3) техніко-криміналістичним засобам; 4) здійснення підвищення кваліфікації; 5) використання додаткової довідкової інформації. Такий підхід дозволить додатково досягти економії витраченого часу на створення документів, прийняття рішень та їх фіксацію в єдиних реєстрах. Крім того, суддя буде мати змогу обирати запропонований системою варіант прийнятого рішення, який буде видаватися на підставі сформованої окремої криміналістичної методики та узагальненої судової практики за цим видом кримінального правопорушення.*

Ключові слова: злочин, автоматизоване робоче місце, АРМ судді, кваліфікація кримінального правопорушення.

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AUTOMATION OF JUDICIAL DECISION-MAKING UPON CRIMINAL OFFENSE CLASSIFICATION AND SENTENCING

Abstract. *Considering the development of scientific and technological progress, which affects all spheres of human life, a change can be stated in the technical and criminalistic means of recording evidence and the use of information technology both in the pre-trial investigation and during the trial, expert, enforcement proceedings and the execution of sentences. The paper covers the issues of automation of judicial decision-making upon crime classification and sentencing. To this end, the criminal law and forensic prerequisites for automation of judicial decision-making were investigated, including the prospects for automation of judicial decision-making. In the course of the study, philosophical, general scientific and special methods of scientific knowledge were used. The paper highlights the need to introduce automation of not only document flow at the stages of pre-trial investigation, trial or enforcement proceedings, which is already achieved in Ukraine in the context of digitalization, but also automation of decision making by a judge. The most important decisions in the implementation of automation are the qualification of a criminal offense and sentencing. This will help achieve the purpose of a fair trial, reduce corruption risks and restore public confidence in the judiciary. We believe that such a purpose can be achieved using the judge's automated workstation (AWS), which must meet certain requirements: 1) methodological support of the trial; 2) organizational, tactical and criminalistic means; 3) forensic means; 4) implementation of competence development; 5) use of additional background information. Such approach will additionally allow to spend less time on the creation of documents, decisions and their recording in unified registers. Furthermore, the judge will be able to choose the version of the decision made by the system, which will be issued on the basis of the prevailing private forensic technique and generalized judicial practice for this type of criminal offense.*

Keywords: crime, automated workstation, judge's AWS, criminal offense classification.

INTRODUCTION

The issue of the use of automated systems in the activities of persons conducting pre-trial investigations or trials was addressed by forensic scientists at different times. This approach is associated with the use of modern information technology to improve the quality or optimization of investigative activities (V. V. Bilous, L. I. Keryk, V. M. Shevchuk, V. Yu. Shepitko) [1; 2], informatization of the investigation process (R. S. Belkin) [3], algorithmization of investigative activities (H. K. Avdeeva, V. Yu. Shepitko), investigation programming, technical and forensic support of bodies of pre-trial investigation [4], use of criminalistic technologies (V. V. Semenogov) [5] or scientific organization of managerial work (V. M. Plishkin) [6].

Considering the development of scientific and technological progress, which affects all spheres of human life, it can be stated that the change of technical and forensic

means of recording evidentiary information and use of information technologies both during the pre-trial investigation, including upon the judicial review, expert, enforcement proceedings, and execution of punishment [7–10]. Currently, registers of pre-trial investigations, court rulings and methods of conducting judicial examinations have emerged[1], recording the status of judicial procedure (proceedings), automated distribution of cases between judges is carried out, as well as document flow of the court at large[2]. Of great importance was the introduction of the Unified State Register of Declarations of Persons Authorized to Perform State or Local Government Functions[3]. The said registers have different levels of access restriction, as this can lead to the disclosure of information on trial participants or infringement of copyright and related rights.

Databases used by professional and non-professional judicial procedure (proceedings) participants can be considered the Unified Register of Debtors, the Electronic Auction of Arrested Property System, technological cards for execution of enforcement proceedings by a state bailiff, presentation of European Court decisions by the Ministry of Justice of Ukraine [11], etc. The emergence of such databases, together with the above registers and automated systems, will minimize corruption risks, conflicts of interest, accelerate the process of adopting the practices of national and international courts, algorithmize the activities of professional judicial procedure (proceedings) participants [12–14].

1. MATERIALS AND METHODS

To determine the optimal forms of automation of the judicial decision-making by a judge during the qualification of a criminal offense and the imposition of punishment, a complex of scientific methods and practice of their application were used. Thus, philosophical, general scientific, and special methods of scientific cognition were employed in the course of the study. Methods of logic (analysis and synthesis, induction and deduction, analogy) were used upon the creation of this paper, the establishment of criminal and forensic prerequisites for automating the judicial decision-making, the identification of the scope of decisions subject to automation, the establishment of their content.

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[1] Order of the Prosecutor General's Office of Ukraine No. 149 "On regulations on the procedure for maintaining the Unified Register of Pre-trial Investigations". (2016, April). Retrieved from https://zakon.rada.gov.ua/laws/show/z0680-16; Order of the State Judicial Administration of Ukraine No. 37 "On instruction on the procedure for production, sending, registration, accounting and storage on paper and in electronic form of copies of court decisions subject to entry in the Unified State Register of Court Decisions". (2008, May). Retrieved from https://cn.court.gov.ua/tu25/7/326

[2] Decision of the Council of Judges of Ukraine No. 30 "On regulation on the automated system of court workflow". (2010, November). Retrieved from https://court.gov.ua/sudova-vlada/969076/polozhenniapasds/.

[3] Decision of the National Agency for the Prevention of Corruption No. 3 "On the functioning of the Unified State Register of Declarations of Persons Authorized to Perform State or Local Government Functions". (2016, June). Retrieved from https://nazk.gov.ua.

The philosophical method was applied in the analysis of views on the problem of decision-making automation; formal and logical method was used during the formation of a set of regulations necessary for the judicial decision-making automation process and formation of the said decisions so as to establish an automated workstation for a judge; comparative law method was applied upon comparing the mechanisms and forms of decision-making automation for a judge and other professional judicial procedure (proceedings) participants.

Due to the method of analysis and synthesis, it was concluded that the administration of fair justice can be ensured through the creation of automated systems that will facilitate the implementation of the purposes and objectives of judicial procedure (proceedings) by its professional participants [15; 16]. In our view, this will allow professional judicial procedure (proceedings) participants to have a maximum range of criminal, procedural and forensic tools for pre-trial investigation, trial, enforcement of court decisions and sentences. Thus, it is possible to accelerate the process of accomplishment of the purposes and objectives of judicial procedure (proceedings) by professional participants, to make their activities more efficient, to reduce the number of mistakes and to minimize the possibilities of abuse and excess by such persons by means of deception, bribery, use of information and other ways of committing criminal offenses against public justice at these stages.

2. RESULTS AND DISCUSSION

2.1 Criminal and forensic prerequisites for automating a judge's decision

A special place among the already existing automated systems that contribute to the fight against criminal offenses in the field of justice is the automated workplace of the investigator. Attempts to create such automated systems were made by forensic scientists. Thus, H. K. Avdeeva and V. Yu. Shepitko created the Insight Automated Workstation of Investigator (the Insight AWS), which is copyrighted and uploaded to the Internet [17]. The Insight AWS of Investigator includes the following blocks: 1) "legislation" (regulation governing the activity of the investigator); 2) "document" (samples of procedural documents); 3) "investigative actions" (procedural regulation and tactics of investigative actions, sample plans and schemes of the venue and conventions of objects); 4) "investigative practice"; 5) "scientific and technical means" (forensic technical support of pre-trial investigation bodies); 6) "forensic means" (theoretical bases of forensics, types of forensics, typical expert questions); 7) "criminal science techniques" (methods of crime investigation); 8) "glossary" (glossary of criminal science); 9) "law enforcement agencies and expert institutions" – basic information and addresses; 10) "training" (simulator programs; tests to verify the level of criminal science knowledge; training videos); 11) "bibliography"; 12) "helpful Information" (information about state authorities of Ukraine, embassies and consulates of foreign countries in Ukraine; codes of direct dialling lines of Ukraine; units of measurement, standard colour chart).

With that, V. M. Shevchuk proposed to supplement the system of "Criminal Science Techniques" with such an element as "Tactical Operations" regarding "individual criminal science techniques", factoring the following elements: a) stages of investigation; b) investigative situations; c) intermediate tactical tasks; d) the content of the tactical operation; e) subjects who cooperate upon carrying out a tactical operation; g) tactical operation plan" [18].

A similar attempt was made by specialists of the National Academy of Internal Affairs, headed by L. D. Udalova, regarding the formation of the software product "Information and reference software "Automated Workstation of the Investigator", which includes the following blocks: 1) "regulations"; 2) "types of crimes"; 3) "expert block"; 4) "document forms"; 5) "procedural activity"; 6) "reference book"; 7) "media" [19]. Such automated systems were developed by criminal science experts in a situational direction so as to record an event or simplify the investigation of a corresponding type of crime. For example, the GRAFIT software package, designed to document the circumstances of a traffic accident, was developed by the specialists of the Forensic Science and Research Centre of the Main Administration of the Ministry of Internal Affairs of Ukraine in Kharkiv region [20]. The "Vbyvstvo" (Murder) Computerized Computer System contains two modules, namely "Vbyvstvo-Diagnostics" and "Vbyvstvo-Typical Versions" to assist an investigator in a murder investigation.

The use of all of the specified software, databases, registers, and automated systems definitively has a positive effect on obtaining more information required by the investigator in their work and, following this logic, helps to counter criminal offenses in the field of justice. However, increasing information and duplicating it in an electronic network can not only have a positive effect but also have the opposite effect – instead of conducting a direct pre-trial investigation of the relevant criminal offense, the investigator only submits information on the pre-trial investigation [21–23]. Considering the heavy workload per investigator in Ukraine, there is a need for operators to provide such information or investigator assistants. However, such an approach may indicate that the activities of the investigator cease to be efficient and quick, and not only the form of recording the activities of the investigator from documentary to electronic is being replaced. Such duplication of pre-trial investigation in documentary (hard copy) and electronic forms testifies to the double burden on the investigator. In our opinion, factoring in the development of scientific and technological progress, there is already a possibility of conducting criminal proceedings by investigators exclusively in electronic form. It is clear that such approach may also extend to the judicial stage. Thus, in Estonia, participants in the procedure and their representatives can apply to the State Court and follow the trial via e-file [24].

2.2 Prospects for automating judicial decision-making

A positive impetus in the automation of legal proceedings is the creation of the Electronic Court. Thus, in 2013, the implementation of the Electronic Court was virtually

initiated[1], and in 2017, a mailbox and an Electronic Court System were created on the web-portal of the judiciary of Ukraine. In the Cabinet of Electronic Services of the Ministry of Justice of Ukraine, an Electronic Court section can be found, where one of the services can be selected: 1) payment of court fees online (information on banking details for payment of court fees; possibility of forming a receipt and online settlement of court fees); 2) information on the stages of court proceedings (information on the court that considers the case, the parties to the dispute and the subject of the claim, the date of receipt of the statement of claim, appeal, cassation appeal, statement of review of the case, the stage of the case consideration, the place, date and time of the court hearing, the movement of the case from one court to another); 3) the Unified State Register of Court Decisions (automated system for collecting, storing, protecting, accounting, searching, and providing electronic copies of court decisions); 4) e-mailing the procedural documents to the participants of the trial (exchange of electronic documents between the court and participants in the trial regarding the transfer of the procedural documents in electronic form to such participants by the court); 5) sending the summons in the SMS form (sending the participants of the trial and criminal proceedings the texts of summons in the SMS form by the courts); 6) disclosure of information on bankruptcy cases (provision of free access to information on business entities (contractors, debtors, guarantors, etc.) being in the bankruptcy proceedings) [26].

The implementation of the Electronic Court project facilitates amendments to the procedural laws[2] by which, for example, in the commercial courts, the Unified Judicial Information and Telecommunication System (Article 6 of the Civil Procedure Code of Ukraine[3]) operates, which includes the registration of a case, the appointment of a judge or a panel of judges (judge-rapporteur) for the consideration of a particular case, ensures the exchange of documents (sending and receiving documents) in electronic form between the courts, sends court decisions and other procedural documents to the participants of the trial on their official electronic addresses. The court also carries out other procedural actions in electronic form, and also conducts the hearing of the case on the materials of the court case in electronic form. In the same manner, Art. 120 of the Civil Procedure Code of Ukraine stipulates that the summons or notice of the expert, interpreter, specialist, including, in cases of urgent necessity provided for by this Code[4],

[1] Order of the State Judicial Administration of Ukraine No. 72 "On the implementation of the project on exchange of electronic documents between the court and participants of the trial". (2013, May). Retrieved from https://ips.ligazakon.net/document/view/SA13013?_ga=2.215357527.1978353140.1581928645-889467428.1581928645

[2] Law of Ukraine No 2147-VIII "On Amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Judiciary of Ukraine and other legislative acts". (2017, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2147-19.

[3] Economic Procedure Code of Ukraine. (1991). Retrieved from https://zakon.rada.gov.ua/laws/show/1798-12.

[4] *Ibidem*, 1991.

the participants of the case can be carried out (including) by e-mail or via other means of communication (including cellular) ensuring the recording of the notice or summons.

We believe that this approach allows to indicate the presence of automated court systems, which undoubtedly contribute, above all, to counteracting the commission of criminal offenses against public justice, constitute a modern means of access to justice, which is convenient for participants in legal proceedings. To some extent, it can be said that the Electronic Court system does not exclude the creation of a judge's AWS in the future, which will automate the adoption of decisions by a judge in the appropriate category of cases according to the structure of a separate trial procedure.

A positive example of the creation of the Electronic Court allows to point at the need for a new product in the form of an Electronic Pre-trial Investigation, which will minimize the impact from other participants in the proceedings on the investigator, including the prosecutor/supervisor of pre-trial proceedings and the head of the pre-trial investigation body, as well as the possibility of informing the participants of criminal proceedings on the results of the investigation, summons for investigative actions by electronic means and mobile communications, with factual recording of results in electronic form and presentation of electronic evidence. Similar to the Electronic Court, the Electronic Pre-trial Investigation will not exclude the formation of the investigator's AWS and the AWS of other professional participants in the proceedings. The provision on the possibility of making a call via e-mail or mobile communication and the transfer of individual copies of procedural documents, as well as on the possibility of issuing court decisions in electronic form, has already been implemented in the Code of Criminal Procedure of Ukraine[1] (Articles 135, 136, 232, 336, 371).

Systems created to assist a judge should not only perform the functions of programs, algorithms, or judicial review methods for certain categories of cases. Such systems should be automated, which points not only at the collection of information useful to the judge in one resource, but also at the independent performance of individual judicial functions by such a resource. Such an automated workstation of a judge should create those documents (draft judicial decision) that a judge usually draws up, with minimal time consumption. That is why the presence of the section "Document forms" or "Templates of procedural documents" in the judge's workstation, albeit aimed at assisting the judge, cannot be referred to as an automated system. Such a block would be more efficient if such templates of procedural documents were classified by type for the corresponding situations in which the judges find themselves and make certain decisions, record the data of the trial in the relevant document by filling out only those parts of the document that are variable and relate to specific criminal proceedings.

In our opinion, such approach is capable of automating and speeding up the work of a judge to a certain extent. Furthermore, it would be important to provide typical

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

variants of the decisions that a judge can make in a particular situation with the transition to the relevant sample document, the variable parts of which must be filled. It is clear that such approach refers to the problem of judicial decision-making so that such an automated workstation does not reduce the judge's ability to make decisions, but provides certain solutions.

Considering approaches to automation of judicial decision-making, a key role in the future judge's AWS will be the element responsible for creating the document and proposing to adopt a decision based on generalized practice and adherence to the appropriate methodology. Such automation, in our opinion, may relate to the classification of the criminal offense and sentencing. Recently, with the acceleration of information influences, there has been a significant digitalization of society and development of the digital state in Ukraine. This process coincided with the initiation of the drafting of the new Criminal Code of Ukraine[1].

The Concept of reforming the Criminal Code of Ukraine and other legislative acts on liability for violations in the public sphere was developed on the basis of Decree of the President of Ukraine No. 584/2019 of August 7, 2019[2] and is associated, inter alia, with the use of digital technologies and with a view to future use in the context of digitalization... In the future, such legislation may become a tool of artificial intelligence in law enforcement" (paragraph 7 of the Concept[3]). Such position fully coincides with the already existing approaches in the criminal science literature regarding the creation of a judge's AWS with decision-making automation (as demonstrated above).

With that, recently, publications related to the digitalization of society have started to appear in legal and even technical literature. In particular, questions are already being raised about the prospects of the responsibility of artificial intelligence as the subject of a criminal offense for its decision [27; 28], including the prospects of introducing the Sugeno algorithm into the judicial decision support system [29].

We believe that the creation of a document with a proposal for a judge to adopt a decision should be based on the classification and sentencing rules for a particular type of criminal offense. The best way to make a decision by an automated system and to implement a proposal for a judge will be to assess the presence of signs of a criminal offense in the act of the accused, the presence of one or more signs aggravating and/or mitigating the punishment, circumstances of release from punishment, etc. The presence of such a "step-by-step" construction indicates the need to create a decision-making algorithm by which the system will operate. Of importance for the modern fact finder will be the possibility of providing judicial practice in the given category of cases (precedents of courts of various levels of Ukraine and the European Court of Human

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

[2] Presidential Decree No. 584/2019 "On Issues of the Legal Reform Commission". (2019, August). Retrieved from https://zakon.rada.gov.ua/laws/show/584/2019.

[3] *Ibidem*, 2019.

Rights) for the correction of a decision made by the system with a motivation for deviating from it [30; 31].

In our opinion, this approach fully coincides with the desire to reform criminal law by reducing judicial discretion through the creation of "typical classifying and privileging features of corpus delicti" and "typical sanctions for crimes of various categories and grades" (paragraph 3 of the Concept[1]). The proposed automated system is quite capable of not only providing a draft decision, but also providing suggestions on classification of the actions of the guilty person, factoring in the signs established in the course of the trial, and providing options for the type and amount of penalty, taking into account the circumstances of the proceedings.

CONCLUSIONS

The judge's AWS may have the following structure: 1) preparatory proceedings; 2) a separate trial procedure (with "vertical" and "horizontal" classification of such methods); 2.1) the creation of a document (with a proposal for the adoption of a decision based on generalized practice and linked to the appropriate methodology); 2.2) templates of documents; 3) organizational and tactical and criminalistic means; 4) legislation; 5) forensic equipment; 6) advanced training (information on holding conferences, round tables, seminars, workshops, classes, testing, taking such measures online, through video communications and the possibility of receiving video lessons and video lectures); 7) reference information (glossary of terms, encyclopaedia of criminal law, criminal procedure, criminal science, information resources of pre-trial investigation bodies, the judiciary).

The creation of the proposed system in the form of an automated workstation of a judge will allow saving time spent on creating documents, making decisions and recording them in unified registers. Furthermore, the judge will be able to choose the version of the decision made by the system that will be issued on the basis of the prevailing private criminal science technique and generalized judicial practice for the given type of criminal offense. In our opinion, this will minimize the number of judicial errors in the course of the trial, reduce corruption risks, and facilitate counteraction to criminal offenses in this area.

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Suggested Citation: Shepitko, M. V. (2019). Automation of judicial decision-making upon criminal offense classification and sentencing. *Journal of the National Academy of Legal Sciences of Ukraine*, 26(4), 209–219.

Submitted: 29/05/2019
Revised: 25/10/2019
Accepted: 04/12/2019

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REVIEW

of a textbook on agrarian law, prepared by the staff of the Department of Land and Agrarian Law of Yaroslav Mudryi National Law University, edited by Doctor of Law, professor A. M. Stativka. Kharkiv: Pravo, 2019, 416 p.

The transformational changes that have occurred as a result of Ukraine's transition to a market-based economic system demand new approaches in the organization of agricultural production and streamlining of the social sphere of the villages. Considering the fact that under the administrative-command system, the agrarian sector of the economy was fully controlled by the state, nowadays agriculture faces a number of issues that involve introduction of new organizational, legal and economic measures. That is why, in preparing the textbook, the authors had an objective to provide students with the statutory course "Agrarian Law", factoring in the modern requirements for reforming the system of higher legal education in the country, aimed at changing and revising existing approaches to the study of agrarian law, application of new methodology in teaching the said course, including accessibly and systematically teaching students the basics of agrarian legislation, which are related to the features of agricultural activities.

Structurally, the textbook consists of three parts and 17 sections. Part I "National Agrarian Policy and the Field of Agrarian Law" contains five sections: National agrarian policy. Public law regulation and public-private partnership in the agrarian sector; Agrarian law as an independent branch of law; Features of legal regulation of agrarian relations; Agrarian legislation; Legal support for food security. In this part of the textbook, the authors gave pride of place to the definition of the national agrarian policy and its legal support, clarified the specific features of the legal regulation of public-private partnership in agriculture and the legal regulation of investment and innovation

activities in the agricultural sector. The authors reveal the essence of the field of agrarian law, prove its independence in the national system of law. Furthermore, the textbook offers a wide list of special principles of agrarian law, thoroughly analyzes the features of agrarian legal relations, describes the agrarian legislation and its system, provides analysis of foreign agrarian legislations. The authors factored in the issue of food security. The authors revealed its essence, including identification of indicators and criteria for food security.

Part II "Legal Forms of Agrarian Production" consists of 6 chapters, which deal with clarification of the legal status of subjects of agricultural production. It is methodologically correct to provide both a general description of the legal status of agricultural producers and a description of the legal status of individual entities – farming, agricultural cooperative, national and communal agricultural enterprise, agrarian holding company, personal farming.

Part III "Sectoral legal regulation of agricultural production and economic activity" consists of 7 sections: Production and economic activity of agricultural producers and its legal regulation; Legal regulation of crop production; Legal regulation of livestock production; Legal regulation of aquaculture production; Legal support for agricultural production in the context of EU and WTO requirements; Legal regulation of sustainable development of rural areas.

Within this section, the authors review the legal regulation of the functioning of particular agricultural sectors and analyze the state of implementation of national agricultural legislation in accordance with the EU requirements, including research of the legal regulation of relations regarding crop and animal production within the WTO. Individual attention is paid to the legal groundwork for the sustainable development of rural areas.

However, apart from the positive aspects of the textbook, there are certain points to be made:

1. Considering the fact that land in agriculture is considered as a means of production, the textbook sufficiently cover the legal regime of agricultural lands. It would be appropriate to describe the subjects of ownership and use of agricultural land, the legal grounds for the lease of agricultural lands, the rights and obligations of land owners and land users and guarantees for their implementation;

2. The textbook authors also superficially considered the issue of contractual relations in agriculture. These issues appear to be relevant in the current context and demand additional attention. Particular attention should have been paid to both the general description of contractual relations in agriculture and the characteristics of individual contracts, namely: the contracting of agricultural products; insurance in agriculture; transportation and storage of agricultural products, etc.

With that, the remarks are for guidance only and do not diminish the high level of work accomplished. The textbook is prepared with consideration of the achievements in jurisprudence, the pedagogical experience of the authors, the use of educational,

educational-methodical, scientific works on agrarian law. The structure and methodology of presentation of topics, the formation of questions for self-control, allowed the authors to reveal the main institutions of agrarian law, features of their legal regulation. This, factoring in the current scientific research, reflects the conceptual provisions regarding further development of agrarian law as an independent branch of law and study.

This textbook can be used not only by students, postgraduate students, lecturers of law, agricultural, economic higher education institutions, but may also be of use for scientists, practitioners in the field of agrarian, environmental, land and other branches of law interested in clarifying the matters of agrarian law.

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Journal of the National Academy of Legal Sciences of Ukraine

Volume 26, Issue 4
2019

Responsible for the release of *O. V. Petryshyn*

Desktop publishing *O. Fedoseeva*

Signed to the print with the original layout 15.01.2020.
Format 70 x 100 $^{1}/_{16}$. Offset paper. Headset Times.
Mind. print. ark. 18,1. Acc. publ. ark. 15,0.

The publisher the Right of National Academy of legal Sciences of Ukraine
and the Yaroslav Mudryi National Law University
61002, 80A Chernyshevskaya Street, Kharkiv, Ukraine
Tel/Fax: (057) 716-45-53
Website: www.pravo-izdat.com.ua
e-mail for authors: verstka@pravo-izdat.com.ua
e-mail for orders: sales@pravo-izdat.com.ua

Certificate of registration of the subject of publishing
in the state register of publishers, manufacturers and distributors
of publishing products series DK No. 4219 dated 01.12.2011

Вісник Національної академії правових наук України

Том 26, № 4
2019

(Англійською мовою)

Відповідальний за випуск *О. В. Петришин*

Комп'ютерна верстка *О. А. Федосєєвої*

Підписано до друку з оригінал-макета 15.01.2020.
Формат 70×100 $^{1}/_{16}$. Папір офсетний. Гарнітура Times.
Ум. друк. арк. 18,1. Обл.-вид. арк. 15,0.

Видавництво «Право» Національної академії правових наук України
та Національного юридичного університету імені Ярослава Мудрого
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Свідоцтво про внесення суб'єкта видавничої справи
до державного реєстру видавців, виготівників і розповсюджувачів
видавничої продукції — серія ДК № 4219 від 01.12.2011 р.